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*E. H. Anderson
Temple*

THE
LAW JOURNAL REPORTS

FOR
THE YEAR 1858:

COMPRISING
REPORTS OF CASES

In the House of Lords,

AND IN THE COURTS OF

**Chancery and in Bankruptcy, Probate and Matrimonial Causes,
Queen's Bench and the Bail Court,
Common Pleas, Exchequer, and Exchequer Chamber,**

FROM
MICHAELMAS TERM 1857, TO TRINITY TERM 1858,
BOTH INCLUSIVE.

The House of Lords Cases are given in the Courts of Chancery and Common Law respectively; Decisions in Error and on Appeal in the Exchequer Chamber will be found in the respective Courts from which the Errors and Appeals come; the Common Pleas includes the Appeals from Revising Barristers; and the County Court Appeals are in the Queen's Bench, Common Pleas, and Exchequer respectively.

A SEPARATE ARRANGEMENT OF CASES RELATING TO THE DUTIES OF MAGISTRATES, INCLUDING
CROWN CASES RESERVED.

EDITED BY
MONTAGU CHAMBERS, ESQ. ONE OF HER MAJESTY'S COUNSEL,
FRANCIS TOWERS STREETEN, ESQ.
AND
GEORGE STEVENS ALLNUTT, ESQ. BARRISTERS-AT-LAW.

VOL. XXXVI.

**NEW SERIES—VOL. XXVII.
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SCHOOL OF LAW
HERMAN STACHURD, JR., UNIVERSITY
LAW DEPARTMENT.

58,977

NAMES OF THE REPORTERS.

1858.

In the House of Lords,

W. WAKEFORD ATTREE, Esq. BARRISTER-AT-LAW.

Lord Chancellor's Court,

GEORGE STEVENS ALLNUTT, Esq. BARRISTER-AT-LAW.

Court of Appeal in Chancery,

SAMUEL VALLIS BONE, Esq. BARRISTER-AT-LAW.

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Court of the Second Vice Chancellor,

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ROBERT SAWYER, Esq.

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Court of Exchequer,

JAMES EDWARD DAVIS, Esq.

AND

WILLIAM FRANCIS FINLASON, Esq. BARRISTERS-AT-LAW.

CASES RELATING TO MAGISTRATES,

REPORTED PRINCIPALLY BY

WILLIAM MILLS, Esq.,

ROBERT SAWYER, Esq. and FRANCIS RUSSELL, Esq.
BARRISTERS-AT-LAW.

JUDGES AND LAW OFFICERS.

FROM MICHAELMAS TERM 1857, TO TRINITY TERM 1858, BOTH INCLUSIVE.

IN THE COURTS OF CHANCERY.

The Right Hon. LORD CRANWORTH, Lord High Chancellor.
The Right Hon. LORD CHELMSFORD, Lord High Chancellor.
The Right Hon. Sir JAMES LEWIS KNIGHT BRUCE, Knt., Lord Justice.
The Right Hon. Sir GEORGE JAMES TURNER, Lord Justice.
The Right Hon. Sir JOHN ROMILLY, Knt., Master of the Rolls.
The Hon. Sir RICHARD TORIN KINDERSLEY, Knt., Vice Chancellor.
The Hon. Sir JOHN STUART, Knt., Vice Chancellor.
The Hon. Sir WILLIAM PAGE WOOD, Knt., Vice Chancellor.

COURT OF APPEAL IN BANKRUPTCY.

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The Right Hon. Sir GEORGE JAMES TURNER, } Lords Justices.

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The Right Hon. Sir CRESSWELL CRESSWELL, Knt., Judge Ordinary.

IN THE COURTS OF QUEEN'S BENCH.

The Right Hon. LORD CAMPBELL, Lord Chief Justice.
The Hon. Sir JOHN TAYLOR COLERIDGE, Knt.
The Hon. Sir WILLIAM WIGHTMAN, Knt.
The Hon. Sir WILLIAM ERLE, Knt.
The Hon. Sir CHARLES CROMPTON, Knt.
The Hon. Sir HUGH HILL, Knt.

IN THE COURT OF COMMON PLEAS.

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The Hon. Sir CRESSWELL CRESSWELL, Knt.
The Hon. Sir EDWARD VAUGHAN WILLIAMS, Knt.
The Hon. Sir RICHARD BUDDEN CROWDER, Knt.
The Hon. Sir JAMES SHAW WILLES, Knt.
The Hon. Sir JOHN BARNARD BYLES, Knt.

IN THE COURT OF EXCHEQUER.

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The Hon. Sir WILLIAM FRY CHANNELL, Knt.

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Sir FITZROY KELLY, Knt., Attorney General.
Sir HENRY SINGER KEATING, Knt., Solicitor General.
Sir HUGH M'CALMONT CAIRNS, Knt., Solicitor General.

PREFERMENTS AND MEMORANDA.

IN the vacation after *Michaelmas Term*, Sir CRESSWELL CRESSWELL retired from the Bench of the Court of Common Pleas, and was appointed Judge of "the Court of Probate," and Judge Ordinary of "the Court for Divorce and Matrimonial Causes." He was also appointed a Privy Councillor.

JOHN BARNARD BYLES, Esq., one of the Queen's Serjeants, was appointed to the vacant office in the Court of Common Pleas, and took his seat on the Bench of that Court on the first day of *Hilary Term*.

IN the same vacation, EVERYN. BAZALGETTE, Esq., JOHN SHAPTER, Esq., SAMUEL BUSH TOLLER, Esq., FRANCIS HENRY GOLDSMID, Esq., RICHARD PAUL AMPHLETT, Esq., all of Lincoln's Inn; THOMAS WEBB GREENE, Esq., and JAMES FLEMING, Esq., of the Middle Temple, were appointed Her Majesty's Counsel learned in the law.

IN the same vacation, JESSE ADAMS, Esq. D.C.L., ROBERT JOSEPH PHILLIMORE, Esq. D.C.L., JAMES PARKER DEANE, Esq. D.C.L., and TRAVERS TWISS, Esq. D.C.L., were appointed Her Majesty's Counsel learned in the law.

IN the vacation after *Hilary Term*, LORD CRANWORTH resigned the Great Seal; Sir FREDERIC THESIGER, one of Her Majesty's Counsel, was appointed Lord High Chancellor, and was created a Peer by the title of BARON CHELMSFORD, of Chelmsford, in the county of Essex.

Sir RICHARD BETHELL, resigned the office of Attorney General, and was succeeded by Sir FITZROY KELLY; Sir HENRY SINGER KEATING resigned the office of Solicitor General, and was succeeded by HUGH M'CALMONT CAIRNS, Esq., one of Her Majesty's Counsel, who soon after received the honour of knighthood.

IN *Easter Term*, DAVID POWER, Esq., of Lincoln's Inn and the Middle Temple, was appointed one of Her Majesty's Counsel learned in the law.

IN the vacation after *Easter Term*, the following Gentlemen were raised to the degree of the coif, viz., WILLIAM PAYNE, Esq. of Gray's Inn, who gave rings with the motto "*Reverentia legum*"; JOHN CROSS, Esq., of Gray's Inn and the Middle Temple, who gave rings with the motto "*In cruce fido*"; JOHN TOZER, Esq., of Lincoln's Inn, who gave rings with the motto "*Et tenui telas discernerat auro*," and CHARLES PETERS-DORFF, Esq., of the Inner Temple, who gave rings with the motto "*Nec mora nec requies*."

IN *Trinity Term*, Mr. JUSTICE COLERIDGE resigned his seat in the Court of Queen's Bench, and was succeeded by HUGH HILL, Esq., one of Her Majesty's Counsel, who having been first called to the degree of the coif, gave rings with the motto "*Nil nisi cruce*." He was afterwards knighted.

REPORTS
OF
CASES ARGUED AND DETERMINED
In the House of Lords,
BY
W. WAKEFORD ATTREE, Esq. BARRISTER-AT-LAW.

AND IN THE
Courts of Chancery,
BY
GEORGE STEVENS ALLNUTT, Esq.,
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THOMAS WYATT GUNNING, Esq.,
FRANCIS FISHER, Esq.
AND
CHARLES EDWARD HAWKINS, Esq.
BARRISTERS-AT-LAW.

DURING FOUR TERMS,
VIZ.
MICHAELMAS 1857, HILARY, EASTER AND TRINITY, 1858.
21 & 22 VICTORIÆ.

ORDERS OF THE HIGH COURT OF CHANCERY.

COUNTRY COMMISSIONERS TO ADMINISTER OATHS IN CHANCERY.

FURTHER REGULATIONS.

6th MAY, 1854.

The Applicant must be a practising Solicitor of *ten years'* standing; he will be required to leave with the usual Certificate signed by two Barristers, a Memorial signed by some of the public functionaries and professional persons in the town where he resides, that he is a fit and proper person for the office of a Commissioner, and that an additional one is required to administer oaths in the particular town or district.

LONDON COMMISSIONS TO ADMINISTER OATHS.

FURTHER REGULATIONS.

6th MAY, 1854.

In consequence of the great number of gentlemen already appointed *London* Commissioners to administer Oaths in Chancery, the Lord Chancellor will not make any further appointments at present, unless, in addition to the Certificates now required, the applicant produces one signed by two householders, stating the necessity for an additional appointment, and a statement of the number of Commissioners within a quarter of a mile of the applicant, and that he himself carries on his business upwards of a mile from Lincoln's Inn Hall.

November 1853.

Any Solicitor desiring to be appointed a *London* Commissioner to administer Oaths in Chancery, is required to lodge with the Lord Chancellor's Secretary a Petition, fairly written on foolscap paper, praying to be so appointed.

Every such Petition must state the following particulars, *i. e.* :—

1. That the applicant has practised as a Solicitor for ten years, and that his place of business is within ten miles of Lincoln's Inn Hall.
2. The parish, and (where practicable) the street, and the number of the house in which he has carried on his business for the last three years.
3. The names of his partners (if any), or, if such be the case, that he has no partner.

Every such Petition must be accompanied by a Certificate, signed by two Solicitors, whose names, additions, and addresses must be given, who shall state that they are themselves Solicitors of ten years' practice, and that the applicant is known to them, and is a Solicitor of respectability.

The accustomed Certificate, signed by two Barristers, will, in addition, be required.

Twenty-one days' notice of every such application shall be given to the Registrar of Solicitors, to be submitted to the Council of the Incorporated Law Society of the United Kingdom.

LONDON AND COUNTRY COMMISSIONERS TO ADMINISTER OATHS IN CHANCERY.

FURTHER REGULATIONS.—25th MAY, 1858.

Where the Applicant has been a Proctor, and has been admitted as a Solicitor of the Court of Chancery, under the provisions of the Act of the 20 & 21 Vict. c. 77, he shall be allowed, in computing the necessary Period of ten years' practice as a Solicitor, to reckon the Period of his practice as a Proctor as if it had been practice as a Solicitor.

ORDER OF THE COURT OF CHANCERY.

*Monday, the 12th day of July, in the 22nd Year of the Reign of Her Majesty
Queen Victoria, 1858.*

THE Right Honourable FREDERIC LORD CHELMSFORD, Lord High Chancellor of Great Britain, by and with the advice and consent of The Right Honourable SIR JOHN ROMILLY, Master of the Rolls, The Right Honourable SIR JAMES LEWIS KNIGHT BRUCE, The Right Honourable SIR GEORGE JAMES TURNER, the Lords Justices of the Court of Appeal in Chancery, The Honourable the Vice Chancellor, SIR RICHARD TORIN KINDERSLEY, The Honourable the Vice Chancellor, SIR JOHN STUART, and The Honourable the Vice Chancellor, SIR WILLIAM PAGE WOOD, Doth hereby Order and Direct as follows :—

When any decree or decretal order has been made upon motion, no re-hearing or appeal shall be allowed, either before the same Judge, or before the Lord Chancellor, or the Court of Appeal, in Chancery, upon motion ; but in every such case there shall be a petition of re-hearing or appeal in the same manner and form, and with the same certificate of counsel, and with the same subscription by the petitioner, or his solicitor, with respect to costs, and with the same deposit, as are required for a re-hearing when a decree has been made upon the hearing of a cause regularly set down for hearing.

CHELMSFORD, C.
JOHN ROMILLY, M.R.
J. L. KNIGHT BRUCE, L.J.
G. J. TURNER, L.J.
RICHD. T. KINDERSLEY, V.C.
JOHN STUART, V.C.
W. P. WOOD, V.C.

CASES ARGUED AND DETERMINED

IN THE

Courts of Chancery,

AND ON APPEAL TO THE HOUSE OF LORDS.

COMMENCING WITH

MICHAELMAS TERM, 21 VICTORIÆ.

Wolfe Esq. 44 L. Ch. 608

FULL COURT
OF
APPEAL.
Nov. 9, 10,
11, 14, 21.]

HENRY O. THE GREAT NORTH-
ERN RAILWAY COMPANY.

*Company—Preference Shares—Priority
as to Dividend.*

The stock in the Great Northern Railway Company consisted of ordinary and preference stock, the latter being created in pursuance of different acts of parliament, and entitling the holders to preference dividends at different rates per cent. per annum. An officer of the company, from time to time, during a period of some years, fraudulently issued fictitious stock of both kinds, which amounted in the whole to 220,000*l.* before the fraud was discovered. It not being possible to distinguish the genuine from the fictitious stock, an act of parliament was obtained in 1857, by which the fictitious stock was declared valid, and it was enacted that the directors should apply a sum of 243,000*l.*, which was applicable for profits up to December 1856, in purchasing and cancelling stock equivalent to that which had been fraudulently created. It was then enacted, that it should be lawful for the directors to apply the balance of the 243,000*l.*, so far as the same would extend, in paying to the proprietors of the several

classes of preference stock or shares the dividends to which they would have been entitled out of the said sum, if the same had been declared and apportioned as dividend, &c. The preference shareholders not having received the full amount of their dividends in 1856 claimed to be paid the deficiency out of the first half-year's profits in 1857; but this claim was resisted by the directors and the ordinary shareholders; and thereupon a bill was filed to obtain an injunction to restrain the declaration of a dividend on the ordinary stock, without regard to the prior right of the preference shareholders to be paid the full amount of their dividend, to be computed from June 1856:—Held, (affirming the decision of one of the Vice Chancellors) that the preference shareholders were entitled to the injunction, it being considered that the right of the preference shareholders was to have the full amount of their respective dividends before any payment in respect of dividends on the ordinary stock, and that the act of 1857 had not deprived them of that right.

This was an appeal, by the defendants, from a decision of Wood, V.C., whereby his Honour declared, "that the plaintiffs respectively and the other holders of preference stock in the Great Northern Railway Company, on whose behalf they respectively sue, are entitled to be paid

B

dividends out of the profits realized by the company on the amount of the preference stock held by them respectively, from the 30th of June 1856, according to the amount of dividends which the said several classes of preference stock respectively carry, before any payment in respect of dividends or otherwise is made to any of the shareholders of original ordinary stock, A. stock and B. stock, in the said company, or any of such stocks, out of such profits;" and ordered, "that a perpetual injunction be awarded to restrain the defendants, the Great Northern Railway Company, from declaring any dividend on the original ordinary stock, A. stock and B. stock, in the said company, or any of such stocks, or any part thereof respectively, without regard to the rights of the plaintiffs respectively and the other holders of preference stock on whose behalf they respectively sue, to be paid in priority the full amount of the dividends payable upon or in respect of the preference stock held by them respectively, to be computed from the 30th of June 1856, and from making or causing to be made any payment for dividend or otherwise to any of the holders of original ordinary stock, A. stock and B. stock, in the said company, or any of such stocks, without first paying or providing for the payment to the plaintiffs respectively, and the several other holders of the preference stock in the company on whose behalf they respectively sue, of the full amount of the dividends payable upon or in respect of the preference stock held by them respectively, to be computed from the 30th of June 1856;" and further declared, "that, according to the true construction of the 3rd section of the Great Northern Railway Company (Capital) Act, 1857, the remedy thereby given to the preference shareholders is cumulative and by way of security to them for the amount of their dividend, and not in substitution of such dividend."

The Great Northern Railway Company was constituted by act of parliament in the year 1846; the works of the railway were proceeded with in the ordinary way; calls were made and sums paid up; but in, and previously to, the year 1849, a large amount of shares had been forfeited for

non-payment of the calls. In consequence of that, the directors made a report, previously to the meeting on the 7th of June 1849, in which they recommended that there should be issued, in lieu of the forfeited shares, the number of which was then stated to be 26,000 (the shares being of 25*l.* each), two scrip shares of 12*l.* 10*s.* each, and that each of these 12*l.* 10*s.* scrip shares should have credit for 2*l.* 10*s.*, as a deposit paid thereon, and should bear interest or preference dividend at the rate of 5*l.* per cent. per annum in perpetuity. Then there was a recommendation as to the mode in which these new shares should be allotted and apportioned among the ordinary shareholders.

An extraordinary meeting took place, in consequence of this report, on the 7th of June 1849, and at that meeting a resolution was come to, "That the forfeiture of the 26,534 shares be and hereby is confirmed"; and it was resolved, "that they be sold or otherwise disposed of by cancelling, at the discretion of the directors. That in lieu of, and to the amount of capital represented by the Great Northern 25*l.* shares, of which the forfeiture has been confirmed by this meeting, there be issued, upon the terms and conditions recommended by the directors to this meeting, scrip shares of 12*l.* 10*s.* each, bearing 5*l.* per cent. interest, or preference dividend in perpetuity." It was doubted, however, whether that could be lawfully done without the sanction of parliament; and at that time an act of parliament was pending for extending the works of the company, which received the royal assent on the 1st of August 1849. It is described as 'An act to amend the acts relating to the Great Northern Railway, and to make a diversion of such railway at Bentley-with-Arksey, in the West Riding of Yorkshire, and to enlarge the Boston, Lincoln and London stations of such railway.' Several objects were in view by that act of parliament, and by the 25th and 26th sections it was enacted as follows: — "That in any case in which it shall happen that the market price of shares which may be forfeited for non-payment of calls shall be such as to render it impossible for the company to sell the same so as to realize a sum equal to the arrears of calls due upon

the same, it shall be lawful for the company to cancel the same shares, and to issue so many new shares, and of such nominal amount as they may think fit; provided the capital to be represented by such new shares shall not in the whole exceed the capital represented by the unpaid portion of the shares which shall be so cancelled; and any such cancelling of forfeited shares and issue of new shares since the 5th day of June last, in accordance with this provision, are hereby confirmed."

The 26th section was, "That it shall be lawful for the company, with the assent of three-fifths of the votes at any general meeting, to guarantee the payment of dividends, not exceeding in any case 7l. per cent. per annum, on any particular shares which the company may, by any of the before-recited acts, be authorized to issue, in preference to the payment thereof on the ordinary shares of the company, and upon such terms as shall be by the resolution of such meeting defined: Provided always, that any preference shares, which shall have been already issued by the company, shall have a preference or priority of dividend over the shares so guaranteed as aforesaid, and all preference shares shall have priority of dividend, according to the date at which such shares shall have been issued." That proviso was said to have been introduced merely *ex majori cautela*, and in pursuance of a rule always acted upon in the Houses of Parliament, viz. to introduce that sort of proviso lest *per incuriam* the legislature should, by giving preference to preference shareholders, be doing injustice to persons who might have already acquired rights by way of preference.

In pursuance of that resolution and that act of parliament, a number of shares were issued in conformity with what had been so sanctioned. That was the first issue of those *preference* shares. These shares, to a large amount, were issued in pursuance of that resolution and that act of parliament, but the company from time to time found it necessary to raise more funds, and several other acts of parliament were passed from time to time, sanctioning the issue of further shares, by way of preference, not exactly in the same terms as had

been sanctioned by the act of 1849, but having substantially exactly the same meaning. In the year 1851, by an act of parliament which received the royal assent on the 3rd of July in that year, it was enacted by the 5th section, "It shall be lawful for the company, with the assent of three-fifths of the votes at any general meeting specially convened for that purpose, to guarantee the payment of dividends not exceeding in any case 7l. per cent. per annum on the shares which the company are hereby authorized to issue, and also on the shares which they are authorized to issue under 'The Leeds Central Railway Station Act, 1848,' in preference to the payment of dividends on the ordinary shares of the company, and upon such terms as shall be by the resolution of such meeting defined: Provided [*the same provision as before*] that such preference or priority shall not prejudice" any previous issue.

So again, in that same year, three weeks afterwards, by an act of parliament that received the royal assent on the 24th of July 1851, there was in the same way power to issue further shares.

Then again, on the 28th of June 1853, an act of parliament received the royal assent, in which there was this enactment. Further capital was authorized to be raised, and by the 12th section it was enacted, "The capital so to be raised shall be divided into shares of 10l. each, and shall bear and receive dividends at the rate of 4l. 10s. per cent. per annum, in preference to the payment of dividends on the ordinary shares of the company," subject to a power of redemption there pointed out. Then there was the same proviso to protect existing and previous rights of preference.

Then again, on the 2nd of July 1855, another act of parliament received the royal assent, authorizing the raising of further capital, and it was then enacted, "That the holders of the said shares shall be entitled to the payment of *fixed dividends* thereon, or on so much thereof as may from time to time be paid up, at the rate of 5l. per cent. per annum, in preference to the payment of dividends on the ordinary shares," with a similar proviso, saving the rights of prior shareholders by way of preference.

In pursuance of all these acts of parliament, from time to time, these preference shares were issued, to the amount in all, taking in all the different acts of parliament, of about three millions of money. The form of the certificates which were issued, and which were given to the shareholders, was not exactly the same in all cases, but substantially had the same meaning. The first that were issued under the act of 1849 were issued in this form :—

"The Great Northern Railway Company.
 "Incorporated 9 & 10 Vict. c. 71, 26th June 1846.
 "£ 5*l.* 5*s.* per cent. perpetual preference stock,
 issued under the provisions of 'The Great Northern Railway Acts Amendment Act, 1849.'
 "Register,
 No. | Folio | Mr. | £
 Is proprietor of this stock certificate,
 No. 185."

Those that were issued under the two acts of 1851 were thus :—

"The Great Northern Railway Company.
 "Incorporated 9 & 10 Vict. c. 71, 26th June 1846.
 "£ 5*l.* 5*s.* per cent. redeemable preference stock, issued under the provisions of 'The Great Northern Railway Acts Amendment Act, No. 1, 1851.'"

Then the next was :—

"4*½* *l.* per cent. redeemable preference stock, issued under the provisions of the Great Northern Railway Company's Increase of Capital Act, 1853."

Then the last was :—

"The Great Northern Railway Company.
 "Incorporated 9 & 10 Vict. c. 71, 26th June, 1846.
 "5*l.* per cent. 12*l.* 10*s.* preference stock, redeemable at 5*l.* per cent. premium, created on the 12th of December 1854, under the authority of the resolution of the half-yearly general meeting of the 26th of August 1854, and confirmed by 'The Great Northern Railway Act, 1855.'"

These preference stocks amounted altogether to a sum of between three and four millions of money. The dividends on all these preference shares were regularly paid up to the 30th of June 1856. No dividend had been declared out of any profits realized since the 30th of June 1856.

The duty of the directors, as to the declaration of a dividend, is defined by the 120th section of the Companies' Clauses Act (8 Vict. c. 16), and it is this :—"Previously to every ordinary meeting at which a dividend is intended to be declared, the directors shall cause a scheme to be prepared, shewing the profits, if any,

of the company for the period current since the preceding ordinary meeting at which a dividend was declared, and apportioning the same, or so much thereof as they may consider applicable to the purposes of dividend, among the shareholders, according to the shares held by them respectively, the amount paid thereon, and the periods during which the same may have been paid, and shall exhibit such scheme at such ordinary meeting, and at such meeting a dividend may be declared according to such scheme."

That is the section which defines the duty of the directors with regard to the declaration of dividend. Ordinarily the dividends in this company had been declared half-yearly, in respect of the profits realized up to the 30th of June and the 31st of December in every year. On the 31st of December 1856 there was a sum of 243,923*l.* 5*s.* 8*d.* of realized profits, which would have been divisible in dividends, but for the frauds of Redpath, one of the officers of the company. Before any division of this large half-yearly accumulated profit of 243,000*l.*, it was discovered that frauds to an enormous amount had been perpetrated by Redpath, who had, by a long-continued system of forgeries, created fictitious stock in the books of the company, to an amount of above 221,000*l.*, and this fictitious stock had been so transferred and mixed up with other genuine stock as to have become incapable of separation, or at least to have been considered so to have become. The directors were therefore unable to proceed in the manner pointed out by the statute for enabling the shareholders to declare a dividend. No dividend could be declared on the fictitious stock; and it was impossible to say which stock was genuine and which was fraudulent.

In this dilemma the directors applied to parliament, and obtained, in the last session an act, 20 & 21 Vict. c. cxxxviii., intitled 'An act to make provision with respect to capital fraudulently created in the Great Northern and East Lincolnshire Railway Companies.' By the 1st section of the act the fictitious stock and shares were declared to be valid, and the holders thereof were declared to have all the rights and privileges which attached to

the stock legally created. But as this would have had the effect of unduly increasing the amount of the capital, it was provided by section 2, that the directors should apply the 243,000*l.* in purchasing up a quantity of stock equivalent to that which had been fraudulently created by Redpath, and in otherwise making good the losses occasioned by his frauds.

The third section of the act was as follows:—"If any balance shall remain of the said sum and of the said monies after such application thereof as hereinbefore directed, it shall be lawful for the directors and they are hereby required to apply such balance, so far as the same will extend, in paying to the proprietors of the several classes of preference stock or shares the dividends to which they would have been entitled out of the said sum of 243,923*l.* 5*s.* 8*d.*, if the same had been declared and apportioned as dividend at the said half-yearly meeting of the 12th of March 1857: provided always, that all the proprietors of each class of preference stock or shares shall receive their dividends according to the priority of the said class, and in preference to any subsequent class; provided also, that if the balance remaining after payment of the dividend to preceding classes of stock or shares is not sufficient to pay the whole amount of the dividend to the next subsequent class, such balance shall be divided rateably among all the proprietors of the same class of stock or shares, according to the amount of the same held by them respectively."

The sum divisible for profits in the period from the 30th of June to the 31st of December 1856 having been thus disposed of, there was no dividend for that period, but in the next half-year, ending the 30th of June 1857, a large sum had been realized for division. The bill in this case was accordingly filed by Mr. Henry and others, on behalf of themselves and all other persons who were holders of preference stock in the Great Northern Railway Company, against the company and the directors, and on the 21st of August a motion was made before Vice Chancellor Wood "that the defendants may be restrained from declaring any dividend on the original ordinary stock, A. stock and B. stock in the said company, or any of such stocks, or any

part thereof respectively, without regard to the rights of the plaintiffs respectively, and the other holders of preference stock on whose behalf they respectively sue as aforesaid, to be paid in priority the full amount of the interest or dividends payable upon or in respect of the preference stock held by them respectively, to be computed from the 30th of June 1856, according to the amount of interest or dividends which such preference stocks respectively carry."

Upon the hearing of this motion it was, by consent, deemed as a motion for a decree, and accordingly his Honour made the decree before stated (1).

(1) The following judgment was delivered on the 24th of August, by—

WOOD, V.C.—The only difficulty, as it appears to me, has arisen upon the 3rd clause of the last act of parliament, which has created a difficulty which requires a great deal of consideration. I was, therefore, anxious that the whole case should be argued most fully, in order that I might have the fullest opportunity of arriving at the best judgment I can form, being very anxious that in a case of this description the parties should have an opportunity of correcting any error into which I may fall (if they think fit), at as early a period as possible. If the 3rd clause had not existed, it does not seem to me that there could have been any doubt whatever upon the case. Even upon the question, whether these were preference dividends in a sense which will entitle them to arrears, or not; either in the one case, or the other, except for the 3rd clause, I should not have had the slightest difficulty in the case, because it appears to me that the purport and scheme of the act is simply to carry into effect an arrangement, by which, out of the profits which had been realized in a certain half-year, that is to say, the ordinary profits of the company, which would otherwise have been appropriated among the shareholders, a certain common calamity which has befallen the whole company shall be set right. As regards that common calamity, I most entirely coincide with the view which has been taken by the counsel who first advised the company, that it is to be viewed as any other calamity, such as the fall of a tunnel, or the effect of an inundation, or the like; and although at first it did appear to me that possibly there might be some special case made for saying that the preference shareholders, as they are termed, should bear a proportion of the loss, regard being had to the forgery of their preference stock, which would have let in other persons to the preference stock—and might be exceedingly inconvenient for them;—and also to the common difficulty of not getting a dividend any more than any other shareholders of the company;—yet it did not appear to me upon further consideration, even before hearing Mr. Daniel's reply, that any such equity could be fastened upon them;—but that it was simply equivalent

Mr. Daniel, Mr. Cairns, Mr. Speed and Mr. E. R. Turner, for the plaintiffs, in support of the Vice Chancellor's decree.—Preference dividends without limit as to the time during which the profits out of which they were to be paid were made

to a loss occasioned by the fraudulent conduct of a clerk who might have run away with the box which contained the 243,000*l.* It does not appear to me that his going off with it could be treated other than as a common calamity, or that it could in the slightest degree vary the position of the several proprietors of the stock as between themselves; and, therefore, that calamity would, like any other calamity, have to be met before profit could be realized, and that profit, when realized, would be applied just like any other profit, namely, in payment of persons according to their several priorities of dividend out of such profit as came to hand. In that point of view, except for the 3rd clause, I have no doubt whatever as to the natural equity between parties under such a contract, or I should more correctly express it by saying, that the legal result of the contract, and the equitable right of the parties, after such a fraud has been committed, would be, that it should be borne out of the whole profits of the concern, and if it reduced the profit to *nil*, the next time profit accrued that profit would be divided according to the contract which the parties had entered into. Accordingly, not merely pursuant to the strict letter of the 120th section, but to what is right and just between the parties, the next dividend would be declared according to the balance sheet framed since the last declaration of dividend,—and it would come to this, that at the previous meeting, supposing the company had had power to deal with the fund as they proposed to do at the meeting held on the 12th of March, they would have brought themselves literally and intentionally within that clause, by saying that no dividend at all should be declared,—and none was declared, for that was the resolution. Therefore that was not a meeting at which a dividend was to be declared, and, accordingly, the account would now be made up for the current year, and the account at the end of the current year would show that the previous half-year had resulted in a loss, and that no profit had accrued to be divided, nor had any been made, nor, therefore, had anything that could be called a dividend, in the strict sense of the term, accrued to anybody, or been declared;—and the company being about to divide their profits, the dividend would be from the last time of the profits being divided, which would be a period anterior to this meeting, that is to say, the whole year; and the preference shareholders would take their 5*l.* per cent. or 4*l.* per cent. out of the realized profit before any thing could be paid to any ordinary proprietor.

In the 2nd section there is nothing to militate against the preamble. The preamble simply recites a meeting, at which it was resolved, "That no dividend should be declared, but that this meeting considered it desirable that the money should be applied to the losses caused by the frauds

and forgeries by Redpath referred to in the Directors' Report."

and forgeries by Redpath referred to in the Directors' Report."

I wish to meet here in passing one observation, which was made by the Attorney General, upon which I think nothing can turn in this case, founded upon *Foss v. Harbottle* (2 Hare, 461), viz., that the company were the parties to direct what should be done in this matter of declaring a dividend. Of course it is so. They have full power to say whether there shall or not be a dividend, upon which I must make some further observations hereafter. They have full power to say whether there shall be a dividend or not; but they have not the slightest power, and it would be absurd to suppose that, having contracted in the first instance, as a company, to give a preference to certain shareholders, they should have the power, of saying, "we will pay the persons to whom we have agreed to pay so much per cent., a less sum," or in any way to vary their rights with respect to that sum; neither did they purport by this resolution to do anything of the kind, they only purported to authorize the directors at once to make good the balance out of this fund.

If I am to assume that the shareholders who have a preferential dividend concurred in this resolution (and I do not see that it makes any essential difference whether I assume that or not), it could only be, that they concurred as a portion of the company, not as voting in their separate rights, and saying, (for it would be an entirely different matter if you could shew that proxies had been granted by the holders of the 5*l.* per cent. preference stock, and the holders of 4*l.* per cent. stock individually saying,) 'we authorize that fund, which will be appropriated to our special dividend if ever it comes to be declared, to be handed over for this particular purpose.' If any such voting had taken place, it would have been a different matter,—but this is a simple common vote of the company in which a resolution of the majority of the shareholders binds. And it appears to me to be plain that no resolution of the company (*quæ* company) could by any possibility amount to a resolution, which would in the slightest degree vary or affect the rights of the shareholders of the different stocks.

If that be so, the question is, whether parliament has varied those rights, and, as far as the second clause is concerned, it appears to me that they did nothing more than give effect to that resolution. All that was said was, that the 243,000*l.*, and any monies which should be received by the company towards the reimbursement of the loss, should be applied in payment of all monies expended by the company owing to such frauds and forgeries; and then in payment of certain costs and charges; and then in the re-purchase, as they should think fit, of the stock, in order to cancel that which had been thus fraudulently created;

prevent a deficiency in a former half-year being made up in a subsequent half-year. The words "per annum" could not be satisfied unless, reckoning from the date of making the stock, the preference interest or dividend was fully satisfied. These

rights of the preference shareholders were not interfered with by the 3rd section of the company's act of 1857. In preference shares in other companies, where it was intended that the preference should only be in respect of the current division of profit,

and then after such purchasing and cancelling, it should be lawful for the company to exercise all the powers vested in them for the creation and issue of capital, as fully as though no such stock had been fraudulently created. Now that was really doing nothing more than what the shareholders were anxious to declare by their resolution, but which they could not achieve without the authority of parliament; and, therefore, it would be no manifestation of intention or that parliament wished in the slightest degree to alter the rights of the shareholders to be paid out of profits according to their respective priorities.

Then we arrive at the 3rd clause, which makes it a matter of considerable importance to discuss, what was the position of the preference shareholders, as to having any claim with respect to arrears. It appeared to me, as it still appears to me, that if they are entitled to be paid their arrears, before any ordinary shareholder can be paid any dividend at all out of the profits of the company; that is to say, if they are entitled to be paid upon their contract 5*l.* per cent. per annum upon the one, and 4*½* per cent. upon the other class, before any dividend could be paid to any other proprietor; in such a case I can have no difficulty from the form of the clause which is here inserted. Because, in that view of the case, there is no indication of any intention to take away such a right as that of having the arrears paid before a subsequent dividend can be made. The whole question on the meaning of the clause is (which is the point of the whole case, as it appears to me), whether or not it is intended to be substitutional, or whether it is a cumulative remedy given to parties, in respect of their right under their contract with the company. If their right was to be paid the whole of their arrears, I could not then possibly hesitate in saying that all that is meant is this,—you, the company, have a certain amount of profit, which, for all we know, may be applied, (but it is not very probable) by the directors in doing all that the second section has directed to be done, and a surplus may remain, even anterior to any other meeting being held. If so, here are realized profits, and those realized profits these gentlemen (the preference shareholders) would have pocketed, except that parliament has thought fit to take them out of their hands for a time, but you (the company) are not to delay them an hour beyond the time at which the dividends can be made. And therefore you are not to deprive them of this fund for the payment of their dividend, in case any surplus shall remain. All their other rights will remain the same, viz., whether or not you, the ordinary shareholders, are to have any dividend at all until these gentlemen have had the full amount of their dividend, which, by the contract, you said should be given to them,—(that is,

assuming of course the right to arrears.)—the contract that they shall have 5*l.* per cent. the one, and 4*½* per cent. the other, before the ordinary shareholders touch any money.

Surely, upon any construction that can be given to this act, it cannot be contended that such an important right,—a right so probable to be realized with regard to the apparently prosperous condition of the company, notwithstanding the fraud,—that the right to that amount should be frittered away, simply by the fact of parliament saying, "If there is any surplus of this fund, you shall be paid out of that surplus," so that thereupon all other rights are to be extinguished. Such an extinguishment, if it had been intended, ought to have been inserted in the act, and provided for.

It is therefore a matter of considerable importance to ascertain whether or not there was this preferential right, which would carry the right to arrears. I think if that be established here, clearly this 3rd section can have no such operation as is contended for.

In the other view of the case, assuming that you, the preferential shareholders, have no such right to arrears, of course the subject becomes more difficult, and more doubtful, and considerable difficulty and doubt unquestionably is thrown upon the case in that view. Because if parliament had such a view as that clearly before it, that your one only right is, not to have 5*l.* per cent. upon your stock, before any person can touch the dividend, but merely at each period when the dividend takes place, you are to take your 5*l.* per cent. when the dividend is made, and to take your chance at the next dividend of getting your 5*l.* per cent., always having the right at each periodical division, (although no fixed period is necessary,) but at each epoch of division, whether periodical or not, in the strict sense as to fixed periods, to have as much as you can get, up to the extent of 5*l.* per cent. per annum, (and no further, of course,) and then, if that be not sufficient at that period, all your rights to arrears are to cease; then it would not be too absurd an inference to give the effect contended for to this clause. In fact, it might be difficult to construe it otherwise—and it is the whole point in the case, to determine whether or not parliament had in contemplation a result of this description:—Here would have been a half-yearly dividend—a half-yearly dividend was ready to be declared—the only difficulty in declaring it was this fraud which had been committed; we will take therefore out of the fund which was ready and prepared for dividend, and out of which you would have had your full amount—it was your fund, it was a fund that would have relieved you, and given you your full profit—"we will take that fund which was properly for you, and we will apply it in paying off this fraud,

it was expressly provided that a deficiency for one period should not be made up in a subsequent period, as in the Crystal Palace Company's Act, 1856, and the Oxford, Worcester and Wolverhampton

and we will give you the surplus, just as if a dividend had been made." If added to this the half-yearly payments at epochs are to be the true test, there would then be a great deal to be said for such an intention upon the whole face of the act, viz., "we are going to settle that half-yearly account for you. That shall be finally arranged. We will take away from you the fund which would have paid you your whole dividend; we will give you, the preference shareholder, whatever may remain of the balance of that dividend, and thus settle that account." Then the 120th section, which declares that the profit shall be taken as from the last period of dividend being made, will not have application to a state of things such as this under this special act; but you must take the account from the last half-year only, and consider the previous half-year as settled by the third clause of the act.

The strongest point of view in which it was put (and it was very ably argued by the Attorney General and Mr. Denison) was this:—That if you take the yearly account,—as you contend you are entitled to do,—upon taking that yearly account a dividend will be declared, on which a right of action will arise;—and here is a direction in the act which says, that *ultra* that dividend you are to be paid, and you are to have a right of proceeding for a certain surplus. That may amount to something under the 5l. per cent., viz. another fractional dividend not amounting to the whole that you were entitled to; but it seems to be inconsistent with saying, that you are to have the full amount of dividend allowed you, unless, indeed, arrears may be charged.

It did seem to me, therefore, from the first, exceedingly desirable, in order to found one's decision, to come to some conclusion in one's own judgment upon this point, inasmuch as though I am by no means clear and positive that it is necessary to decide the first point, yet it seems to me that I am bound to form the best judgment that I can upon it, viz., the right of preference to a dividend; and I have formed an opinion, and I think it right to express it at once, in order, as I have said before, that if it is to be corrected it may be corrected early.

Upon this question of preference dividend I had the subject before me in a case that has been referred to; but there, the difficulty was got over upon my coming to the conclusion that it was a charge upon the revenues of the company, which some words in the special acts authorized me to arrive at. It appears to me that all these cases must be decided on the special provisions of each particular act.

As regards the two first stocks, the "5l. per cent. in perpetuity," and the first "5l. per cent. redeemable," I really have no great difficulty, even if the term "guarantee" is to be of that technical im-

Railway Capital Act (19 & 20 Vict. c. cxxvi.). They referred to—

Stevens v. the South Devon Railway Company, 9 Hare, 313; s. c. 21 Law J. Rep. (n.s.) Chanc. 816.

Sturge v. the Eastern Union Railway Company, 7 De Gex, M. & G. 158.

Crawford v. the North-Eastern Railway Company, (before Vice Chancellor Wood), not reported.

portance which Mr. Denison said one was bound to assign to it. His argument was this:—That there is a well-understood difference between preference stocks, which give preference dividends, and guaranteed stocks, as they are sometimes called; and he referred to two or three acts of parliament, in which that difference was clearly and distinctly pointed out.

Now, I set no value at all upon the talking and conversation which takes place at meetings of the description in evidence before me, because, after all, one must judge of the result by what is embodied in the resolutions. Yet still there is some little negative evidence arising from discussions; for they do not shew to my mind at all,—or rather, they tend to shew me the contrary,—that there is that clear and precise understanding which Mr. Denison seems to attribute to the railway world, by which words have acquired a technical and settled distinction to such an extent, that when you speak of a preference stock, one must distinctly understand that that is not stock which carries arrears. "Guarantee" is not a technical word; "guarantee" is a legal word, which we understand very well, and upon which one would have to decide upon the force of the legal expression; but "preference" stock is a word in some degree different. And it may be possible that it would materially affect my decision, if there was a common custom of business or trade, or whatever you please to call it, by which everybody was to understand, that when he got preference stock he was not to be guaranteed his preference;—indeed, this would not conclude the question, for to be "guaranteed," as I apprehend, gives a right of action against the company, and the guarantee may be enforced by judgment, and that judgment might go to the whole of the goods of the company, and would not depend upon whether there was a dividend or no dividend;—the guarantee might not arise until the dividend was declared, possibly,—(that might or might not be so under the words used in the guarantee); but whether it does so or not, that would not be the same thing as "preference stock," but would have a different effect. The question arises, whether everybody understands, when he is told that he has preference stock at 5l. per cent., that he is to have half-yearly dividends and nothing else, and not to have the arrears. I cannot find that any such understanding has arisen. On the contrary, in fact, at one of the meetings,—that of the 7th of June,—clearly no such distinction appears to have been present to the mind of anybody. That is all the observation that I have to make upon what

The Attorney General, Mr. Rolt, Mr. Denison and Mr. Rochfort Clarke, for the defendants, in support of the appeal.— The guarantee contained in the acts of parliament, under which those shares were

created, was limited to priority and rate and amount only of dividends. The existence of profits was left unsecured. The words "per annum" were merely indicative of the scale. This placed the prefer-

enced with complete success, and that by a clause in the Great Northern Act, which had received the royal assent, parliament had sanctioned the issue of those shares. Now the company are told by the Report that these shares, which they are authorized to issue, bear interest or dividend in perpetuity at 5l. per cent.; that is what they are told has been done to a large extent, and that about 4,000 of them have been taken. Then the Report describes the difficulties about the shares not having been taken up, and that it is intended to give the registered proprietors of all classes the option of taking up those 25,000 shares upon payment of 10l. 10s. a share. And this Report is adopted by the whole body of the meeting unanimously.

passed at the meeting in debate. Of course the resolution is very important to be looked at. The next thing, I find then, is this. A meeting takes place on the 7th of June, when the act is pending in parliament, whether with this clause in it or not does not appear; and, therefore, I will not assume that the clause was in it. It may be safer to take it that the clause was inserted after the meeting of the 7th of June, with a view to what then and there took place. On the 7th of June it appears that a resolution is come to, that certain scrip shares are to be issued upon the terms and conditions recommended by the directors to this meeting, each bearing 5l. per cent. interest or preference dividend in perpetuity. Mr. Denison said, it might possibly mean interest for the year during which they are allowed to pay interest out of capital or the like, which in some railway acts is the case. But it appears to me to be clear, that there, as far as the resolution could go, they put interest and dividend in plain and distinct apposition, the one to the other—the one as being equivalent to the other; that the shares are to bear interest or dividend at that rate, as far as the resolution goes.

Now, if the resolution of three-fifths of the proprietors be necessary to make a guarantee for payment of dividend not exceeding this amount, it appears to me clear that they had ratified completely and perfectly by their resolution at this meeting all that had been done on the 7th of June:—and that which had been done on the 7th of June was the issuing of shares, which should bear 5l. per cent. interest or preference dividend in perpetuity. The whole title of the shareholder would depend upon those two resolutions, the one previous to the act, and the other subsequent to the act;—and if he is told that he has got 5l. per cent. preference stock issued under the provisions of the Great Northern Railway Amendment Act, 1849, I should be strongly inclined to hold, that it would be too late for any company, after having got this money and paid dividend upon it, and received the full benefit of it without dispute or demur, and having issued those papers, which are issued pursuant to the provisions of the act,—it would be a very difficult thing for a company so situated—to sustain an objection founded upon three-fifths of the proprietors, not having assented,—if such an objection were made. Even the courts of law have held in cases of this description, where no objection is taken, and where the company avails itself of the benefit of the act, that it is somewhat late for parties to come and say, "true it is there was a meeting, but three-fifths did not assent;" still more, to come and say, "you do not shew that three-fifths did assent;" certainly the onus is on the parties who took the benefit of this act to shew that there was any informality when they purported to issue shares in pursuance of the act. It appears to me, I confess, as regards this act, that the description would lead any shareholder to suppose that they were issued in conformity with the act. And it appears to me to be the sound construction of this statute that it must be taken most strongly against the persons to whom the money is to be advanced, and that the stock issued by them is to be taken as stock which is duly issued. If it were necessary to determine here the question of guarantee upon the company's having complied or not with the pro-

Then comes the act of 1849, which did not receive the royal assent until after the resolution was passed; and that act ratifies their cancelling the forfeited shares and issuing new shares, and that is confirmed as to all shares issued since the 5th of June last. It is enacted, "That it shall be lawful for the company, with the assent of three-fifths of the votes at any general meeting, to guarantee the payment of dividends, not exceeding in any case 7l. per centum per annum on any particular shares, which the company may, by any of the before recited acts, be authorized to issue, in preference to the payment thereof on the ordinary shares of the company, and upon such terms as shall be by the resolution of such meeting defined: Provided always, that any preference shares which shall have been already issued by the company shall have a preference or priority of dividend over the shares so guaranteed as aforesaid, and that all preference shares shall have priority of dividend according to the date at which such shares shall have been issued."

I think Mr. Denison is right in saying that is a general clause, thrown in by the committee, as a safeguard to meet any case of preference shares, that they shall not be prejudiced by this act of parliament, the legislature not having opportunity to investigate whether or not preference shares have in fact been issued.

The next thing that was done after that, is a meeting, held on the 11th of August 1849, (the act now being passed,) and at that meeting there is a Report read, which refers distinctly to the resolution of the 7th of June, and states that the measures authorized by the extraordinary general meeting of the 7th of June last have been attend-

ence shareholder in the same position as the ordinary shareholder. The dividend applied to the period of time during which the profits made were to be divided—it was a periodical division of periodical profit.

visions guaranteeing the payment of dividend on this stock, it seems to me that those words, "Issued in pursuance of the act," imply that the whole issue was made with a guarantee of the payment of dividend if three-fifths of the voters consented.

Now, Mr. Denison gave an answer to one observation which I made, which applied distinctly to the act of 1851, and did not apply quite so strongly to the act of 1849, because there are some general words which might give the power of issuing preference shares independently of that act;—but as regards the act of 1851, there is no power to issue preference shares, except under the clause which speaks of guaranteeing the payment.

Mr. Denison's answer was, I think, ingenious, that there being a larger power, namely, the power of guaranteeing, that implied the smaller power of issuing preference stock. But, unless there is this settled and understood difference (which I have not arrived at, at all, upon the face of these proceedings) between holders of stocks of this description, that when you simply say, "dividend on preference shares," no such right is to accrue,—it does appear to me, that if you hold out to the shareholder that you are issuing the stock by that description, and that it is pursuant to the provisions of the acts of 1849 and 1851, he will take it to be guaranteed under the powers of those acts, and the onus will lie upon you to shew that you are not deceiving the public in issuing stock—expressed to be issued under those provisions—but including all the provisions except the guarantee. Having a certain power, namely, the power of issuing with or without guarantee; can you say that an issue "under the provisions of the act" does not carry the guarantee, but only carries a preference upon the stock?

It appears to me to be less important to discuss that point now from the view which I take, for at present I cannot divest my mind (whatever doubt there may be upon the subject) of the conclusion upon the subsequent acts, which simply give a fixed rate of dividend in preference to any other dividend to ordinary shareholders, that that must mean a fixed share of the whole profits of the concern before any other shareholder gets any share. That runs through the whole profits made, because it is very important to observe that neither the General Railway Act, nor the special act here, lays down any time whatever at which the dividend is to be made—that is a matter entirely in the bosom of the company to say, when they will or will not divide profits, they having the power of dividing profits at any time they please.

I find the two acts under which the subsequent stock was issued in nearly the same words, and I agree with Mr. Daniel in thinking that the words "fixed dividend" makes no difference in the two cases.

By the first act it is enacted, that the com-

All the guarantees amounted to an engagement in case the profits were sufficient, and therefore the preference shareholders could not have any deficiency of profits in one half-year made up to them in the next.

pany shall be authorized to raise shares, which shall bear and receive dividends at the rate of 4½ per cent. per annum, in preference to the payment of dividend on the ordinary shares of the company, with a power in the company to redeem the same on six months' notice. If it had been half-yearly dividend or yearly dividend, as it is in that special act of 1848, or the like, the case, in truth, I may say, would be the other way. Then it would be plain that you are to divide every half-year, and out of the half-year's profit you are to have the dividends: but here it says, "You subscribe so much money; you are to have, not every half-year so much per cent. on your stock, but you are to have 4½ per cent. per annum upon your loan or advance, or whatever it is called, and a dividend at that rate."

Now, "dividend," in its most narrow and restricted sense, can mean nothing less than the share of the profits of the company: but if it is not "share of the yearly profits," and the act does not say that, why am I to confine it to any fixed period whatever, and why am I not to say that the true construction of a clause of this description is, that the persons who hold this stock shall take out of the profits of the company, whenever they may accrue, 4½ per cent. per annum from the date of their advance, before any other person shall take a farthing out of the profits of the company at any time of division? It does not appear to me to be any straining of the act to hold that.

On the contrary, I do see most prodigious inconvenience if you resort to any other construction. It appears to me to be contrary to the true construction of those words, taking them in their narrowest sense, namely, taking "dividend" to mean "share of profits."

It is like the case, pressed upon me, with a different view, of an ordinary partnership—if the profits were to be divided annually, it would be one thing if the partnership deed said that—but if it was simply a partnership for so many years, and it was said, "out of the profits you shall have so much per cent. upon your capital, before any profit shall be received by the other partners,"—the partner would have at all times the right to say, I have not received 4½ per cent. upon my capital, and not a farthing can be touched by any one else; pay me my 4½ per cent. upon my capital before profit comes to you in any shape. And if he had not got his 4½ per cent. when you chose to make a dividend, he might say, those profits are mine—I am to have a dividend amounting to 4½ per cent. per annum, and I have not got it, and until I have got it you cannot have any share.

If one looks to the other view of the case, how does it stand? In a very large number of cases,—indeed I may say in the majority of cases,—it may not be so in this company, because it is a successful company, supported by wealthy men, who may have absorbed, to a great extent,

Dividends and interest were distinguishable: the latter was the result of contract, but the former only arose from a contingency, viz., the existence of profit to be divided. It was admitted that dividend

was to be out of profit merely, but then it was contended that the deficiency of the preference dividend in one year was a charge upon profits in the next year. But a charge on profit was a contradiction.

the extraordinary preferential shares;—but in many companies strangers are brought in, when the first shareholders are nearly ruined. They take the advantage of capital being brought in, and the majority of the old shareholders clearly have no right, as every one must see, to alter the bargain made as to paying the stipulated 5*l.* per cent.

But what they cannot do directly they may do with the greatest ease in this way, and without fraud (because fraud would be another consideration): they may have half-yearly dividends if they like, so that it shall be put beyond all question of fraud. They would say, our dividend is not made for the occasion; we divide half-yearly, and we go on with it every year. But they may wish to speculate upon a large amount of profit; they may wish to have a larger quantity of carriages and carry on business to a larger amount, and to have a larger amount of locomotives, all which would be fair. They may say, now let us do this, let us buy these whenever there is only just enough to pay the preferential shareholders, and there is nothing to pay us. Therefore the preferential shareholder would pay for the whole of the rolling stock; he would have the whole burden of it, and then the next half-year he could not claim any surplus. And presently, when that had taken place, and the business had increased, the company might have a large fund coming in, and the ordinary shareholder would be entitled to divide it; and, therefore, in other words, he would get, as it appears to me by the force of this construction, a dividend, that is to say, a share of the profits, before the other persons had received dividends, or a share of the profits amounting to 4*½* *l.* per cent. per annum.

I have myself a very strong opinion, that when you announce that by any act of parliament the preference shareholders of this company are to have dividends amounting to 4*½* *l.* per cent. per annum, that is to say, a share of the profits to that amount, in preference to the payment of any dividend upon the ordinary shares of the company, you must take care that the persons to whom you give this preference receive the dividend to that amount out of the profits of the company, before you take one sixpence for any dividend to the shareholders whom I may term the ordinary shareholders of the concern.

Having come to that conclusion, I confess it appears to me, for the reasons which I gave before, that no intention to the contrary is apparent upon the face of this act of 1857. There is no natural equity, but the natural equity is clearly the other way; and the calamity which falls upon the company does not touch or affect the rights of the particular parties, *inter se*, but is to be paid for out of the general assets of the company; and such being the loss of the company, the profit is less. This profit should be divided according to the stipulation you have

made, and if the stipulation is, that the preference shareholders are to have a given amount of interest out of profits, then it does not appear to me that it can be a sound construction to hold that this enactment takes it from them, merely because the act says that, in the possible case of there being a surplus (which surplus would belong, as realized profits, to those preference shareholders), it is to be paid to them in the first instance, or that the consequence of enacting that they shall not lose their right is to be, that the legislature intended thereby to transfer the right to the ordinary shareholders, or to allow them to touch the profit without first fulfilling their engagements—for there is the real point of the case.

It seems to me that the ordinary shareholder is not entitled to touch profit until the preferential shareholder is satisfied. Parliament might well contemplate that it would all be settled before the next half-yearly meeting, according to the view they take in dealing with the funds, and therefore the true construction of the clause would be, that you shall not deprive those gentlemen of any right that they have on the existing fund; but as to the rest, we leave that to be dealt with as the law deals with it, and we only secure to them this fund,—this, at least, they shall have towards the satisfaction of their demand. It does not appear to me that any difficulty arises from the circumstance that they would have a legal right of action when the surplus is ascertained, and again a right of action for the next dividend, because the answer would be, you are only to get 5*l.* per cent. before the ordinary shareholders touch profits, and you have already been satisfied *aliunde*; this may well be provided for by a declaration in the decree.

In the first instance, following the first part of the prayer of the bill, the plaintiffs are entitled to an injunction to restrain the defendants from making a dividend; and then there will be a declaration that, according to the true construction of the 3rd section of the 20 & 21 Vict., the remedy thereby given to the preference shareholders is cumulative, and by way of securing to them the payment of the full amount of their dividend, and not in substitution of that dividend. After that declaration they could not possibly make any demand; for it would thereby appear that they had been paid, and that the act was merely a further security.

Questions as to whether such remedies are cumulative are not new. There is one reported; I think *The Great Northern Railway v. Kennedy* (6 Rail. Cas. 5; s.c. 19 Law J. Rep. (N.S.) Exch. 11) is the case to which I refer. It was argued that there could not be a forfeiture of shares, because the company had availed themselves of the other remedy, and the Court said those remedies were cumulative.

I think in this case, taking the view I have done, that the preferential shareholders have a

There could be no profits until every preceding charge had been paid. There could be no dividend unless it was declared; but it was assumed that if in 1856 there was only a dividend of 2*l.* per cent., the preference shareholder became entitled to a further dividend of 3*l.* per cent. But as no one could get a dividend until it was declared, it must, according to the argument, be contended that in the next year there

right to be first paid, it could not possibly on any sensible construction be held that Parliament intended to deprive them of that right or to give a new right to the ordinary shareholders of participating in the dividend, before they had satisfied the contract with the preferential shareholders.

It is not necessary to say more than that I have not clearly arrived at an opposite conclusion even upon the opposite assumption. Upon that, however, I should have had a good deal of doubt, and I should have liked to have reconsidered the question, if I had arrived at the conclusion that preferential dividends were really payments to be made from half-year to half-year—in that point of view, as far as I have been able to consider it, it appears to me that in the first case the letter of the law would be with the plaintiffs. There might be a difficulty arising then on the 3rd section, and it would be much more arguable unquestionably to say, that this is intended to be substitutional for the half-year, and to call it an account settled, because then it would proceed upon the principle, that when the half-yearly meeting took place, it was the ordinary time to declare the dividend, that a dividend would have been made, that there was a fund in hand to pay that dividend, but that Parliament stepped in and took away, perforce, that fund which would have been paid to the preference shareholders, and gave them back a fragment of it.

Upon that there might have been a great deal to say; and if I had not a strong view on the other part of the case, it would have been enough to throw upon me a considerable burden, in determining what is the true construction of this act of parliament; whether it was intended to have this operation to defeat the legal right, or what, upon the true construction of the 120th section of the general act, and what has been done by the company, might now be the right of the plaintiffs,—for the 120th section clearly provides that there shall be a declaration of dividend for the time elapsed since the last dividend, including therefore the whole of the past year; but, on the other hand, there would be an answer to that, on the suggestion of the defendants, which would then arise with much more force than in the case of the preferential shareholders being entitled to arrears, namely, “No, if you take the dividend on that year, then your right being only to have a dividend half-year per half-year, you will then have dividend for a whole year, whilst the legislature also, by the 3rd section of the last act, gives you the dividend for the pre-existing half-year.” I felt pressed by that argument to a considerable extent,

should be two dividends, one for the deficiency in the previous year, and the other for the subsequent profit. Interest required no such preliminary, as that was by contract, but dividends required the ascertainment of profit and a declaration—*ss. 116. to 122. of Companies Clauses Act*. The act of 1857 shewed that the legislature intended that the common loss should be borne by all classes of shareholders alike.

but even looking at that point of view I am not clear that the legislature can be held to have positively taken away the right which existed in these parties, not having expressed such intention in any clearer manner than they have here done, and whether it still might not be said, The fact is, you shall have your chance of payment out of that surplus if it comes into hand before the period for making the yearly dividend accrues;—or possibly this event might have been contemplated—a view which the success of the Great Northern Railway seems to have prevented;—the frauds here are so large that they may delay payment for a considerable period of any dividend. It is not certain that the payment will be made in a year—and if the dividends are suspended for a year, as regards the surplus funds, let the parties who wait for that time receive any surplus. I should certainly have taken a longer period for consideration if I had entertained the view that was pressed upon me, of those being only rights, which are to depend in the one case upon the accident of the period at which the company may choose to declare their dividend—what in another case perhaps a stronger expression than the term “accident” might be used, because there might be many ways in which the interest of the body of shareholders would conflict with the interest of the preference shareholders, and in which, without attributing the slightest fraud, you might see the ordinary shareholder taking every advantage that he can by law avail himself of.

It does not appear to me, taking this second view of the case, that the point would by any means have been reduced to a certainty. It would have put me in a position of much more doubt than I do feel upon it as the case now stands, entertaining as I do certainly a very decided opinion, that shares, so constituted as these have been under even the last two acts (which are not so strong as the first two acts), entitle the person who holds them to say, nobody shall have a sixpence out of the profits of the company, until I have had my 4*l.* per cent. or 5*l.* per cent. dividend.

Coming to that conclusion, I feel, Mr. Daniel, that you are entitled to have the declaration contained in the first part of the notice of motion, and then an order that the defendants may be restrained from declaring any dividend on the original A. stock and B. stock, or any of such stocks, or any part thereof respectively, without regard to the rights of the plaintiffs respectively and the other holders of preference stock on whose behalf they sue respectively to be paid in priority the full amount of their interest or dividends respectively.

The recital which alluded to the election of directors and auditors being by all the shareholders (2) shewed that all the shareholders, preferential as well as ordinary, were in the same fault; and even if the argument of the preference shareholders were correct as to their rights under the former acts, still this act treated the dividend of 1856 as paid, and the 3rd section shewed that the right to that dividend was discharged; but if it did not amount to a release of the dividend, yet the section provided a mode of discharging the dividend of 1856, so that no provision could be made for it out of the first half-year of 1857. The preamble of the act stated that by Redpath the whole state of things had been brought into such difficulty that no declaration could be made. The 1st section, then, which was not retrospective, gave title to those who had it not before, and afterwards applied itself to the disposition of the 243,000*l.* The preference shareholder was not a creditor, but a partner, and as such must bear the contingencies. The 3rd section implied that the 243,000*l.* was to be considered as the dividend of 1856, and provided for the distribution of the balance as a declared dividend, the words "so far as the same will extend" being inserted, as there were classes of preference shareholders having priority *inter se*, to prevent interference with that priority. It was not, therefore, just that the preference shareholders should have the benefit of the 3rd section and also a dividend for 1856.

Mr. Daniel was heard in reply.

Nov. 21.—The LORD CHANCELLOR (after stating the circumstances as before set forth) continued:—The effect of the 2nd section of the act of 1857 was that there was no longer any fund divisible for profits accrued in the period from the 30th of June 1856 to the 31st of December 1856; but in the next half-year (that is, the half-year ending the 30th of June 1857), a further sum has been realized for division,

(2) The portion of the recital alluded to was as follows:—"and whereas the proprietors of all the stock and shares of the company, whether preference, or A. or B. or ordinary stock, are alike entitled to vote at the meetings of the company upon all questions, and upon the election of directors and auditors."

amounting to 200,000*l.*, or thereabouts. What, then, is the duty of the directors in respect of this sum? That depends on the 120th section of the Companies Clauses Consolidation Act. The directors are, by the express provisions of this clause, bound to prepare a scheme apportioning the sum realized among all the shareholders according to their respective rights. The profits to be apportioned are, by the express terms of the section, the profits for the period current since the last preceding declaration of dividend. If that period is half a year, then half a year's dividend would be due: if a whole year, then a whole year's would be due. In the present case the period is a whole year; and, therefore, the shareholders are entitled to a whole year's dividend, unless there is something in the act of last session to interfere with that right. I can discover nothing of the sort in that act. The 1st section legalizes the fictitious stock. The 2nd section directs an appropriation of the sum realized for profits up to the 31st of December 1856, which, but for such direction, could not have been made.

These provisions certainly do not touch the question as to how the profits to be apportioned after June 1856 should be applied; but the argument of the appellants, so far as it rested on the effect of the statute, was founded mainly on the 3rd section. By that section it is enacted, "If any balance shall remain of the said sum" (that is, of the said sum of 243,000*l.*), "and of the said monies after such application thereof as hereinbefore directed" (that is, the application of it in purchasing stock and clearing off Redpath's frauds), "it shall be lawful for the directors, and they are hereby required to apply such balance, so far as the same will extend, in paying to the proprietors of the several classes of preference stock or shares, the dividends to which they would have been entitled out of the said sum of 243,923*l.* 5*s.* 8*d.*, if the same had been declared and apportioned as dividend at the said half-yearly meeting of the 12th of March 1857: provided always, that all the proprietors of each class of preference stock or shares shall receive their dividends according to the priority of the said class, and in preference to any subsequent class: provided

also, that if the balance remaining after payment of the dividend to preceding classes of stock or shares is not sufficient to pay the whole amount of the dividend to the next subsequent class, such balance shall be divided rateably among all the proprietors of the same class of stock or shares, according to the amount of the same held by them respectively."

It was contended, that the effect of that section, either alone or together with the others, is, to confine the right of the holders of privileged shares, so far as relates to profits accrued between the 30th of June and the 31st of December 1856, to the balance, if any, of the 243,000*l.*, which should remain after making good Redpath's frauds. But what foundation is there for such an argument? I will not say that such an enactment would, in my view, have been unjust. The whole act was a compromise rendered, or supposed to be rendered, necessary by Redpath's frauds; and if, therefore, the legislature had said in express terms, that the future declarations of dividend were to be made as if the 243,000*l.* had been applied in satisfaction of the profits accrued for the half-year next following the 30th of June 1856, and that the future profits should be deemed to be profits accruing, not according to the 120th section of the general act, for the period current since the last declaration of profits, but for the period since the 31st of December 1856, then there would have been good ground for the argument of the appellants. But I do not so construe the act; and if I am right in assuming that, irrespective of the act, the duty of the directors would, on the next declaration of dividend, be to apportion the sum then divisible as a sum representing the profits for the period current since June 1856, which would give the privileged shareholders a right to a year's dividend, that right cannot be taken from them, unless an intention to deprive them of it is positively stated, or is clearly deducible from the language of the legislature. I do not so construe the clause in question. It merely provides that the balance, if any, of the 243,000*l.* shall go, as the whole would have gone if there had been no default. The object of the act was to give validity to the shares fraudulently

created, and to enable the directors to apply the existing fund in restoring the capital to its proper amount. What would be the amount required for such a purpose was uncertain. It might not be so large as to exhaust the whole of the 243,000*l.* It was, therefore, necessary to enact how the surplus, if any, should be applied. If there should be no surplus, then the funds of the company would be dealt with as if no divisible fund had existed on the 31st of December 1856, and the consequence would be that the next division of profit would be made on the fund realized since the 30th of June 1856. The only effect of the 3rd section is, to authorize the application of a particular balance, if any should exist, in the same way as if it had been appropriated for division by a regular vote of a general meeting.

The clause does not say that for all purposes it is to be deemed that an apportionment of profits had been made by the resolution of the 12th of March 1857. The legislature contemplated the possibility of a surplus, and therefore provided for its application, if any should exist. If there should be no surplus, then the 3rd section may be struck out of the act, and it is impossible to suppose that the legislature meant that the right of the preference shareholder should depend on the accident of whether there should or should not be a surplus, a matter which could not be ascertained till possibly a very distant day.

I think it clear, therefore, that there is nothing in the act of last session to interfere with the right of the preference shareholders to receive a year's dividend out of the sum ascertained by the directors to be the amount of profit applicable to dividend since the last declaration of dividend in respect of profits which accrued up to the 30th of June 1856. It is from that date that the dividend is to be declared, and the sum out of which the dividend is to be declared is more than sufficient to produce the full amount of the dividends payable to the holders of the privileged shares, and this is all that practically concerns the parties in this litigation.

But the decree goes further. It declares "that the plaintiffs respectively, and the other holders of preference stock in the Great Northern Railway Company, on

whose behalf they respectively sue, are entitled to be paid dividends out of the profits realized by the company on the amount of preference stock held by them respectively, from the 30th of June 1856, according to the amount of dividends which the said several classes of preference stock respectively carry, before any payment in respect of dividends or otherwise is made to any of the holders of original ordinary stock, A. stock and B. stock, in the said company, or any of such stocks, out of such profits. And it is ordered, that a perpetual injunction be awarded to restrain the defendants, the Great Northern Railway Company, from declaring any dividend on the original ordinary stock, A. stock and B. stock, in the said company, or any of such stocks, or any part thereof respectively, without regard to the rights of the plaintiffs respectively, and the other holders of preference stock, on whose behalf they respectively sue, to be paid in priority the full amount of the dividends payable upon or in respect of the preference stock held by them respectively, to be computed from the 30th of June 1856, and from making or causing to be made any payment for dividend or otherwise to any of the holders of original ordinary stock, A. stock and B. stock, in the said company, or any of such stocks, without first paying or providing for the payment to the plaintiffs respectively and the several other holders of preference stock in the company, on whose behalf they respectively sue, of the full amount of the dividends payable upon or in respect of the preference stock held by them respectively, to be computed from the 30th of June 1856."

It is necessary, therefore, for us to say whether that declaration and the consequential direction are right; in other words, whether, if the sum to be divided, at any period of distribution, is insufficient to pay in full the dividends due to the holders of preference shares, they are entitled on the next declaration of dividend to receive the arrears unpaid as well as the new dividend? The Vice Chancellor decided in the affirmative; and, after much consideration, I think he correctly so decided.

The difficulty arises from the want of

a specific and distinct definition as to the extent of the rights conferred on each particular class of shareholders by way of preference. The plaintiffs say, the right of a shareholder, who is entitled to a dividend by way of preference, is to receive his dividend out of all profits from time to time accruing, and to carry over his demand for any unpaid arrears to all subsequent divisions of profits. The defendants say, he has no right upon any fund, save that actually under distribution, and, if that fund is insufficient to satisfy him, he has no claim on any subsequent profits. The expression "preference share," or "preferential dividend," is equivocal. It by no means clearly indicates what are the rights of those to whom it applies. I do not think it can fairly be said to be an inaccurate expression, whichever of the two constructions be put upon it. All that the language fairly imports is, that some preference is given to the persons to whom the language applies. How far the preference is to extend must be ascertained by other media than the mere expression itself.

It was argued that the word "dividend" must be taken, *ex vi termini*, to apply merely to one fund to be divided, and that it could not in its true meaning be extended to any fund afterwards to be brought into division. But it must be observed that the word "dividend," as used in this and similar cases, is never used with strict accuracy, if strict accuracy depends upon its primary meaning. The word "dividend," if we look to its derivation, means obviously the fund to be divided, not the share of any particular partner or person in that fund, and strict language would require us to speak, not of the dividend which each shareholder is entitled to receive, but of his *aliquot portion of the dividend*. This, however, is rather a verbal or grammatical than a substantial discussion, and I advert to it only for the purpose of shewing, that in construing the clauses in these acts, which give to certain shareholders, in preference to others, rights to dividends, we must construe the word "dividend" in a secondary sense, and not according to its strict original meaning. And, acting on this view of the case, I have come to the conclusion, that

what these statutes, in fact, guarantee to the favoured shareholders is, a charge on all accruing profits at the stipulated rate, before anything is divided among the ordinary shareholders. This is, substantially, *interest* chargeable exclusively on profits. There is nothing in such a use of the word "dividend" which is at all at variance with ordinary usage. We speak of the *dividends* payable on the 3l. per cents., when in truth we mean no more than an annuity of 3l., chargeable upon and payable out of the public revenue. But the strong ground on which I rest in support of this construction is, that on any contrary hypothesis the legislature would not unfrequently place the interest of the directors in conflict with the duty they owe to the shareholders. Thus, before the directors propose a fund to be apportioned by way of dividend among the shareholders they may and ought to set apart any sum which they may think reasonable to meet contingencies, or to enable them to enlarge or improve the works. It is expressly provided by the 122nd section of the Companies Clauses Act,—“Before apportioning the profits to be divided among the shareholders, the directors may, if they think fit, set aside thereout such sum as they may think proper to meet contingencies, or for enlarging, repairing or improving the works connected with the undertaking, or any part thereof, and may divide the balance only among the shareholders.” It is obvious that the question, what amount it may be reasonable to set apart for such a purpose, must often be one of great nicety; and in deciding it, the directors may have to determine whether the fund retained may or may not be so large as to make the divisible surplus insufficient to pay the privileged shareholders in full. The consequence of such an appropriation may be to deprive them of a portion of their dividend, and, on the other hand, materially to increase the next half-year's dividend, so as to leave a large surplus for the general ordinary shareholders. If the loss on the former dividend is not to be carried on and made good out of the next apportionment, it is obvious that the relative rights of the different classes of shareholders may depend on the discretion of the directors—a state of things which

the legislature could hardly have intended. If the directors are, as probably they will be, ordinary shareholders, they will have an interest so from time to time to set aside portions of their funds for the benefit of the company in the next half-year, as to prevent the preference shareholders from receiving a dividend in full, and they will thus create a larger fund for division on the next occasion, the entire benefit of which, on the argument of the appellants, will accrue to the benefit of the ordinary shareholders. I am aware that it will always be the duty of the directors to fix the amount of the fund to be retained with reference to the general interest of all classes of shareholders, and not to favour any one class at the expense of the other. But when I see that on one construction of these acts the legislature will have given to the directors an interest in opposition to their duty, and that on the other construction they will not have done so, I am led strongly to believe that the latter is the sounder interpretation. The same reasoning is also applicable to the duty of the directors under section 120. There is no time fixed at which dividends are to be declared, and if at the end of any particular half-year the fund for division should be little more than nominal, prudence would, or might, lead the directors to postpone the taking of any step towards the declaring of a dividend until a subsequent period. But if by declaring a dividend when the fund is merely nominal the claim of the preference shareholder is cleared up to the time of the distribution, it is obviously the interest of the ordinary shareholders that such a declaration should be made. So that here, too, the interest of the directors as ordinary shareholders may be in conflict with the duty they have to perform towards all persons interested, including the preference shareholders.

These anomalies are all avoided if we hold that the preference given by these statutes confers a right to receive dividends at the stipulated rates, attaching not only on the profits accrued when the dividend is declared, but, if they are insufficient, then on subsequent profits. On such a construction, which the language well justifies, there can be no inducement to the directors, either unduly to set aside

funds for enlarging the works with a view to future profit, or to propose a dividend when there is no substantial fund for distribution. The rights of those entitled to preference will be effectually secured, and the interest of the directors cannot be brought in constant conflict with their duties.

I therefore concur with Vice Chancellor Wood in the conclusion at which he arrived; namely, that if on the declaration of a dividend the fund to be divided should be insufficient to satisfy the claim of the shareholders entitled to preference, those shareholders will be entitled to be paid in full out of all subsequent dividends before the ordinary shareholders can receive anything;—a view of the case which fully justifies the terms of the decree.

I must add, however, that, even if this had not been so, the right of the holders of the preference shares to receive their dividends of all the profits accrued for the period current since the ordinary meeting at which the dividend was declared of the profits up to the 30th of June 1856, appears to me to admit of no doubt.

I am therefore of opinion that the present appeal, having entirely failed, ought to be dismissed with costs.

LORD JUSTICE KNIGHT BRUCE.—The appellants in this cause are the defendants, contending that the decree under appeal gives the plaintiffs undue protection, and ascribes to them rights not belonging to them. The hearing of the suit before Vice Chancellor Wood occupied, we are told, not quite two days; here it consumed more than three;—a quantity of time disproportioned, I think, to the nature of the contest. The case supposed, and to be assumed, is that of a dividend, fairly and properly declared, out of the profits or net income, or upon the profits or net income, of the Great Northern Railway Company, in respect of the time between two specified periods; but a dividend, not sufficient to pay, in respect of that time, the preference stockholders the full amount of their respective minimum per-centage, (a word not, perhaps, English, but intelligible):—as, for instance, a dividend, declared at Lady-day, 1856, for the time

between that and the preceding Michaelmas, which does not give a stockholder of 10,000*l.*, entitled to preference to the extent of 5*l.* per cent. per annum, so much as 250*l.* In such circumstances the defendants contend that, in respect of all profits and dividends subsequent to Lady-day, 1856, the preference stockholder must, as between himself and the ordinary shareholder, stand in the same position and be considered to have merely the same rights as if the Lady-day dividend had given him 250*l.* instead of a sum less than 250*l.* I think this proposition not maintainable, and am of opinion—clearly of opinion—that, according to the true meaning of the acts of parliament, resolutions and certificates, creating the title of the plaintiffs and the other persons on whose behalf they are here, the ordinary shareholders are not entitled to any dividend or share of profits in respect of any time or period until payment, or provision made for paying, to the preference stockholders the full amount of their minimum dividend severally in respect, not only of the same time or period, but also of all antecedent time—for example, until in the instance supposed the difference between the former dividend of the 10,000*l.* preference stockholder, and the 250*l.* shall, independently of any other dividend, have been made good to him. The phraseology of the statutes, reports and certificates, not very expanded as concerns the matter in contest, may be open to grammatical, or philological, or conveyancing evil, or indeed criticism, but compared with that of some compositions which the Courts of justice of this country are expected to construe, is of absolute accuracy and perspicuous clearness. I lay no stress against the defendants, though probably stress might well, in favour of the plaintiffs, be laid, on the grossly unjust consequences likely, if not certain, to follow an adoption of the defendants' construction. Not any such consideration is, I think, requisite for ascribing to the language of the acts, reports, resolutions and certificates, a force adverse to the appeal. If, indeed, intention were made subservient to words, and not words to intention, there might perhaps be something to be said for the ordinary shareholders, but I do not know that

even such a wide departure from the principles of jurisprudence would help them. The expressions, "5*l.* per cent. perpetual," "5*l.* per cent. redeemable," "4½*l.* per cent. redeemable," and "5*l.* per cent. 12*l.* 10*s.* preference," in the certificates, must of course be read in conjunction with the acts of parliament and resolutions which authorize them respectively, and be understood as if in each case the words "per annum" had been inserted immediately after the word "cent." or "centum." Of this there can be no doubt.

The word "dividend" carries no spell with it. Applicable to various subjects, it is not intelligible without knowing the matter to which it is meant as referring, and, of course, where there is a context, it is liable to be affected by that context. But the defendants' gloss upon it seems to me arbitrary and fanciful. The word, as used in the places in which we have now to deal with it, means, I apprehend, *share of profits*. Nor can I discover any necessity, authority or reason, for limiting and restricting the effect of the word "preference," as the defendants require it to be. The expression, where we have to construe it, seems to me correctly used in a large and general sense as between or amongst the stockholders and shareholders in respect of time and profits. A. and B. and C. are partners in a trade, each having contributed an equal share of capital, but they agree that out of the profits 5*l.* per cent. per annum shall preferably, and in the first instance, be paid to A. on his portion of the capital. The division of profits between them is agreed to be, and is, periodically made; but at one of the periodical divisions the profits fall short of sufficiency to pay this amount to A, from the time to which, out of the profits, his interest had been previously paid. Is the deficiency not afterwards to be made good to him out of the profits when more than adequate to answer it? I have heard no reason why not. If, indeed, such a thing is prohibited by the terms of the contract, they must be abided by. Is there any such prohibition in the present instance? As it seems to me, clearly not.

A part of the argument for the defendants having been illustrated by the figure of the filling of a cup, I may be excused

for suggesting another case. Let us suppose a right to have a tun of wine from a vineyard—is that the same as the right to have a tun of wine from a *vintage*? I do not think so. In the former case, the deficiency of an earlier, might have to be supplied by a later, vintage—not so, probably, in the other. Here, as I apprehend, the plaintiffs have the *vineyard*, and not merely the chance of a particular *vintage* to look to.

In what I have been saying I have disregarded, nor meant to refer to, the statute of the present year, except as by the 1st section it enacts thus:—"All stock, of whatever description, and all shares in the Great Northern and East Lincolnshire Railway Companies respectively, appearing upon the registers of stock and shares of the same companies respectively, on the 31st day of January and the 31st day of March 1857, respectively (when the said registers were respectively last closed), are hereby declared to be valid, and to entitle the holders thereof to all the rights, privileges and advantages, and to subject the holders thereof to all the duties and liabilities which attach to the same stock or shares, or which would attach to the same if they had been all legally created and issued under the authority of the acts relating to the said companies respectively." This section, in my judgment, must be considered both retrospective and prospective as to its effect. But then comes the question, if question it should be called, as to the effect on the plaintiffs' rights of the 2nd and 3rd sections of the act of the last session; and it is, in my judgment, plain that, as between the plaintiffs and the ordinary shareholders, the legislature meant by those sections to leave, and did leave, the plaintiffs, with respect to their rights under the 1st section and the former statutes and their contracts, in the same position as if the profits represented by the sum of 243,923*l.* 5*s.* 8*d.*, mentioned in the 2nd section, had not existed or had been originally less, by the amount of such portion of that sum as should be abstracted by force of that section. This the Vice Chancellor has perhaps better expressed in the last declaration of his decree in these words:—"This Court doth declare that, according to the true construction of the

3rd section of 'The Great Northern Railway Company (Capital) Act, 1857,' the remedy thereby given to the preference shareholders is cumulative, and by way of security to them for the amount of their dividend, and not in substitution of such dividend." I adopt that declaration, and though not because, yet not the less willingly because, the claim of the defendants to support their appeal upon the ground—the alleged ground—that the act of 1857 is fatal to the suit, even though independently of that act the plaintiffs would have been entitled to succeed, is one which could not, in my opinion, be sustained without casting much discredit, not only on those who prepared and conducted the bill of 1857, but on both Houses of Parliament also. I do not think such an imputation deserved by either House of Parliament or by the promoters of the bill, especially the defendants' solicitor, Mr. Leech, whom, having had him under my observation professionally for more than twenty years, I consider to be an excellent man of business; that is to say, a man of integrity, as well as of diligence, accuracy and knowledge. It may be, or is, superfluous to add, but I will, nevertheless, distinctly say, that, independently of the statute of this year, the losses sustained by the company through the frauds of their servant Redpath (whether any of those above him neglected, or did not neglect, his duty), were, in my judgment, most clearly losses to be, as between the preference stockholders and the general shareholders, borne wholly by the latter. Nor, perhaps, before parting with the cause, should I omit to observe, that the provisions mentioned in the argument, which certain acts of parliament relating to other companies have made respecting preference dividends, appear to me altogether immaterial for any present purpose, and that the statute of the 8 Vict. c. 16, upon which, and especially the 66th, 90th, 91st and 116th, and six following sections, much comment was bestowed at the bar, though containing, probably, matter favourable to the plaintiffs, appears to me not to afford the least assistance or countenance to the defendants' claim. I think the whole decree manifestly right, and the appeal unreasonable.

LORD JUSTICE TURNER.—The question which we have to determine in this case is, whether the holders of the preference stock in this company, who are represented by the plaintiffs in this suit, are entitled, as against the holders of the company's ordinary stock, to be paid out of the net revenue of the company for the half-year ending the 30th of June 1857, dividends upon their preference stock from the 30th of June 1856, or from the 31st of December 1856 only: the plaintiffs (the holders of the preference stock) claiming their dividends from the former date; and the defendants (who represent the holders of the ordinary stock) insisting they are only due from the latter date.

Upon the facts on which this question depends, there does not appear to be any dispute. It is admitted that the company's net revenue for the half-year ending the 30th of June 1857, is more than sufficient for the payment of the full amount of the dividends claimed by the holders of the preference stock, and the validity of that stock is not disputed. This question depends, as it seems to me, upon three points:—First, what were the rights which were attached to the preference shares (now converted into stocks) under the acts and resolutions by which those shares were created? Secondly, what were the rights belonging to the holders of these stocks under the Companies Clauses Consolidation Act? And, thirdly, whether the rights thus attached and belonging to these stocks have or have not been taken away by the act of this company, passed in the year 1857, in consequence of Redpath's frauds.

In order to determine the first of these questions, we must, of course, examine the constitution of these shares, of which there are four classes. The first class was created in the year 1849. By the act of that year it was enacted (by section 26.) that "it should be lawful for the company, with the assent of three-fifths of the votes at any general meeting, to guarantee the payment of dividends not exceeding in any case 7l. per cent. per annum on any particular shares which the company might, by any of the thereinbefore recited acts, be authorized to issue in preference to the payment thereof on the ordinary shares of the com-

pany, and upon such terms as should be by the resolution of such meeting defined. And it was provided, that any preference shares which should have been already issued by the company should have a preference or priority of dividend over the shares so guaranteed as aforesaid, and all preference shares should have priority of dividend according to the date at which such shares should have been issued." In pursuance of this act, stock was issued, the certificates of which purported that the holder was entitled to 5*l.* per cent. perpetual preference stock. How the case would have stood if it had rested upon these certificates alone, I will not undertake to say. The certificates plainly import, that the holders were entitled to stock bearing 5*l.* per cent. But whether 5*l.* per cent. interest or 5*l.* per cent. dividend; or, if 5*l.* per cent. dividend, whether 5*l.* per cent. dividend at certain periods, or 5*l.* per cent. dividend when a dividend should be made to other shareholders, is not expressed upon the certificates. On the one hand, the certificates are issued by the company, and form the inducement to the holders to take the stock. They ought, therefore, as I think, to be construed in favour of the holders; and of course it must be more for the benefit of the holders to have 5*l.* per cent. certain than 5*l.* per cent. dependent upon a contingency. On the other hand, they are certificates of stock, and stock carries dividends, not interest; and "dividends," it is said, must be construed to be portions of profit, more especially when put in contrast with the ordinary dividend, as may be said to be the case here by force of the word "preference." This was the difficulty to which I meant to refer in *Sturge v. the Eastern Union Railway Company*, which was mentioned in the argument, although the difficulty was not there so clearly put as it might have been, the passage referring to the subject being blended with observations on the act which I then had under consideration, and which did not, or at all events did not prominently, present the difficulty. To say that my mind is altogether free from this difficulty now, would be going too far. I can go no further than to say, that I do not feel the difficulty now so strongly as I felt it when

that case was before me. I think more weight is due to the consideration, that these certificates ought to be construed in favour of the holders, than I gave it in that case.

Returning, however, to the case before us, it cannot, I think, be denied that the language of these certificates as to the 5*l.* per cent. is equivocal, and we must therefore look to the context to explain it. Now, the certificates refer to the act of parliament, and the act of parliament refers to the resolutions. How then does the case stand upon the act? The act, as I understand it, empowers the company to pledge itself to the payment of dividends at a certain rate per cent. per annum, in priority to the ordinary dividends. It may, therefore, be admitted that the act refers to payments out of profits; but to what description of payments does it refer? To payments to be measured by time;—and, if the payments are to be so measured, how are they to be distinguished from interest to be paid out of the profits at certain periods? It cannot surely make any difference that they are denominated dividends. Take then the resolutions in connexion with the act. It appears that there were two issues of these shares in the year 1849: one before the act under the resolution of the 7th of June 1849; the other after the act, under the resolution confirming the report of the 11th of August 1849. But it appears that the report, confirmed by the resolution of the 11th of August 1849, recommended that the shares to be created under it should be entitled to the same privileges as the shares issued under the resolution of the 7th of June 1849, and both sets of shares, therefore, were to stand upon the same footing, and to be governed by the resolution of the 7th of June. Now, what was the purport of the report on which that resolution was founded? It seems to me to be clear that the expression "preference dividend" in that report was used in the sense of interest. It was argued, indeed, for the appellants, that the expression "interest or preference dividend" in that report meant interest until the shares were fully paid up, and preference dividend afterwards. But I am by no means satisfied of this, and even supposing it to be so, there would still remain the question, what

was meant by "preference dividend" after the shares were paid up? The whole tenour of the report shews, I think, that what was so meant was interest. It may further be observed as to the shares created in 1849, that such of them as were created before the passing of the act were, as I understand the act, confirmed by the 25th section of it—a section which it can hardly be doubted had reference to the resolution of the 7th of June, as it confirms the shares which had been issued since the 5th of June.

Passing then from the shares issued in 1849, we come to the shares issued under the act of 1851. I think it quite unnecessary, however, to enter into detail in the consideration of the question before us with respect to these shares. The provisions of this act of 1851 are in all material respects the same as the provisions of the act of 1849, and there is no variance between the certificates issued under the two acts. It is sufficient to say that the observations which I have already made as to the former shares, so far as they relate to the act and the certificates, apply equally to these shares. Then, as to the shares created under the act of 1853. The case of the plaintiffs as to these shares seems to me to be even stronger than their case as to the former shares, for these shares depend wholly upon the provisions of the act under which they were created, and the act is express that the shares shall bear and receive dividends at the rate of 4*l.* 10*s.* per cent. per annum in preference to the payment of dividends on the ordinary shares. And so as to the shares created under the act of 1855, which enacts, that the holders of these shares shall be entitled to fixed dividends at the rate of 5*l.* per cent. per annum, in preference to the payment of dividends on the ordinary shares, with the modification only that the title shall be subject to such conditions as shall be expressed at the time of the issue of the shares, at which time it does not appear that any conditions were expressed.

It was argued on the part of the appellants, with reference to all these shares, that from the relation in which the preference and ordinary shareholders stand to each other, their relation being that of partners and not of debtor and creditor,

the preference shareholders could be entitled to no other advantage over the ordinary shareholders than the priority of payment; but this consequence does not seem to me at all to follow from the relation of the parties. The position of the preference shareholders may, indeed, shew that what was payable to them must be payable out of profits; but I see no ground for saying that it shews that what is payable to them is payable out of the profits of the current year, or that it at all limits their demand against the profits. Their rights in those respects would depend, not upon the relation of the parties, but upon the terms on which that relation was constituted. Reference was also made on the part of the appellants to several other acts of parliament, from which it was sought to be inferred that the legislature had assumed that preference shareholders were not entitled to back dividends. But the acts referred to are later in date than the acts which we have had in this case to consider; and if these acts give the right, it cannot, as I conceive, be taken away by inference to be deduced from later acts. I have, however, thought it right to look into the acts referred to, and I think the provisions on which the appellants relied may well be accounted for on other grounds. Upon the whole, therefore, I am of opinion, upon the first point, that there was attached to all these preference shares on their creation a right to be paid out of the profits of the company whenever those profits should accrue, before any payment to the holders of ordinary shares, the full amount of the dividend at the rates mentioned in the certificates from the times when such full payment had last been made. Supposing, however, that this right did not attach to these preference shares on their creation, it would be necessary to consider how the rights of the holders of them would stand under the Companies Clauses Consolidation Act.

The Lord Chancellor has already read the 120th section of that act, and it must be present to the mind of everybody concerned in this case, and I shall not therefore read it again. By that section it is enacted, that whenever a dividend is intended to be made, the scheme to be prepared by the directors is to shew the profits

from the period when the last dividend was made, and those profits are to be apportioned according to the shares, which of course must mean, with reference to their priority, as well as in other respects; for otherwise no dividend could, so far as I can see, ever be declared upon preference shares. The scheme for this dividend therefore was to shew the profits from June 1856, when the last dividend was declared, and the profits to be apportioned by it were the profits from that period. How these profits were to be apportioned according to the shares, having regard to the priority (to which, as I have observed, regard must be had) without the dividend for the whole year being apportioned to the preference shareholders, I have been wholly at a loss to understand.

Some argument was attempted to be raised on the other provisions of the act, by which the accounts were to be made up half-yearly; but the half-yearly account and the scheme of dividends are perfectly distinct matters, and are so treated by the act. It was said, too, that there were no profits from June to December 1856, for that parliament had, by the act of 1857, appropriated the income during that period to other purposes; and the argument was even carried so far as to contend that the act of 1857 amounted to a legislative declaration of dividend. Suppose, however, that matters had proceeded in the regular course, and dividends had been declared half-yearly, and parliament had, in any half-year, appropriated the income of a week or a month to some other purpose, could it have been contended that the remainder of the income was not divisible according to the shares? I think not. If the argument could not be maintained as to such a period as I have mentioned, I do not see how it can be good as to any portion of the period for which the account is to be made up. As to the argument on the legislative declaration of dividend, no more, I think, need be said than that nothing could, in my opinion, be more foreign to the purposes of the act of 1857, than to impute such an intention to the legislature. I think, therefore, this point also must be decided against the appellants.

There remains, then, only the question

on the operation of the act of 1857 — whether it has taken away from the preference shareholders those rights which existed up to the moment of its being passed? I am of opinion that it has not. After what has been already said on this subject, I shall say but a few words upon it. I take it to be a sound rule of construction, that certain rights are not to be taken away by uncertain words. The scope and purpose of this act seem to me to be plain—to reduce the capital of the company within its proper limits—a purpose wholly foreign to the determination of any question between the preference and the ordinary shareholders. If, therefore, the legislature has done what the appellants contend for, it has done so, not by any enactment designed for the purpose, but by the means which it has used for carrying into effect a different purpose. It has, indeed, taken away a fund which would have been applicable to the payment of the preference dividend, but the fund which it has taken away would also have been applicable to the payment of the ordinary dividend. It does not seem to me, therefore, that the mere fact of this fund having been resorted to, can furnish any inference in favour of the ordinary shareholders. The rights of the preference shareholders were both present and future;—present, as to the fund with which the legislature dealt, and future as to the profits which might afterwards accrue; and I do not see how the fact of the present right of the preference shareholders having been interfered with, can be taken to have destroyed their future right. The appellants therefore cannot, I think, maintain their case, either upon the general scope and purpose of the act, or upon the particular fund having been resorted to in order to effectuate it. It was said, however, on their part, that the misfortune which gave rise to the act was a common misfortune, and that the legislature intended that it should be borne in common. But the act itself contradicts this theory; for the surplus which, according to this theory, was to go to the preference shareholders in lieu of their dividend, was to go to them according to their priorities, so that the loss would fall wholly on the lower classes of preference shareholders. Are we to impute to the legislature this intention, that as between

the preference shareholders themselves the whole loss should fall upon the lower classes; but that as between the preference shareholders and the ordinary shareholders the whole loss should not be borne by the ordinary shareholders? Again, it was said, for the appellants, that parliament must have intended to substitute the balance, which is disposed of by the 3rd section, for the full dividend which would have been payable to the preference shareholders, for that otherwise the preference shareholders might be twice paid; and this argument was also pressed as bearing upon the second point by creating a difficulty in the apportionment to the preference shareholders from the uncertainty of what would be coming to them under this 3rd section. But how did this balance mentioned in this 3rd section arise? From a fund which was primarily applicable to the preference dividends. Is it to be inferred that the legislature meant to take away other rights of the preference shareholders, because it gave back to them a fund to which they were originally entitled? And, as to the double payment to the preference shareholders and the suggested difficulty in the apportionment, of course the preference shareholders could not be twice paid. What, if anything, they had received under the 3rd section would be known to the company, and would be deducted from what was apportioned to them for dividend. Another argument on the part of the appellants was, that, except upon their construction of this act, the third clause was unnecessary. But this argument assumes that there would of necessity be a surplus sufficient for the payment of all that was due to the preference shareholders, and this the legislature cannot, I think, be taken to have known: and even if it did know, I do not think that the mere fact of its having secured the fund to those to whom it originally belonged, could justify us in adopting the inference for which the appellants contend. Upon these grounds, I am of opinion that the argument of the appellants on this third point also is untenable, and I think this appeal must be dismissed, and dismissed with costs.

LORDS JUSTICES,
Nov. 5. }

YEM v. EDWARDS.

Forest of Dean—Encroachment—Statutes 20 Car. 2. c. 3. and 1 & 2 Vict. c. 42.—“Holder”—Tenant for Life.

The possessor of lands, encroachments on the Forest of Dean, devised the same to his wife for life, with remainder to his sons. The statute 20 Car. 2. c. 3. had enacted that all titles obtained by encroachment after the passing of the act should be void. The statute 1 & 2 Vict. c. 42. enabled “holders” of certain encroachments so made to acquire the fee. The wife obtained a conveyance of the fee in such encroachments:—Held, (affirming a decree of one of the Vice Chancellors) that she had acquired the fee, not for her own benefit only, but for the benefit of all parties interested under her husband’s will.

This was an appeal from the decision of Vice Chancellor Wood (reported 26 *Law J. Rep.* (N.S.) Chanc. 590), presented by the defendants. The facts of the case are very fully stated in the foregoing report and in the judgment of his Honour, and for the present purpose may be briefly stated as follows. By the statute 1 & 2 Vict. c. 42, ‘An act to empower the Commissioners of Woods and Forests to confirm the Titles to and grant leases of encroachments in the Forest of Dean,’ it was enacted that as to encroachments made between 1782 and 1812, and coloured “blue” in the survey, the Commissioners might grant to the holders leases of their encroachments for their lives at a nominal rent, with power to the lessees to purchase the fee simple within ten years.

John Yem was in possession of “blue” land and also of other land, to which the act conferred an absolute title. By his will he gave all his real estate to his wife, Benedicta Yem, for life, and after her death to his five sons. He died in 1824. After the passing of the act Benedicta Yem obtained a lease and afterwards a conveyance of the “blue” land in fee simple under the provisions of the act. By her will, dated in 1856 (in which year she died), she devised the “blue” land so acquired unto Mr. Edwards and Mr. Cooper, upon trusts for sale, &c.

The devisees under the will of *Benedicta Yem* brought actions of ejectment against the sons of *John Yem* to recover possession of these lands; the latter filed their bill for an injunction to restrain the actions and to have a conveyance. Upon the motion for an injunction it was agreed that the motion should be turned into a motion for a decree, and upon the hearing Vice Chancellor Wood made a decree in favour of the plaintiffs, holding that *Benedicta Yem* had acquired the fee simple impressed with the trusts of her husband's will.

From this the defendants, her devisees, appealed.

Mr. Jessel supported the decision of the Court below, on behalf of the sons of *John Yem*, the plaintiffs, relying on the simple facts without citing any authorities.

Mr. Dowdeswell (of the Common Law Bar), for the appellants, insisted that before the passing of the act 1 & 2 Vict. c. 42. *John Yem*, as an encroacher on the Forest, had no title whatever in himself, and could therefore confer no title on his devisees or pretended devisees, for the statute of Charles the Second had extinguished such pretended title. *John Yem* died before the passing of the act of Her Majesty, and therefore had no interest transmissible by his will. Whether under any presumed validity of that will, or only as a mere casual occupant, his wife *Benedicta Yem* was the person in possession of the "blue" land as "holder," and as such, she obtained the lease and subsequent grant in fee simple, according to the provisions of the statute. In the case of *Goodtitle v. Baldwin* (1), which related to a title set up to encroachments in the Forest of Dean, it was an ejectment to recover possession of a cottage and land; and there Lord Ellenborough asked—"How can the lessor of the plaintiff make out any title?" It was held, that no presumption of a grant from the Crown could be made to legalize the possession of one who had held for forty-one years, under whom the lessee of the plaintiff claimed, and there the Court relied upon the effect of the statute 20 Car. 2. c. 3, and refused a rule for a new trial. Thus, any title to encroachments is wholly

ignored, and therefore *John Yem* had not and could not have any devisable interest in this land, and the title of *Benedicta* obtained under the statute of Her Majesty was good, being wholly free of any trust created by her husband's will.

Mr. Southgate followed on the same side.

Mr. Jessel was not called on to reply.

LORD JUSTICE KNIGHT BRUCE.—This is one of the most absurd appeals I have ever met with or heard of. A man held land by a bad title, a wrongful title, and therefore without any pretence to a rightful title; but yet he held it, and claimed it, and actually had it in his possession as his own. Thus holding it, he took upon himself to devise it as his own to his widow for her life, and after her death to his children. He died without any interruption of his possession, and the widow succeeded him in his occupation; and the inference from the facts is, that his widow entered upon that possession under her husband's devise to her for life—as his devisee. All this was, no doubt, immaterial to the true owner, who so far allowed the testator to deal with the land as possessor; but after his death the widow bought possession of the real owner, and it is now said that she could hold it adversely to the persons entitled in remainder under her husband's will. I decline to make any observation upon such a contention; it has been attempted to be supported on the special language of the statutes, which, however, have no bearing upon the question, which were never intended to have any bearing upon the question, or to do anything so unjust and absurd. The appeal must be dismissed with costs.

LORD JUSTICE TURNER.—I am entirely of the same opinion. It is admitted that the general rule of law must apply to this case, unless the provisions of the acts of parliament referred to have altered that general rule. But, in my judgment, there was nothing of the kind here. The 4th section of the act leaves the question entirely open, and it is as follows:—"And be it enacted, that as regards the said encroachments set forth on the said plans, and thereon coloured blue, the Commissioners for the time being of Her Majesty's Woods,

(1) 11 East, 488.

Forests, &c., or any two of them, shall, on the application of the persons respectively claiming to be entitled thereto, grant leases of the said several encroachments to the persons whose names are mentioned (in the references to the said plans annexed to or which accompanied the said report) as the holders thereof, or the persons claiming under them or otherwise; such leases to be granted to such persons respectively, and their respective heirs and assigns, for and during the lives of such three persons as shall be named by the respective possessors of such encroachments, and during the lives and life of the survivors or survivor of such three persons, and, at such rents as the said Commissioners for the time being of Her Majesty's Woods, Forests, &c., shall think fit, not exceeding the rate of 2s. per acre." Then there is the other clause (the 8th section of the act), which provides that the fee should be granted to the person to whom, in the opinion of the Commissioners, the lease ought to be granted. Suppose a case of a lease granted to the trustee of a will, for instance; he would take it upon the trusts declared by the will: could he claim the fee for himself merely because the act said that the fee was to be granted to the person who, in the opinion of the Commissioners, was entitled to the grant of the lease? It is to me perfectly clear that the clause, as to the trial of the right to leases (section 12. of the act), was intended to apply only in a question between adverse titles. The case of different claims under the same title, or between persons having the same privity, is not in any way mentioned in the act of parliament, and the general rule must prevail. The plaintiffs are entitled to the relief which they ask, and the appeal must be dismissed, with costs.

WOOD, V.C. } LAFONE v. THE FALKLAND
Nov. 2, 3. } ISLANDS COMPANY.

Production of Documents — Privileged Communications.

Before the institution of a suit, but in expectation that proceedings would be taken against them, the defendants, acting on the

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advice of their solicitor, employed an agent to collect evidence at a great distance from this country. The communications made by the agent were held to be privileged from production.

Protection will not be withheld from communications made in apprehension of litigation, on the ground that the precise form which the litigation afterwards assumed was not foreseen.

An affidavit in support of a claim to seal up certain passages in a book not being sufficiently explicit, the Court inspected the disputed passages in order to determine their right to protection.

This was a motion, on the part of the plaintiffs, that the defendants might unseal for inspection portions of certain documents which had been sealed up, on the ground of privilege.

Two of the documents in question, certain passages in which had been sealed up, were two reports, sent to the defendants by Mr. Havers, their agent in the Falkland Islands, in answer to inquiries which they, by the advice of their solicitor, had directed him to make there for the purpose of procuring evidence on behalf of the defendants, in anticipation of proceedings by the plaintiffs. As to the passage sealed up in the first of these reports, the solicitor for the defendants, by his affidavit, swore that it was in answer to inquiries directed to be made by him, as the solicitor of the defendants, for the purpose of procuring evidence in the cause, and, as such, the same was claimed to be privileged. As to the second report, he stated as follows:—"I verily believe that the whole of the information contained in the said last-mentioned report was collected by the said Thomas Havers, and that such report was made in consequence and in pursuance of the instructions sent out by me, as such solicitor as aforesaid, through G. H. Cripps, the managing director of the said company, for the purpose of procuring the necessary evidence in support of the defendants' case." Other passages sealed up were in the minute-book of the directors, and as to these the solicitor stated in the same affidavit (par. 10):—"The passage sealed up in the directors' minute-book, marked B., under

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date of the 18th of October 1855, relates to instructions given by the said company to me, this deponent, as such solicitor aforesaid, relating to this suit"; and (par. 11) "The passage sealed up in the same minute-book, under date of the 28th of February 1855, relates to a communication made by me to the said company with reference to an opinion of counsel taken upon the questions at issue in this suit."

Mr. Roll and *Mr. G. M. Giffard*, in support of the motion, contended that there was no privilege to protect communications between parties and their non-professional agents—*Glyn v. Caulfeild* (1), *Goodall v. Little* (2). The communications were made *ante litem motam*.

Mr. Willcock and *Mr. Hardy*, for the defendants, cited—

Steele v. Stewart, 1 Phill. 471; s. c. 14 Law J. Rep. (N.S.) Chanc. 34.

Curling v. Perring, 2 Myl. & K. 380; s. c. 4 Law J. Rep. (N.S.) Chanc. 80.

Betts v. Menzies, 26 Law J. Rep. (N.S.) Chanc. 528.

Pearce v. Pearce, 1 De Gex & Sm. 12; s. c. 16 Law J. Rep. (N.S.) Chanc. 153.

Mr. Roll, in reply, referred to *Reid v. Langlois* (3).

WOOD, V.C.—I think I could not, without overruling *Steele v. Stewart*—which, of course, I am incompetent to do—hold that these documents are not protected. It seems to me that the true principle is laid down by Lord Lyndhurst in that case, that it matters not whether a person, who is at a distance and furnishes the information, is a paid agent sent out by the party himself, or sent out by the solicitor, or used as his clerk. But as in that case it was stated that he was the agent of both, Lord Lyndhurst said it was not inconsistent to say, being the agent of both, still he was the agent of the solicitor in doing that which it was the solicitor's duty

to do. I think the real test, and the meaning of Lord Lyndhurst's observation there, is,—was what this agent was performing, the solicitor's duty, which would have been performed by the solicitor, if the circumstances of the case permitted it? That seems a very clear principle to put it on. The case of *Curling v. Perring*, I think, in some respects, though not altogether new, went a step further than any previous case which had been decided, although it might not extend to that principle. In that case the solicitor had, for the purpose of obtaining evidence in the case, entered into communication with a witness, and not with his own client. It was urged that the communication with the witness was not protected, because the relation of solicitor and client did not exist between the solicitor and the witness; but the Master of the Rolls held, that the communications with the witness were entitled to protection, because it would be impossible for persons to have the fair management of their cases if the solicitor were not protected in all his communications with persons whom he supposed to be capable of giving evidence in favour of his client. Then *Steele v. Stewart* went, perhaps, a step further than that, because there the communications which were protected were not merely made between a witness in the cause and the solicitor; but they were in the first instance communications made between a person who had been sent out to collect evidence and the solicitor, and, secondly, letters and communications from that person so sent out to collect evidence to the solicitor's principal, namely, the defendant in the cause. Lord Lyndhurst came to the conclusion that, although it was stated that the gentleman was sent out as the agent of both parties as they averred, yet it was still to be taken in substance, that as he was performing the office of a solicitor, and the duties which a solicitor's clerk could perform, he was to be taken to be the solicitor's agent, and, therefore, the communications which he would transmit, either to the solicitor or to the defendant himself, must be protected. And they were. In the case before me, it is clearly the solicitor's duty to prepare the evidence. He swears in consequence, with regard to this first passage, that, "the

(1) 3 Mac. & G. 463.
(2) 1 Sim. N.S. 155; s. c. 20 Law J. Rep. (N.S.) Chanc. 132.

(3) 1 Mac. & G. 627; s. c. 19 Law J. Rep. (N.S.) Chanc. 337.

parts sealed up of the report are in answer to inquiries directed to be made by me as solicitor of the company for the purpose of procuring evidence in this case, and as such are claimed to be privileged." The same difficulty existed there as in *Steele v. Stewart*. The matter in litigation was a considerable distance off. The solicitor could not very well go himself to the Falkland Islands, and probably it was not very convenient to send one of his regular clerks for that purpose; but he applies to the managing director and says, "You have an agent; it is my duty to get up the evidence in this case; I tell you what is the evidence I require for the purpose, and I desire you to communicate with your agent there"—for in that sense he is the general agent of the company—"and direct him to procure this evidence and transmit it to England." That agent procures the evidence and transmits it to England, and of course transmits it for a purpose which will bring it within the case before Lord Lyndhurst. Upon this affidavit, it is impossible to hold otherwise. The agent is written to transmit the information on the instructions of the solicitor, who is to get up the evidence. The affidavit does not say that it was transmitted to the defendants in order to be communicated to their solicitor. If it had done so, it would have been in the very words of *Steele v. Stewart*. But the solicitor says this is an answer sent to communications made at his suggestion for the purpose of getting up the evidence in the cause. Then it appears that Mr. Havers undertakes to perform for the solicitor that which the solicitor could not perform in person. Mr. Havers transmits the results of his inquiries to the director, and the results of those inquiries must be communicated to the solicitor who desires to have them; and if so, they are sent back for the purpose of being communicated to the solicitor, in order that they may be made part of the evidence in the cause. Now, I feel myself the more bound to hold this doctrine in its strictest form with regard to the transmission of evidence, inasmuch as I have held that under the new provisions an order for the production of documents may be obtained after publication passed. I quite see all the mischief that would arise if you were to permit under that order

(which was permitted by the last stretch of the powers of the Court for the production of papers) the invasion of that privilege which is maintained sacred in *Steele v. Stewart*, of the solicitor's free and unrestricted liberty of communicating, as he may think fit, with any agent whom he may think fit to employ with reference to the evidence to be procured for the defence of the case which is before him. Unquestionably he would be hampered and limited in the real defence of the case if at any time through the progress of the cause, and after issue joined, there was to be a fresh demand on him to produce all those documents which he has had communicated by or through the means of his agent for the purpose of defending the suit. *Steele v. Stewart* seems to have been intended to meet a case before the new practice, and if it were necessary before, it seems *a fortiori* necessary under the present practice of the Court. There is one argument I ought to notice, although Mr. Rolt did not refer to it again in his reply. It was, that these reports can hardly be said to be information with reference to this suit, inasmuch as the letters originally sent out were written before the suit was instituted. But they have been sworn to be in apprehension of litigation, and it appears to me that I should be refining far too much if, when there was a contemplated litigation of some sort, the precise character and form of that litigation not being ascertained, I were to hold that information obtained in contemplation of that litigation was not to be protected because the frame of the suit was somewhat different from what was contemplated. In effect, it was a matter in which the company expected to be placed in litigation with an opponent; expecting that, they employed a solicitor, who says he wants certain information for their defence with regard to any litigation that can take place. He therefore directs them to write to their agent, that being the only means which he has of obtaining information, inasmuch as it is not convenient for him purposely to send out a clerk to get it. That information is accordingly obtained and brought back. It seems to me that this is precisely the case of *Steele v. Stewart*. With regard to the tenth and eleventh paragraphs about the minutes,

I confess the form of the affidavit is unsatisfactory, and the subsequent paragraphs, also, which say they relate entirely and exclusively to communications which relate to another case, those words not being used with reference to the other two passages. I think the right course to take will be, as has been done in other cases, to myself open those two passages to which that remark applies: looking at the course this Court has always taken, and at the same time looking to the form of the affidavit, it is possible there may be something beyond, and the right and proper course is for me to open those two passages and to form my own opinion thereon.

KINDERSLEY, V.C. } FAIRLEY v. TUCK.
Nov. 7.

*Declaration as to Dower in a Conveyance
—Execution of Deed.*

Where upon a purchase of freehold estate the conveyance deed contained a declaration, "that no widow of the purchaser should be dowerable out of the hereditaments," it was held to be unnecessary, for the validity of the declaration, that the deed should be executed by the purchaser.

A question was raised in this case upon an adjourned summons, as to whether the widow of William Tuck, the purchaser of a freehold estate, was entitled to dower, under the following circumstances:— Upon the purchase of the estate the conveyance contained this declaration, "And the said W. Tuck hereby declares, that no widow of his shall be dowerable out of or upon the hereditaments hereby granted and assured, or intended to be, or any part thereof." This deed was executed by the vendor, but the purchaser died before executing it. A suit was instituted for the administration of W. Tuck's estate, and the freehold property in question was ordered to be sold for the payment of his debts. The title was laid before one of the conveyancing counsel, who considered it doubtful whether or not the widow of W. Tuck was entitled to dower out of the estate, and

the question was directed to be argued in court.

Mr. W. W. Cooper appeared for the intended purchaser of the estate, and submitted that for the purpose of disentitling the widow of a purchaser to her dower, it was necessary that the deed should be executed by the purchaser. If the deed were not signed by the husband, he could not be said to have executed any declaration as to dower. If this had been a declaration of trust it would have been necessary that the person making the declaration should sign the deed, and it was quite as necessary that this declaration should be signed. By the 6th section of the Dower Act, 3 & 4 Will. 4. c. 105, it was provided, "that a widow shall not be entitled to dower out of any land of her husband, when in the deed by which such land was conveyed to him, or by any deed executed by him, it shall be declared that his widow shall not be entitled to dower out of such land." It was clear under this section that the deed must be executed by the husband, and execution of course meant execution according to the Statute of Frauds. It was also submitted that the words used in the declaration in question, "that no widow of his shall be dowerable," were not sufficient, but that the exact terms of the act must be followed, that a widow "shall not be entitled to dower."

Mr. Whitworth followed the same line of argument on behalf of the widow of the purchaser.

Mr. G. Lake Russell appeared for the creditors of the husband, and contended that it was sufficient if the deed by which the land was conveyed declared that the widow should not be dowerable. It was a common practice that the deed should be signed only by the vendor, and yet it was an effectual conveyance of the property, and the statute only provided that the conveyance deed should contain such a declaration. It was enacted by the subsequent part of the section, that the husband might disentitle his wife to dower by any other deed executed by him, but this was a distinct enactment from that referring to the purchase deed itself.

KINDERSLEY, V.C. — The arguments which have been used on behalf of the purchaser and the widow are very ingenious; but the case appears to me to be perfectly clear. Two questions have been raised: one is, whether in order to prevent any right to dower accruing to a widow in land purchased by her husband, it is necessary that the deed should be executed by him; and, secondly, whether the precise words of the act must necessarily be followed in the declaration against dower. As to the first question, it was well known at the time the act was passed, that it was the every day's practice upon the purchase of an estate that the conveyance deed was executed by the vendor only, inasmuch as the purchaser was merely the person to whom the estate was conveyed, and the signature of the vendor was sufficient to render the conveyance valid. It was, therefore, regarded as quite unnecessary for the purchaser to execute the deed. This custom must have been well known to the legislature, and the very language used applies to such a state of things, for the words are, not that the husband "shall declare," but "it shall be declared" by the purchase deed that the widow shall not be entitled to dower. The section continues, "or by any deed executed by him," so that the wife may be declared disentitled to dower by the conveyance deed, "or by any deed" executed by the husband. The act does not in terms refer to the conveyance deed being executed by the purchaser, because in practice it is commonly not executed by him. On the construction of this clause, therefore, my opinion is, that it was not the intention of the legislature to declare that the conveyance deed should be executed by the purchaser, in order to make the declaration contained in that deed valid. The second point raised is, that the words of the declaration ought to follow the words of the section of the act, and that the wife should be declared "not entitled to dower," instead of "not dowable." The meaning is in substance the same, and I think that the objection by the purchaser cannot prevail. As this was a fair question to raise, all parties must have their costs.

LORDS JUSTICES.}

Nov. 7, 25. }

KING v. KING.

Trustee and Cestui que Trust—Transaction between Parent and Child soon after Majority—Caution—Costs of Trustees.

Funds were settled for the benefit of the survivor of husband and wife for life, and after the death of the survivor to be held in trust for all or one of the children or child or remoter issue of the marriage as husband and wife should jointly appoint, and in default as the survivor should appoint. There was only one child of the marriage, a son, and the wife died without having exercised the joint power. Two months after the son came of age the father appointed that the fund should be paid to him after his own decease. Soon after this the father and son applied to the trustees to transfer the funds into their joint names. The father had also, during the minority of the son, applied to the trustees to transfer the far greater part of the fund into his sole name. The trustees laid a case before counsel, who advised that if certain requisitions were complied with, the trustees might safely transfer without suit. The requisitions were complied with, but the trustees refused to transfer without the protection of the Court. The father and son filed a bill to compel the transfer to them, and prayed that the trustees might pay the costs. One of the Vice Chancellors made a decree for the transfer, but ordered the father and son to pay the costs of the suit; and upon appeal, as to costs, by the father and son,—Held, that the decree was correct: Lord Justice Knight Bruce dissenting.

Where there are transactions between father and child, commencing before the child attains twenty-one, and continued soon after that time, regarding the property of the child, trustees of the fund, who act bona fide, and from no improper motive, are entitled to have evidence of their caution and vigilance preserved by suit before they make a transfer.

The bill in this cause was filed in December 1856, by Capt. Richard Henry King and Richard Twyford King, his son, against the trustees of Capt. King's marriage settlement, Dr. William King and Mr. Frederick William Bushell, praying the transfer to the plaintiffs of certain mortgages, and that the

defendants might pay the costs of the suit. The statements in the bill were, that in contemplation of the then intended marriage between Richard Henry King and Mary Twyford, a settlement, dated the 3rd of May 1830, was executed, whereby the lady assigned to trustees, of whom Dr. King was one (Mr. Bushell having been appointed trustee subsequently), their executors, administrators and assigns, two legacies of 8,000*l.* and 6,000*l.* upon trust, with the consent of the wife and the husband, or the survivor of them, to lay out the said sums in the purchase of parliamentary stocks, funds or securities, or upon mortgage of real securities in England, and during the joint lives of the plaintiff and his wife, to pay the income in manner therein mentioned; and after the death of one of them, to pay the income to the survivor for his or her life; and after the decease of the survivor, to hold the said trust monies and the stocks, funds and securities in which the same should be invested, and the interest and dividends thereof, in trust, for all and every, or such one or more exclusively of the others or other of the children or child or remoter issue of the plaintiff, Richard Henry King, and his wife, as the plaintiff and his wife should, during their joint lives by any deed or deeds, &c., from time to time direct or appoint; and in default of such direction and appointment, and so far as any such direction or appointment, if incomplete, should not extend, then as the survivor of the plaintiff and his wife should, by any deed or deeds, instrument or instruments in writing, to be by him or her sealed and delivered in the presence of, and to be attested by, two or more credible witnesses, or by will, from time to time direct, or appoint; and in default of such last-mentioned direction or appointment, and so far as any such direction or appointment, if incomplete, should not extend, on the trusts therein mentioned. The deed contained a power to appoint new trustees.

The marriage was soon afterwards solemnized, and there was issue of it one only child, Richard Twyford King, who was born on the 20th of May 1835. Mrs. King died on the day following his birth, without having ever joined in the exercise of the power of appointment. The trustees

for the time being of the settlement received the legacies, and invested them upon mortgage of freehold lands and premises in the parish of Plumstead, in Kent, and at Reading, on which security the trust funds were at the time of filing the bill. Richard Twyford King attained twenty-one on the 20th of May 1856. By a deed-poll, dated the 11th of July 1856, made in pursuance and execution of the power contained in the settlement, Capt. King appointed that the trust monies, and the securities on which the same might be invested, should from and immediately after his own death go and be paid to Richard Twyford King, his executors, administrators and assigns; and soon after the execution of the said deed-poll the plaintiffs joined in an application to the defendants, requesting them to transfer into the joint names of the father and son the mortgages and other securities, and to deliver to them jointly the title-deeds affecting the same.

The bill then stated, that the trustees, desirous of being secure, laid a case before Mr. Roundell Palmer, of the Chancery bar, who gave an opinion set forth (1), with the

(1) The opinion of the learned counsel was in the following terms:—"I think it would be going too far to say that no transfer such as that requested could safely be made except under the direction of the Court, and I am disposed to advise the trustees to make it without such direction, subject to the following conditions: First, Mr. King the son must not be represented in the matter by the same solicitor with his father; but must have the benefit of the independent advice of a separate solicitor of undoubted respectability and experience, who has never before acted for the family, and who must communicate on his behalf with the trustees, after having had the correspondence which has already passed placed in his hands. Secondly, the trustees must be assured, both on the part of the father and the son separately represented, that the appointment which has been made, if any reliance is to be placed on that, is unconditional and absolute, and free from any previous bargain or agreement between the father and the son, as to any division or transfer, or other use or appropriation of the fund for any purpose beneficial to the father. And, thirdly, the father and son should join in a proper release to the trustees in such form as counsel may advise. These precautions are in my judgment necessary, not only to secure the trustees against any subsequent impeachment of the transaction by the son himself, who would, so far as I can see, be entitled to say that all the communications which have been hitherto made to the trustees are his father's and not his own, and that the trustees have

whole of the requisitions of which the plaintiffs complied, notwithstanding which they declined to make the transfer.

Messrs. Henderson & Howard, of Bristol, gentlemen of high character, strangers to the family, were employed on behalf of Richard Twyford King, to whom the whole correspondence which had passed between the parties was submitted; and a notice signed by these gentlemen on behalf of the son, and also by Capt. King's solicitors, was served upon both the defendants, which notice, after reciting the events which had happened, the deed-poll of the 11th of July 1856, and the opinion of counsel, required the defendants to transfer the mortgage securities into the joint names of Capt. King and his son, and warning them that if they neglected to give any answer to that requisition, or if they neglected or refused to comply, a bill would be filed against them for the purpose of compelling them to make such transfer, and that that bill would pray the costs of the suit against them personally. Accompanying this notice was a document in the following terms:—"I, Richard Henry King, do hereby declare that the appointment made by deed-poll, dated the 11th day of July 1856, referred to in the notice sent herewith, is unconditional and absolute, and free from any previous bargain or agreement between me and my son Richard

notice of circumstances amply sufficient to affect them with any equity which may exist as between himself and his father; but also to make the trustees safe against the possible effect of any future appointment by the father to issue of the son, in case, under any unforeseen state of circumstances, the father should hereafter desire to raise, by means of such an appointment, any question as to the validity of the transaction. If the trustees receive satisfaction on all the above points, I think they may safely make the transfer without suit. If they receive satisfaction on the first and third points, but not on the second, I think it probable that the transfer may still safely be made, subject, however, to the judgment of the counsel who may have to prepare the release (which ought in that case to extend to a release of the power of appointment), and to the full and unreserved communication to all the parties of the arrangements actually made and intended between the father and the son. But unless satisfaction, to this extent at all events, is given upon the above points, I think the trustees cannot safely transfer in the manner desired without the direction of the Court; and I should feel no apprehension at all as to their being allowed the costs of the suit, should a suit become necessary, under such circumstances."

Twyford King, as to any division or transfer, or other use or appropriation of the fund for any purpose beneficial to me; and that I am ready and willing to join with my said son in a proper release to you, in such form as counsel may advise."

Another notice to a similar effect was sent, signed by Richard Twyford King, and a third, signed by Messrs. Henderson & Howard, stating that they had been retained by him as his solicitors to act for him in the matter of procuring the transfer of the said mortgage securities; that they had never before acted for his family, and that a correspondence which had already passed between the parties and their respective solicitors had been placed in their hands, and that they had perused the same.

No notice having been taken or answer given, the plaintiffs filed their bill, in December 1856, praying that the defendants might be decreed to transfer the said mortgage securities into the joint names of the plaintiffs, and to deliver to them the title-deeds, documents and papers, relating to the said securities respectively, and that they might also be decreed to pay the costs of the suit.

The defendants, by their answer, admitted the facts as to the property, and the opinion, and made the following case:—That the plaintiff Richard Twyford King was only recently of age; that he was very inconsiderate and thoughtless; that while an undergraduate at Cambridge he had incurred debts, and had in fact left the University without having taken a degree; that he was wholly under the controul of his father and dependent upon him; that in February 1856, before Richard Twyford King was of age, a letter had been sent to them by Capt. King, expressing his desire to have one of the mortgage-deeds, which secured a sum of 12,000*l.*, transferred into his own name alone, and that soon after the date of that letter, Capt. King had said to the defendants' solicitors, at an interview he had with them, "that a son ought to be dependent upon his father, and that his son had consented to give him (Capt. King) the controul of the fund, and trust to his honour to provide for him"; that Capt. King was engaged in various speculations, and it was their belief that if they transferred the

funds in the manner prayed by the bill it would be substantially the same thing as to hand them over to the father's absolute controul, and they were apprehensive that if they were to do so without the sanction of the Court, they might, after the death of Capt. King, be held liable to the son for the whole amount; and that under these circumstances they submitted that they were not compellable to transfer the trust funds and securities as required, without having the direction of the Court for that purpose.

Among the evidence was an affidavit of Capt. King, denying that he had made any such statement as alleged, and an affidavit by both the solicitors of the trustees, positively stating that he did. The letter of February 1856 was also put in evidence, and will be found set out *in extenso* in the judgment of Lord Justice Turner; as also a reference to the evidence as to the residence of the son.

The cause came on before Vice Chancellor Stuart, who required that he should be informed what was intended to be done with the property, and whether the son still adhered to his desire that the transfer should take place. Accordingly, evidence was produced, and on the 24th of June 1857 the cause was heard, and his Honour made a decree for the transfer, but ordered that the plaintiffs should pay the costs of the suit (2); and hence this appeal.

(2) His Honour's judgment was as follows:—The plaintiffs insist that the conduct of the defendants with reference to the fund, which unquestionably belongs to the plaintiffs, has been vexatious—so vexatious, in fact, as to render them liable to the costs of the suit. This Court always regards with great jealousy transactions between a father and a son who had just come of age, when the effect of those transactions is to put the son's property under the father's controul. That jealousy has formed the ground of decision in so many well-established cases, that one almost wonders at the arguments which have been gravely advanced at the bar. The so-called vexatious conduct of the defendants was simply the conduct of persons actuated by precisely the same feeling of jealousy with which the Court regards transactions of the nature now in question; and if there was a case in which that jealousy ought to be exercised, it is the present. The duty of the defendants was to protect the interest of their *cestuis que trust*, and especially that of the son, who, but for their protection, was, it seems, to look to his father for nothing but controul. It is impossible to say that the defendants were bound to adopt the course suggested to them by their counsel in the

Mr. Malins and Mr. B. L. Chapman, for the appellants, said that though in form the appeal was from the whole decree, yet in substance it was only against so much of it as related to the costs which the Vice Chancellor had ordered the plaintiffs to pay. In the first place, though it might be said that there could not by the rules of the Court be an appeal presented for costs alone, yet the case of *Angell v. Davis* (3) shewed that such a course was allowable.

[LORD JUSTICE KNIGHT BRUCE.—The Court does not require to be addressed on any such point.]

Then, upon the merits, it was plain that the plaintiffs had between them the whole interest in the fund, and after the execution of the deed-poll of July 1856, by which the father appointed to his son after his own decease, no other person could become interested. Counsel of great ability and learning had been called on to advise the trustees as to their duty and responsibility, and the father and son acceded to all the requisitions which counsel made, some of which were clearly beyond the point to which *cestuis que trust* could be properly called on for compliance.

[LORD JUSTICE KNIGHT BRUCE.—I have read the opinion of counsel, and admit that I am surprised at the wide range they take for the safety of the trustees. As, however, I have asked for and am not able to obtain the case in answer to which that opinion was written, perhaps it is scarcely fair to offer any remark upon the opinion.]

Not only were all the requisitions com-

opinion which has been set out in the bill. No doubt vexatious conduct upon the part of the trustees will be punished in this court by the infliction of costs. But in a case like the present, where the trustees knew that the father had been dealing with his son during infancy, and where the son proposed to those trustees to make a transfer of his property before he had been of age two months, they were bound to act cautiously. The present litigation has been unnecessarily expensive. The trustees merely wanted to be relieved from liability, and they have been involved in a hostile and costly suit. Upon the whole case, since the father and son come and assert their rights, and since the son, now upwards of twenty-two years of age, persists in wishing to deal with his interest in the trust property, there must be a decree as prayed by the bill, so far as regards the property; but the costs of the suit must be borne by the plaintiffs.

(3) 4 Myl. & Cr. 360.

plied with in the amplest and the strictest manner, but the Messrs. King offered the trustees a release; notwithstanding which, they drove them to filing a bill to enforce their undeniable right to a transfer of the mortgages. Such conduct was grievously oppressive and vexatious, and the order of the Court below, instead of being what it was, ought to have been one directing the trustees to pay the whole costs of the litigation. If in such a case as this the trustees were not visited with the costs, it was plain that all trustees might hereafter, when all their demands had been complied with, and all their objections removed—demands even made under the advice of counsel and objections raised by him—put their *cestuis que trust* to the delay, expense, trouble and annoyance of a suit in the Court of Chancery. On their own shewing the conduct of the trustees had been vexatious and oppressive, and they ought, as in *Firmin v. Pulham* (4), to be directed to pay the costs, or, at all events, if the Court did not see fit to go so far, they ought, as in *Campbell v. Horne* (5), to be refused any costs. A recent case decided by the Full Court of Appeal, *In re Woodburne's Trusts* (6), was, however, strong to shew the opinion entertained of vexatious conduct by trustees, and valuable as teaching them that they could not act oppressively without incurring the censure and feeling the disapprobation of the Court by the infliction on them of costs.

[LORD JUSTICE KNIGHT BRUCE.—I have seen so much dissatisfaction and disapprobation expressed with and of that decision, that I am more than ever satisfied that it is correct.]

Mr. Bacon and *Mr. Wickens*, for the trustees, said that when the case was in the court below they intimated their willingness to do whatever the Vice Chancellor thought right; and his Honour was so struck with the circumstances of the case that he called upon the counsel for the plaintiffs to explain what was intended to be done with the money, and when every explanation was given which the parties

thought fit to give, the Vice Chancellor on the plaintiffs' own shewing made the order complained of. Nothing that these trustees had done was more cautious than the occasion called for. Here was a father before his son came of age requiring by letter that 10,000*l.* out of 14,000*l.* should be placed at his disposal, and had the trustees complied with the joint request made so soon after the son came of age, with the full knowledge of this attempt to deal with the fund while the son was an infant, they would have been conniving at what the Court would hold to be a breach of trust. The reasons given by the Vice Chancellor were conclusive. Had there been a case made of cruelty by the trustees towards the *cestuis que trust* the Court might have taken a strong view of their conduct, and have deprived them of their costs, but even then it would not so exercise its jurisdiction as to make them pay costs. All that the trustees had done was to throw the protection of their vigilance and caution over the younger of their *cestuis que trust*, and not to leave him wholly at the mercy of his father. Evidence of this fact could not be preserved without a suit, and it was trusted that the Court would confirm the decision of the Vice Chancellor. Although the Court seemed to be inclined to permit an appeal for costs alone, it would give the respondents the benefit of any rule which might be fairly thought to exist upon the point.

Mr. Malins declined to trouble the Court with a reply.

Nov. 25.—LORD JUSTICE TURNER.—This was an appeal against so much of a decree of Vice Chancellor Stuart, as allowed to the defendants, who are trustees on behalf of the plaintiffs, their costs of the suit.—[After a brief recapitulation of the facts, his Lordship proceeded]:—I have the misfortune to differ with my learned Brother on this case. Having carefully read through the whole of the correspondence, documents and evidence, I shall state my reasons for agreeing with the Vice Chancellor's judgment. This Court views with jealousy all transactions between parent and child, more especially if such transactions take place soon after the child

(4) 2 De Gex & Sm. 99.

(5) 1 Y. & C. C. C. 664.

(6) 26 Law J. Rep. (N.S.) Chanc. 522.

attains twenty-one, and even still more especially where those transactions have had their inception before twenty-one has been attained, and very dangerous consequences might ensue if the Court did not give its support to trustees who only exercised the same jealous vigilance as itself. Of course it is necessary, in every case, in the first instance to ascertain that the trustees have acted and are acting *bond fide* and from no improper motive; but when this is once established, the Court ought to support, and not to punish them. In this view, I have considered the effect of the proposed transfer. Its effect was to give to the father, Mr. Richard Henry King, the whole controul over the property of his son; it might be right and wise to do so, or it might be the contrary: and in the present instance, according to my view, it would have been in all probability right and wise; but it is a very different question whether the trustees ought to be deprived of their costs, because they were suspicious of such a proceeding. Before the son had attained his majority, the father complained in strong terms of his extravagance; and shortly before his majority the father said that a son ought to be dependent on his father, and that his son had consented to give him the controul of his property, and trust to his father's honour to provide for him. I think upon an attentive consideration of the evidence, that the fact of this conversation having taken place is established; and it is consistent with such a conversation that Capt. King, in the month of February 1856, before his son attained his majority, should write to the trustees, requesting the transfer of the larger mortgage into his own name alone. [His Lordship read the letter, which was as follows:—"Hôtel de l'Ecu de Genève.—Geneva, Switzerland, Saturday, the 16th of February, 1856.—To William King and F. W. Bushell, Esquires.—Gentlemen,—As trustees to my marriage settlement, I beg leave to inform you that my son consents to a joint discharge of the trust in conjunction with myself in May next, when he will have attained the age of twenty-one years. We will thank you, therefore, when the proper time is come so to do, to cause the necessary

writings to be prepared and the proper notices to be given to the mortgagees. With respect to the 2,000*l.* mortgaged to Mr. Edward Clarke, of Reading, it is our intention to call that in *positively*; and as the notice to pay that mortgage in was given some months back, and must now be good and in force, we beg that you will cause Mr. Clarke to be informed that he will stand by that notice, and be prepared to pay the money in at the time of our signing the release. With respect to the 12,000*l.* mortgaged to Mr. Lewis Davis, of Woolwich, it is our wish not to call that mortgage in, but by the necessary writings to transfer it into my own name only. Any other course respecting this mortgage will depend upon Mr. Davis himself. I make this communication to you that you may have the earliest possible notice of my son's consent to cancel the trust, but it is of course open to your opinions and detailed arrangements. As this letter will be sent to Mr. King in the first instance, I must ask the favour of him to forward it to Mr. Bushell after reading it. I have only to add, that I shall not communicate with the solicitors—I leave that to the trustees themselves—and that I intend to return to England about the end of the present month. I remain, &c., R. H. King."'] Then, on the day before the son attained twenty-one, an application was made to transfer both mortgages into the joint names of the father and the son; and it appears besides, that at that time, and at the present time also, the son was and is resident with the gentleman who is the solicitor of his father and of himself. Under these circumstances, if the case had rested there, I think that the trustees would have been justified in refusing to make the transfers without the sanction of the Court. But there is another ground which influenced their conduct; the power of appointment given to the father under the settlement extended to remoter issue; if such remoter issue should ever be dissatisfied with what was done, there is nothing to prevent them from disputing the appointment to the son Richard Twyford King, and the whole transaction and transfer. This, therefore, cannot be considered a transaction in which there was a total ab-

*Shum v. Francis 12 RQB. 39*M.R.
Nov. 7, 9, 10. }

SWINFEN v. SWINFEN.

*Attorney and Client—Suit—Compromise—Counsel.**A compromise of a trial at law, made by counsel, upon the suggestions of an attorney that the same would be desirable,—Held, not to be binding upon the client, who was not aware of it, had not sanctioned it, and would not acquiesce in it.**Held, also, that a bill to enforce a specific performance of the compromise ought to be dismissed, but without costs, as the compromise arose from the mistake of parties acting for their respective clients.*

Samuel Swinfen was seised in fee of a large estate, called "Swinfen Hall," situate in the parish of Weeford, in the county of Stafford. In 1851 he made a will, by which he devised the whole of his real and personal estates to his only son, Henry John Swinfen, who, however, died on the 15th of June 1854; after which Samuel Swinfen made his will, as follows:—

"I, Samuel Swinfen, Esq., of Swinfen, Staffordshire, make this my last will and testament. I give to Mrs. Taylor, who lives with me, 20*l.* a year for her life. I give to Mrs. Swinfen, my son's widow, all my estate at Swinfen, or thereto adjoining, also all furniture and other moveable goods here, her heirs, executors, administrators and assigns, and I appoint her my executrix. Witness my hand this 7th day of July 1854.

"Samuel Swinfen, Swinfen.

"Witnessed by us, all present at the same time, by Mr. Swinfen's request,—

"Thomas Rowley, M.D., Lichfield.

"Charles Swinfen, Leamington.

"Charles Simpson, Town Clerk, Lichfield."

The testator died on the 26th of July 1854; and his will was duly proved on the 15th of November 1854, by his executrix, Patience Swinfen.

Frederick Hay Swinfen, the son of Francis Swinfen, deceased, a brother of the half blood, was the heir-at-law of the testator, and of John Swinfen, a brother of the whole blood.

On the 12th of July 1853, F. H. Swinfen, who was a captain in the 5th Dragoon Guards, filed the original bill in this cause,

sence of risk; the risk may be small, and I think that it would be, but trustees are entitled to have protection against every possible risk. It was urged, however, that the trustees had taken the opinion of counsel, that in that opinion three requisitions had been made for their protection, that those requisitions had been strictly complied with, and that, after all, the trustees had declined to make the transfers. With all respect for the eminent counsel,—there is none more eminent at the bar,—I think that that opinion fell short of full security to the trustees; they were entitled not only to have all the requisitions made on their behalf complied with, but also that evidence should be preserved of the fact of that compliance; and this could not be done without the intervention of a suit. In my opinion this decree is for these reasons correct, and the appeal must be dismissed; but as my learned Brother differs with me in opinion, it must be dismissed without costs.

LORD JUSTICE KNIGHT BRUCE.—The defendants previously to the month of December 1856, when this bill was filed, were apprised of facts which, in my judgment, rendered it perfectly safe for them to execute an assignment or assignments of the mortgages, to obtain which the bill is filed. In my view, they ought to have executed those assignments before that month, and consequently before the institution of the suit. There may not have been, and I do not say that there was, any improper motive for their refusal, but I could not say that their conduct has not rendered them liable to an imputation of having been cautious overmuch, and strict beyond precisionism. If I had heard the cause originally, my conclusion would have been at all events not to give the trustees their costs, even if I had not ordered them to pay costs; but inasmuch as my learned Brother, who it is hardly necessary for me to say, is quite as likely to be correct in his judgment as myself, agrees in the view of the learned Vice Chancellor, the order of his Honour must be confirmed. I need scarcely observe, that I think the trustees entitled to no costs of the appeal.

against Patience Swinfen and others, praying, *inter alia*, for an issue *devisavit vel non*, to determine the validity of the will of Samuel Swinfen, and that Patience Swinfen might be put upon terms of *bond fide* trying such issue.

On the 30th of July 1855, upon a motion for a receiver, it was ordered, by consent, that Patience Swinfen should issue a writ of summons, (8 & 9 Vict. c. 109,) against F. H. Swinfen, to try the validity of the will of the testator, but the appointment of a receiver of the rents was refused (1).

On Saturday, the 15th of March 1856, the trial came on, at Stafford, before Cresswell, J. and a special jury, and after the examination of some of the witnesses of the plaintiff the Court adjourned until the Monday. At the sitting of the Court on that day, Sir Frederick Thesiger, as counsel for Mrs. Swinfen, agreed with the Attorney General (Sir A. Cockburn), as counsel for Capt. Swinfen, in the presence of the solicitors of both parties, to compromise the suit on the following terms: "Juror to be withdrawn. Estate to be conveyed by the plaintiff at law to the defendant in fee, free of incumbrance, (if any) created since the death of Samuel Swinfen; such conveyance to take place from Michaelmas 1855. The defendant to secure to the plaintiff an annuity for life, on the estate, of 1,000*l.* a year, inclusive of the 300*l.* a year already secured to her on the estate, also to date from Michaelmas 1855. If any charge is existing on the estate, created prior to the death of S. Swinfen, the interest to be borne in equal moieties. The plaintiff's costs, as between attorney and client, not exceeding 1,200*l.*, to be paid by the defendant. Power to either party to make this agreement a rule of court. In the event of any questions arising on the above terms, the same to be referred to Sir F. Thesiger and the Attorney General. The house and grounds to be occupied by the plaintiff, without payment of rent, till Michaelmas next." A juror was then withdrawn, and the memorandum of compromise was afterwards embodied in an order of Nisi Prius, and on the 15th of May following it was made a rule of court.

(1) See *Knight v. Duplessis*, 2 Ves. sen. 360.

On the 24th of March, Messrs. Frere, Goodford & Cholmeley, the solicitors of Capt. Swinfen, wrote to Mr. Simpson, requesting copies of certain deeds, and a list of all the title-deeds, that they might carry the compromise into effect. No answer was sent to this. On the 31st of March 1856, Messrs. Frere again wrote to Mr. Simpson, stating that they understood that Mrs. Swinfen intended to evade the performance of the agreement, and that unless they heard by return of post to the contrary, they should assume that such was her intention.

On the 1st of April 1856 Mr. Simpson replied—"I have never expressed an intention to resist the agreement, and have received no instructions to do so. I had no concern in the arrangement of the compromise, except to object to it, nor had Mrs. Swinfen. It was made against her positive directions, and I have not hesitated to speak of it in the strongest terms of disapprobation."—"Of course, if Mrs. Swinfen instructs me to resist the course of action on the agreement, and if she should be well advised to do so, I am at liberty to follow her instructions, and I will in that case give you the earliest possible notice."

Further correspondence took place between Messrs. Frere and Mr. Simpson upon the subject of carrying the compromise into effect; and on the 1st of May 1856, Mr. Cole, the London agent, wrote to Messrs. Frere the following letter:—"I have received from Mr. Simpson the views of Mrs. Swinfen on your last letter, so far as regards the arrangement made by counsel at the Stafford Assizes, and the substance is that she is not disposed to carry out the terms thereof, on the ground of the arrangement having been made, not only without her sanction, but directly in opposition to her wishes. Under these circumstances, I conclude you will have to bring the matter before the Court in such way as you may be advised."

On the 5th of June 1856, a rule *nisi* was obtained for an attachment against Mrs. Swinfen; she shewed cause against the rule, on the 11th of June, when it was discharged on the technical ground that there was no evidence to shew that Mrs. Swinfen had refused to perform the agreement since it had been made a rule of Court.

In discharging the rule for an attachment, the Court (Cresswell, J., Williams, J. and Willes, J.) expressed a strong opinion that they would presume on counsel having authority to compromise, and that the agreement was binding on the plaintiff; and they accordingly discharged the rule, without prejudice to the defendant proceeding in any way he might be advised to enforce the agreement.

A second rule *nisi* for an attachment was obtained in Michaelmas term 1856. Affidavits in opposition were filed, by Mrs. Swinfen, by her solicitor Mr. Simpson, and by Sir Henry Durrant. The affidavit of Mrs. Swinfen was to the following effect, among other things—that she never, either before or after the commencement of legal proceedings, gave any instructions or authority to her attorney or to any other person, to make a compromise on her behalf: that after the commencement of legal proceedings she gave to her attorney no other instructions than to support the will and maintain its validity and integrity: that on the 15th of March, after the adjournment of the Court, she was told that Sir F. Thesiger wished to see her, and that upon going to his lodgings she was informed by him that the Attorney General had offered to give her an annuity of 1,000*l.* a year on condition of her compromising the action and giving up the Swinfen estate: that Sir F. Thesiger urged her to do this on the ground that the trial was likely to go against her: that she replied that she could not accept that or any other offer—that she only wanted her own—that she wished the case to be tried by the jury, and she would abide by the verdict, as she considered it her duty to support the will: that she requested that Sir Henry Durrant should be sent for, which was accordingly done, and the offer was repeated before him: that he advised her to take time to consider it: that she assented, and agreed to send her answer by one o'clock the next day: that on the next day she positively expressed to her attorney her resolution to reject the offer, and requested him to convey her answer to Sir F. Thesiger: that her attorney received no authority whatever from her, directly or indirectly, to accept any other terms, or to give any new instructions to counsel, and that her attor-

ney left her with the simple direction to convey her refusal of the offer to Sir F. Thesiger: that about one o'clock the same day (Sunday) a telegraph was forwarded to Sir F. Thesiger in these words—"The offer is refused:" that she proceeded by the first train on Monday morning, accompanied by Sir Henry Durrant, to be present at the trial: that they went immediately to the court-house, and arrived there a minute or two after the juror had been withdrawn: that on passing from the outer hall to the court-house they met Sir F. Thesiger in an ante-room, who said to them, "It is all settled; I have compromised the case; I have done my best for you:" that Sir Henry Durrant said, with an expression of surprise, "By whose authority?" that Sir F. Thesiger replied, "By yours"; to which Sir Henry rejoined, "The deuce you did:" that Sir F. Thesiger made no reply to this, but shortly after left the room: that immediately afterwards she was informed of the real nature of the compromise, and expressed to her attorney astonishment at what had been done, and her determination not to submit to the compromise: that being informed that her cause was at an end, she left the court with Sir Henry Durrant, and returned home: that since that time she had never done anything to confirm the compromise, nor anything which might lead her opponents to believe that she intended to ratify or confirm, or that she acquiesced in it, but, on the contrary, had in various ways signified to them her disapproval of the compromise, and her resolution to repudiate it: that the value of the Swinfen estate was about 65,000*l.*, and that the value of the annuity offered to her was not more than 10,000*l.* The affidavit of Mr. Simpson confirmed the material statements of Mrs. Swinfen, as did also the affidavit of Sir Henry Durrant. The affidavit of Mr. Simpson also stated, amongst other things, that previous to any litigation he had received from the defendant's attorney an offer of an annuity of 600*l.* or 800*l.*, in addition to the plaintiff's rent-charge of 300*l.*, together with a sum of 700*l.* in cash, on condition of Mrs. Swinfen giving up the estate, which offer she absolutely refused: that his only instructions were, to maintain the will in its integrity, and that he gave such instructions to counsel:

that on the Monday morning he called, with Mr. Cole, on Sir F. Thesiger, and informed him that he had no authority to re-open the treaty, and that he was quite sure that Mrs. Swinfen would entertain no other offer than on the basis of the whole estate for her life: that while the conference was proceeding in court he reminded Sir F. Thesiger that he had no authority to negotiate any compromise for his client; to which Sir F. Thesiger replied that he would take all the responsibility on himself jointly with his colleagues: that he (Mr. Simpson) refused to have anything to do with the compromise, and left the court: that he saw Mr. and Mrs. Charles Swinfen in the hall, who earnestly requested him to put a stop, if possible, to the proposed agreement, as they were quite sure Mrs. Swinfen would repudiate it: that he then returned to Sir F. Thesiger, and as Mrs. Swinfen was expected every minute, he requested him to wait for her arrival, but that Sir F. Thesiger did not comply with his request, and a juror was withdrawn a few minutes before the arrival of Mrs. Swinfen: that he was not asked to peruse the agreement, and that he particularly urged upon the attention of Sir F. Thesiger, that he was making a mere commercial bargain; and, therefore, that he (Mr. Simpson) could not act as Mrs. Swinfen's attorney on such a basis. Affidavits in reply were made on behalf of the defendant-at-law by Sir F. Thesiger, Mr. Alexander, Q.C., Mr. Whitmore and Mr. Gray, who had been the counsel for the plaintiff on the trial. Sir F. Thesiger stated, among other things, that at the close of the first day of the trial, he had reason to believe that the plaintiff was in some danger of an adverse verdict, and he desired Mr. Simpson to bring her to his lodgings, requesting Mr. Alexander and Mr. Whitmore, the other counsel engaged with him in the cause, to attend: that he pointed out to the plaintiff the consequences of a defeat, and the desirableness of coming to some arrangement: that he did not say that the Attorney General had offered an annuity of 1,000*l.*, no such offer having been made by him, but that upon the plaintiff asking him what sort of an arrangement was contemplated, either he or the other counsel suggested the sum of 1,000*l.* per annum as an amount which they all

agreed would be reasonable: that the plaintiff said, she would do nothing without Sir Henry Durrant, under whose advice she had been acting: that he (Sir F. Thesiger) desired him to be sent for, and that they repeated in his presence all that they had previously stated to the plaintiff: that they separated that evening upon an understanding that they were to consider the suggestions which had been made, and communicate by telegraph the next day, whether the counsel were to be at liberty to negotiate with the other side for an arrangement: that in the afternoon of Sunday, he received the telegraphic communication, "The offer is refused:" that Mr. Whitmore and himself thought that the message did not exactly meet the case, as no offer had been made, but that they were all convinced that the idea of an arrangement must be abandoned, and that they were prepared to proceed with the trial on the following day: that on the Monday morning Mr. Simpson came with Mr. Cole to his lodgings, and told him that a circumstance had come to his knowledge which made it extremely desirable that the case should be arranged: that being thereby strongly confirmed in his view that it would be for the interest of the plaintiff to effect an arrangement, he said he would instantly go to the Attorney General and offer to take 1,000*l.* a year, and that with the entire acquiescence and sanction of Mr. Simpson, he proceeded to the Attorney General: that it being very near the time for the sitting of the Court, their communication was very brief, but that the Attorney General at once agreed to the proposal, that the plaintiff should receive 1,000*l.* a year as the basis of the arrangement: that nothing was then agreed upon on the subject of costs, but that on their arrival in court Mr. Simpson endeavoured to stipulate for the payment of costs as between solicitor and client: that he (Sir F. Thesiger) proposed this to the Attorney General, who suggested the naming of a certain sum: that upon this he inquired of Mr. Simpson, in the presence of Mr. Cole, what would be a proper sum to fix for the costs: that he answered 2,000*l.*, which the Attorney General objected to, and proposed 1,000*l.*: that he (Sir F. Thesiger) then discussed with Mr. Simpson

and Mr. Cole for some time on the subject of the costs, and asked Mr. Simpson to explain the mode in which he made up the amount: that he then, with the consent of Mr. Simpson, offered to take 1,500*l.*: that the Attorney General in the mean time had drawn up the heads of the arrangement, and inserted the sum of 1,250*l.* for the costs, as the utmost he was disposed to give: that while he (Sir F. The-siger) was urging Mr. Simpson to take this sum, a friend of the defendant interfered, to induce the defendant not to settle at all: that after what he had heard from Mr. Simpson at his lodgings, he was certainly most anxious that the trial should not proceed, and he pressed the Attorney General with the observation, that after they had substantially agreed it would not be right for him to allow his client to recede: that the Attorney General offered a modification of the terms of the proposed agreement, which he (Sir F. The-siger) urged upon Mr. Simpson to accept: that it was true that Mr. Simpson more than once, at this period of the negotiation, requested him to wait till the plaintiff arrived, who, he informed him, was expected in an hour, but that he, fearing from the disposition of the defendant, that if the trial proceeded there would be an end to all hope of arrangement, pressed upon Mr. Simpson to agree before it was too late; and upon his hesitating, he (Sir F. The-siger) said that he must take it upon himself, to which Mr. Simpson made no objection, but said that he (Sir F. The-siger) must defend him against his client: that he immediately answered that he was willing, with the counsel who were engaged with him, to take the responsibility on himself, and that he then signed the paper which contained the final terms of agreement between the parties: that it was not true that the plaintiff, at the interview which took place at his lodgings, said that she could not accept the 1,000*l.* per annum, or any other offer: that, on the contrary, there was a considerable discussion as to the terms of compromise. The affidavits of Mr. Alexander and the other counsel for the plaintiff confirmed the statements of Sir F. The-siger, and stated that above an hour was consumed in settling the terms of the arrangement, and the

discussion relative to the costs; that nothing occurred during that time which led them to suppose that Mr. Simpson did not authorize or concur in the arrangement, except so far as related to one matter of detail, namely, the time from which the rents were to be paid to the defendant; and that there was not the slightest intimation given by Mr. Simpson, that he was acting without the authority of his client. On cause being shewn, (before Cresswell, J., Williams, J. and Crowder, J.,) the rule *nisi* was discharged, Crowder, J. being of opinion that counsel had not, by the mere relationship of counsel to client, a general power to bind his client by an agreement to compromise; at the same time expressing doubts whether the presence in court of the attorney, and his tacit acquiescence in a compromise of the cause by counsel, did not make the compromise binding upon the client; and he refused to grant an attachment for contempt against Mrs. Swinfen. The Court, therefore, in accordance with its usual practice, when the Judges are not unanimous, declined to issue an attachment against Mrs. Swinfen, and the rule *nisi* was discharged, but without costs—*Swinfen v. Swinfen* (2). The supplemental bill was then filed, by the plaintiff, Captain Swinfen, on the 14th of February 1857, praying that the defendant, Mrs. Swinfen, might be decreed specifically to perform the agreement of compromise, or, in the alternative, that another issue *devisavit vel non*, for a new trial of the former issue, might be directed; it also asked for the appointment of a receiver. Some additional evidence was gone into, both as to the state of mind of the testator at the time of making his will, and also as to the conduct of Mrs. Swinfen since the alleged compromise. Mr. Wiley, a surveyor, made an affidavit on behalf of the present plaintiff, Captain Swinfen, to the effect, that on the 28th of March 1856, being a fortnight after the alleged compromise, he called upon Mrs. Swinfen, respecting some trees which had been cut down, and some fixtures which Captain Swinfen was willing to take: that Mrs. Swinfen did not upon that occasion

(2) 18 Com. B. Rep. 485; s. c. 25 Law J. Rep. (N.S.) C.P. 303: 1 Com. B. Rep. N.S. 364; 26 Law J. Rep. (N.S.) C.P. 97.

inform him that she did not recognize the act of her counsel, or that she did not intend to concur in the arrangement, but merely said that if she was annoyed she would refuse to execute the conveyance; and would rather go to prison than do so: that at a subsequent interview, on the 9th of May following, when he spoke to her about parting with her gamekeeper to Captain Swinfen, she stated that she would not part with him, that the woods belonged to her up to Michaelmas, and that she disputed the agreement which had been entered into by her counsel; and that the impression conveyed to his mind by her language on that occasion was, that she was displeased with the compromise, and would not agree to it unless compelled to do so. Sir A. Cockburn also made an affidavit, in which he stated, among other things, that during the progress of the arrangement in court it was never intimated, or for a single moment suggested, that there was any, the slightest doubt as to the perfect acquiescence of the plaintiff, or of her attorney, Mr. Simpson, who was present, as to the main provision or principle of the settlement, or as to their entire concurrence therein.

The Attorney General (Sir R. Bethell), Mr. R. Palmer and Mr. Hobhouse, for Capt. Swinfen, insisted that the compromise was properly entered into, and that counsel duly instructed had full authority to bind the client by his acts. They cited—

Furnival v. Bogle, 4 Russ. 142; s. c. 6 Law J. Rep. Chanc. 91.

Filmer v. Delber, 3 Taunt. 486.

Thomas v. Hewes, 2 Cr. & M. 519; s. c. 3 Law J. Rep. (n.s.) Exch. 158; 4 Tyr. 335.

Elworthy v. Bird, Tam. 38; s. c. 2 Sim. & S. 372; 3 Law J. Rep. Chanc. 190.

Mole v. Smith, 1 J. & W. 665.

Howard v. Braithwaite, 1 Ves. & B. 202.

Bligh v. Tredgett, 5 De Gex & S. 74; s. c. 21 Law J. Rep. (n.s.) Chanc. 204.

Wilson v. Wilson, 1 J. & W. 457.

Hargrave v. Hargrave, 12 Beav. 408; s. c. 19 Law J. Rep. (n.s.) Chanc. 261.

Wade v. Stanley, 1 J. & W. 674.

In re Hobler, 8 Beav. 101.

Doe d. Williams v. Howell, 5 Exch. Rep. 299; s. c. 19 Law J. Rep. (n.s.) Exch. 232, upon which Vice Chancellor Stuart, in a case of *Howell v. Williams* afterwards directed a specific performance of the agreement.

Bayly v. Buckland, 1 Exch. Rep. 1; s. c. 16 Law J. Rep. (n.s.) Exch. 204.

Neeld v. the Duke of Beaufort, 5 Jur. 1123.

Doe d. Duke of Beaufort v. Neeld, 3 M. & G. 271, 294; s. c. 3 Sc. N.S. 618; 10 Law J. Rep. (n.s.) C.P. 266.

Paley on Principal and Agent, 199.

Mr. Kennedy and Mr. Cole, for Mrs. Swinfen, were not heard.

Nov. 10.—**THE MASTER OF THE ROLLS.**—There must be a new trial. The relief sought by the supplemental bill is not such as can, under the circumstances, be granted. The first question is, whether an attorney or solicitor employed by a client is at liberty to compromise a suit he has been employed to conduct, without the authority of the client. The second question has reference to the practice which the Courts adopt in such cases. Between principal and agent, the agent has full authority to do everything within the implied scope of his authority. If an attorney is employed to conduct a suit for a client, a compromise does not in terms come within the scope of his authority; it is not within the management of the cause. Upon what principle, therefore, can it be said that there is an implied authority for an attorney to compromise the suit which he is employed to conduct? Suppose an attorney is employed to recover an estate, does the authority extend to selling that to a stranger? Yet a compromise is nothing more than a sale from the plaintiff to the defendant upon certain terms. Could Mr. Simpson have said to a stranger, "If you will secure 1,000*l.* per annum to Mrs. Swinfen, and pay her all the costs of the suit and of the action, you may go on with the action: if she succeeds you shall

have the estate, if she fails you must secure her the annuity." No one would suggest that a stranger was within the scope of the authority; neither then can the defendant be. Upon ordinary principles it cannot be so treated. I should as little expect an attorney to have such an authority as I should expect a person employed to take horses to a particular place to feed and to break them in, to have an implied authority to sell or to exchange them. A coachman drives my carriage, and I am liable for all the acts which he does whilst driving the carriage; but he has no authority to sell or exchange the carriage. Unless there is some different rule applicable to attorneys, it is impossible to say that an attorney has an implied authority to dispose of the subject-matter of the suit, instead of conducting the cause which he is employed to do. In *Elworthy v. Bird* Sir J. Leach considered whether any authority was given, not doubting that if the authority was given it bound the principal; if the authority were not given, the principal could not be bound. A man is brought up before the magistrates at Quarter Sessions for an assault upon his wife; they recommend a compromise; he is in court at the time; they intimate that if he will consent to a compromise a nominal sentence will be passed upon him: thereupon his solicitor in his presence does consent, and he is brought up, and the Justices tell him that in consideration of his having given that consent they will pass sentence of a nominal fine upon him. He says nothing to repudiate it. The case is singular by reason of its being a criminal proceeding; but one does not well see how that can affect the principle of the contract. Sir J. Leach said, under these circumstances, not only was there a plain contract, but there was an acquiescence at the time which this Court must enforce against this party. Then, as to acquiescence. If a client is present and stands by and sees his solicitor entering into the terms of an agreement and makes no objection whatever, he is not at liberty afterwards to repudiate it. In *Thomas v. Hewes* the Judges seem to have expressed an opinion that there was very great doubt whether by any possibility Lord Falmouth could be bound without his express authority on the subject. In that

case the order or agreement had been acted upon, for possession had been delivered up, and steps had been taken in accordance with it, and no resistance had been offered by Lord Falmouth for a considerable time, and they held that he was bound on the ground of acquiescence. The Judges there expressed an opinion that, except by express authority of the client, he could not be bound by a compromise entered into by his attorney. The case of *Furnival v. Bogle* is undoubtedly a case of a very peculiar description, and I am not sure that I understand the distinction upon which the Lord Chancellor puts it when he says, that certain facts not being known to the solicitor at the time which were material to the case, the compromise did not bind the client; but if the solicitor had stood exactly in the position of the client,—if a person had entered into a contract, and he had not present to his mind or was not aware of certain facts which were not fraudulently withdrawn from his knowledge by the other side, that would not be a reason for setting aside the contract he had entered into: that was his own affair, and the Court would not set aside the contract;—under these circumstances, the authority of the solicitor binds the client. The question is, to what extent does it bind him? Does it in this case bind the parties to the compromise entered into? There may be cases of considerable nicety as to whether the act consented to is or not properly an act in the conduct and management of the cause. If it be such an act, then it is within the authority of the solicitor in the conduct and management of the cause; if it be not, then it is not within the authority. That disposes of this case. It was said, in argument, that unless this doctrine is supported, the business of the Court cannot proceed—that it is a matter of the greatest possible importance to place reliance on the statements of counsel that they are authorized to do particular acts. The observation in *Re Hobler* is, "the business of the Court cannot proceed unless credit be given to the statements of counsel that they have authority for what they do." That seems rather to confirm than contradict my conclusion, and I concur in it. Certainly the Court constantly deals with such matters. It frames orders on consent

on non-opposition, not merely on behalf of adults of full understanding, but also of married women and of infants, who have no power of consenting. In the case of a married woman this Court will not permit any one to say she has consented, where she has to dispose of property, in which she might be entitled to a settlement, but requires the consent to be given by herself on what is supposed to be a private examination by the Judge, but which usually takes place in open court. That is for the purpose of shewing that no undue influence has been exercised upon her. The Court also deals with the property of infants, but it directs a reference or has facts before it, to prove that it is for the benefit of the infant that certain proceedings should take place; and thereupon it binds the infant by a proceeding in which, in ordinary cases, consent would have been necessary. How does this Court act with all other persons who are perfectly competent to consent? Counsel gets up and says, "I consent." The Court does not doubt the authority, neither does it when any one gets up and says, "I appear as counsel for A. B." If the arguments in this case were to prevail, it would be the incumbent duty of the Court in every case to ascertain that the facts really had been brought before the attention and had received the consent of the client before the order was made. The Court gives credit to counsel with great justice: it knows that counsel act according to their instructions. It gives credit to the instructions of the solicitor: it knows perfectly well that solicitors act with the most perfect *bona fides*, and never give instructions which they do not consider they are duly authorized to give. Accordingly it is that the Court never inquires whether the client has given his consent or authorized his solicitor to give it. It assumes from the counsel saying he consents, that the solicitor before instructing the counsel has obtained the consent of the client to the act, which he calls on the Court to perform and give effect to. If that were not so—if it were that the solicitor, without the authority of his client, could give a consent to deprive a party of his property, how could this Court act with confidence, without seeing that the solicitor had duly exer-

cised his discretion as it does in the case of infants? In the case of infants, the Judge does it because he knows they cannot give their consent: he does not do it in the case of persons who can give their consent; he assumes that they have been made acquainted with the facts, and that they have authorized the thing to be done. If the case were otherwise, what would be the consequence of the doctrine suggested? It would be this, that every prudent man who employed a solicitor to conduct a case for him would desire him to give a notice to the opposite side,—“You are to understand that the employment of the solicitor does not authorize him to compromise the suit without my sanction and authority.” After that, could the compromise be good? A great portion of the argument has gone to the extent that it was a species of authority which the client could not remove from his attorney; that it was one which he would be bound by, though it was against his desire, though that fact was communicated to the other side, though his refusal to consent had been communicated to the other side. I, therefore, have not only no doubt whatever, that both upon principle and authority the employment of an attorney does not authorize him, either to sell the subject-matter of the suit to a stranger, or to the other side, without an authority for that purpose; but that, so far from its being productive of injurious consequences that he should not possess that authority, the consequences would be to the highest degree injurious if he had that authority, and that alone would seriously impede the administration of justice. For myself, I should be ill disposed to allow any case to be taken by consent in important matters without being satisfied that the client himself had been communicated with on the subject. It has happened to me on one or two occasions when it appeared that counsel were consenting for a client, and where it was apparently against his interest to consent, to request the counsel to communicate with the client and to see that he understood exactly what the effect of his consent was before it was given. When at the bar, I have known that counsel have repeatedly adopted that course before they came into court, and had assured the Court that the client consented.

There are various facts and matters totally independent of the conduct of a cause which are not necessary to be communicated to the attorney for the purpose of the conduct of the cause which may materially influence the mind of the client in either assenting to or dissenting from any agreement that may be proposed. I remember a singular case that occurred, of a counsel of great learning before the Lord Chancellor refusing to consent for a client, he having been instructed by the attorney in his brief to consent. The client himself was in court: counsel said 'this is so much for the injury of my client that I will not consent, and I will not allow him to consent.' The client complained of his conduct, and said he knew what he was giving up, that he was perfectly aware of the circumstances, that he had a particular affection and regard for the person to whom it was to be given, that he was desirous of making the sacrifice; he was told there would be no difficulty in the matter, the Lord Chancellor would order the petition to stand over: he had but to satisfy his counsel of what he had mentioned and the result would be satisfactory. I mention that to shew that, unless by communication with the client, no attorney can be certain, in matters on which he has to consent and which do not involve the conduct of the cause, but which dispose of the subject-matter of the cause, whether he has before him all the facts which will enable him to come to a sound decision on the subject. Since I have been upon the bench I have always assumed that the client has been communicated with, and that it is with his sanction and knowledge that what has been done has taken place. Unless that were so, the functions of this Court in matters of consent would be paralyzed. It would be too great an abuse of authority for an attorney to say that he has a right to dispose of the property of his client in that way when, if he had communicated to him the facts, the result would have been different from what he supposed, and yet the other side are to say they are entitled to insist on such an agreement and the party is to be bound by it. This is a case in which Mrs. Swinfen cannot be bound by any implied authority in Mr. Simpson

to enter into such a compromise. Mr. Simpson was undoubtedly the cause of the compromise—of the treaty being entered into on the Monday morning—if he had not gone to Sir Frederick Thesiger and suggested to him the propriety of certain terms of compromise, no such treaty would have been entered into. According to Mr. Simpson's statement, the terms he suggested were quite different from those which Sir F. Thesiger agreed to, and the terms which Sir F. Thesiger agreed to were those which he knew from the lady herself she was not disposed to accept, because he had received a telegraphic message that the offer was refused. It is clear, whether considered as an offer or a proposition to be made, that the substance of it was the same. Looking at Sir F. Thesiger's affidavit (and there cannot be the slightest doubt of its being accurate throughout), he states this fact also. He says—"I was pressing Mr. Simpson not to prevent a beneficial arrangement by standing out for 250*l.*, when a friend of the defendant at law, Capt. Swinfen, interfered, to induce the defendant to declare his determination not to settle at all; that after what I had heard from Mr. Simpson, at my lodgings, I was anxious that the trial should not proceed, and I pressed the Attorney General with the observation that it would not be right to allow his client to withdraw from what he had agreed to." Mr. Simpson states, I think, in his affidavit, that he objected to the compromise in court; that he stated he would have nothing to do with it; that it must be made on Sir F. Thesiger's own authority, and that he must protect him from his client, and that he would not enter into the compromise. It is true he sat still, and did not address the Court on the subject, but so the matter stood; after that, can it be said, that a compromise was entered into with the consent of the solicitor? I think it is very difficult to say that it is the fair construction of the evidence before me. He certainly had authorized something other than that to be entered into, but that particular compromise he does not appear to have authorized. Have the acts of Mrs. Swinfen, then, sanctioned this compromise? She came to the court-house a few minutes after

the compromise had been made and a juror had been withdrawn; and in the ante-room leading to the court she met Sir F. Thesiger, who told her the compromise had been effected; and she or Sir Henry Durrant asked him, by whose authority? he said "By yours," and after a few minutes left them. It has been argued that the proper course for Mrs. Swinfen to have adopted was, immediately to have gone into court, and required her attorney to say she objected to the compromise, and insisted on the trial proceeding. It must, however, be felt that she was placed in a position of peculiar difficulty and embarrassment—one in which upon reflection, if there had been a person conversant with the management of courts of justice and trials therein, to advise her, it would have been difficult to know what course to have recommended her to take. Assuming she was able at that moment to say, "I will have nothing whatever to do with the compromise—I object to it—I repudiate it altogether," would any counsel, conversant with courts of justice, have recommended her to go into court and, by her attorney or counsel, insist on the trial proceeding? I doubt very much whether any gentleman of experience would have recommended that course. It is not the mere experience of *Nisi Prius* practice, it is our daily experience, how much the minds of persons are affected by little matters; how often a turn is given to the consideration of a case by the disposition and feeling which the parties themselves entertain. No person who has filled any judicial situation, or a *quasi-judicial* situation, but must be aware that he has constantly to guard against that feeling arising in his own mind, and endeavour to prevent it from having any undue weight. If she had said to her counsel, "Is that a proper course to be taken?" his answer would have been, "The Judge will not be very well pleased to have three more days, when he expected the matter was settled. The jury will not be very well pleased to have three more days, when they thought they were discharged from their functions. Your counsel will not be in very good spirits: they have expressed an unfavourable opinion of your case, and you are forcing them to go on. Would it be too

much to say, it will be a very great danger to you; you will incur very great risk of success if you choose to go on in this state of circumstances." A prudent man would probably have said, "You had better take a little time to consider"—that is, assuming they could have gone into court. Undoubtedly that does appear a sufficient excuse for this lady not going there at the moment, and saying to the Judge, "I insist on this trial proceeding now, at this moment, though a juror has been withdrawn, and on going on with the whole of the case." That does not certainly exonerate her from the necessity of expressing her opinion as speedily as possible after it was over. Upon this part of the case I cannot but say (not having heard the comments of counsel on the other side), that she does appear, at all events, in the communications in writing, to have played "fast and loose" on this subject. At the same time it was stated expressly, on the 28th of March, to Mr. Wiley, that she was dissatisfied. In the first place it was stated at the railway station that she was dissatisfied with the verdict. It was stated to Mr. Wiley that if she were pressed on the subject she would repudiate the whole matter; and on the 31st of March Capt. Swinfen's solicitor writes to the solicitor of the plaintiff to say, "We understand that she intends to repudiate the agreement; if we do not hear from you, we shall assume that it is so, and we shall take measures to enforce it." That is exactly a fortnight after the trial. Now, certainly, there have been none of the consequences of misleading any one. It has not been denied that there was an express intimation that she would repudiate the arrangement; but within a fortnight after the agreement had been entered into, the solicitor of Capt. Swinfen wrote, shewing their knowledge of the fact, and stating their intention to proceed speedily to enforce it. There are no facts to shew that an injury has been sustained by the defendant by reason of that having taken place, other than the general injury which has arisen from the arrangement going off, which is, that a great amount of litigation has arisen since; and probably if a great delay should take place before the trial, there might be some loss of evidence. At

present, it does not appear that there is any loss of evidence. I cannot, therefore, say that the plaintiff has bound herself by any acquiescence to carry out this arrangement. I disapprove of the terms in which she has put that passage in her answer. It is open to the observations already made; but I cannot, upon that, say, that the agreement ought to be specifically performed, or make a decree against her on the ground of acquiescence. It is not made in the suit seeking decree for a specific performance, but it is made in the other suit, and it certainly did not mislead any one. It never induced Capt. Swinfen or his advisers to believe that she intended to rely on the agreement, and to make it the footing of her future proceedings as to the property; because it did not suspend the motion for an attachment, which was made immediately afterwards, and which was enforced. The way in which the Court ought to deal with cases of that description is really on the matter of costs when that can be so arranged. Then I am also pressed with a circumstance which is to some extent removed, but not sufficiently, by the case of *Howell v. Williams*. This is a case which is peculiarly of common law cognizance. It is true this was an issue directed out of this Court, but it would be very difficult if there were an arrangement for the compromise of a suit—I am not now considering the question of an award, which is a different matter, but an agreement for a compromise of an action at law, which the Court of common law, whose action it was, and which had entire cognizance of the matter, had thought fit in its discretion not to enforce the performance of—that this Court should say we will do with the common law action that which the common law Court has refused to do, and thinks it ought not to do. That would appear to be a very strong proposition. It is true this is an issue directed out of this court to enable this Court to arrive at a satisfactory conclusion—"to inform the conscience of the Court" and enable it to administer justice between the parties. That appears to be the answer to the observation that this arrangement could have stood if they had taken a verdict against the plaintiff and there had been an arrangement afterwards for granting

an annuity. I do not concur in that observation. It would have been exactly the same question that is now before the Court—a question whether a compromise was a fit one to bind the client, not having been entered into with the due authority of the client, in an issue directed out of this Court to determine whether a will had been duly executed or not. And this Court would in that case have directed a new trial of the cause for the purpose of ascertaining the point. Upon that part of the case I have come to the conclusion, that it is impossible to say this is an agreement which can be specifically enforced.

It has then been said that if there is to be a new trial, it ought to be on payment of costs. The question is, on what terms the new trial shall be directed. I am not disposed to put it upon the terms of directing that Mrs. Swinfen shall pay the costs. The case has been one founded on a mistake. I have known one or two cases in which the Court has itself fallen into an error, by reason of which certain proceedings were useless, and the Court has been asked to direct one of the parties to pay the costs. But the Court has said, it is impossible to do that; it is the error of the Court. The evil here has arisen from a mistake of parties, whom you cannot make pay the costs; consequently, I cannot direct any costs to be paid. At the same time, though I am of opinion that the bill for a specific performance of this agreement must be dismissed, (assuming always that it is confined to this point, for I think there is an alternative relief prayed), I should certainly not give the costs of dismissing the bill; for I should treat this as one of the consequences of the whole of these proceedings which have taken place, and of the mistake which has been fallen into on all sides. I do not make Mrs. Swinfen pay the costs incurred, by reason of the agreement entered into by counsel in the presence of her attorney. On the other hand, I do not give her the costs of the bill, which I am prepared to dismiss.

Mr. Kennedy said, that the question of costs was one of the utmost importance; they had been occasioned by no fault of Mrs. Swinfen, the compromise was repudiated, but these costs had been incurred

by an endeavour to enforce it, both at law and now by this supplemental bill; Capt. Swinfen, therefore, ought to pay the costs.

The MASTER OF THE ROLLS.—Sir A. Cockburn firmly believed that Sir F. The-siger had full authority to compromise the suit in such a way as to make it binding upon all parties. It would, therefore, be hard to make Captain Swinfen pay the costs of a proceeding which had arisen out of that mistake. Credit must be given to statements made in court, and I should not allow counsel's consent to be questioned. The alternative relief which the supplemental bill prays, may be obtained under the original bill. I shall, therefore, dismiss the supplemental bill altogether, and make an order in the original suit for a new trial, in the terms previously directed.

hound Inn," at Sydenham, filed a bill against Wharton, the owner of the property, for the specific performance of an alleged agreement, said to have been executed by Wharton, the defendant, for a lease of that inn for the term of twenty-one years.

The case made by the bill was this:—In the year 1849 Mr. Ridgway was tenant to Messrs. Meux & Co., the brewers, who held the property in question for a long term, of which there were then three years unexpired, and which would expire at Midsummer 1852. Ridgway alleged that so being under-tenant of Messrs. Meux, he was desirous of procuring from Mr. Wharton, who was the owner or landlord, a new lease, to commence at the expiration of the lease which he then held for three years under Messrs. Meux & Co.; that about the spring of 1849 he applied to the defendant, Wharton, to give him a new lease, to commence at the expiration of the present one, and that the defendant referred him to Mr. Crawter, who was a land surveyor or valuer, as the person by whom he, Wharton, should be guided in the business. In consequence of this communication Mr. Wharton sent Crawter to look at the property, and Crawter did look over it, and made a report upon it in the latter end of May or the beginning of June. The report, so far as it related to the Greyhound Inn, the property of Mr. Wharton (who possessed other property besides that held by the plaintiff) was to this effect:—It first of all described of what the property consisted, and then stated what the state of the plaintiff's trade was; that the plaintiff kept nine horses and three flies, and that he was very naturally desirous of obtaining an agreement for a lease, to commence at the expiration of Messrs. Meux & Co.'s lease, and that he offered, on a sixty years' lease, to become the direct tenant of the inn, and then it made several other statements, and ended as follows: "Such being the case, and from the circumstance of the underletting by them being for the same term as their lease (that is, Messrs. Meux & Co.'s), which would prevent possession being now gained by the owner thereof, I see no particular inducement to the owner, or advantage that would be derived by him in entering into such an agreement upon the terms

Jones v. Victoria G. Dec. 4 2 27 2 N. 321
Rosette v. Miller 48 2 2 Ch 12.
Cong. Miller 48 2 2 Ch 549
2nd. Wharings
to 2 96 2 577
Harlow v. Riffenil
71 2 2 Ch 355.

IN THE HOUSE OF LORDS.]

1856.

Feb. 25, 26, 28.

1857.

June 15, 18, 26.

RIDGWAY v. WHARTON.

Agreement—Statute of Frauds—Agent.

A paper was signed by a duly authorized agent; it contained an agreement to do a certain thing, but not any explanation of the necessary details, but it referred to another paper which did contain them:—Held, that the two might be connected together by parol evidence, so as to constitute an agreement sufficient within the Statute of Frauds.

A paper sent to a solicitor as "instructions" to prepare a lease, may be treated as the final agreement for the lease, if the evidence shews that it was only so sent to be put into a formal shape; but the act of so sending it is evidence to raise a primâ facie presumption that it did not contain all that the parties meant, but might afterwards be modified by either of them.

This was an appeal against a decree of the Lord Chancellor, which had reversed a previous decree by Sir J. Stuart, V.C.

In this case the plaintiff, Ridgway, being the tenant of an inn, called the "Grey-

proposed, but I recommend the following terms be offered to Mr. Ridgway, viz., an agreement for a twenty-one years' lease, to commence at the expiration of Messrs. Meux & Co.'s term. Mr. Ridgway to lay out not less than 600*l.* in taking down and rebuilding that portion of the premises before alluded to, and sinking a well. The lease to contain covenants for repair. The triangular piece of ground marked in the plan No. 32, a little piece of ground on the opposite side of the road, now occupied by the tenant, to be given up on his making terms with Messrs. Meux & Co., and not to be included in the twenty-one years' lease to him, but could then be offered for building purposes, having a frontage to the road, and eligible for that purpose; the rent to be 70*l.* clear. Tenant to insure, and pay all taxes." Then Crawter added, "On these terms being proposed it will probably lead to a negotiation, by which a fair rent may be obtained, and some arrangement made to permanently improve the premises, for which there is ample room."

That report was made by Mr. Crawter to the defendant Wharton at the latter end of May or the beginning of June, and upon that some communication took place between Wharton and Crawter, in which Wharton desired Crawter to see Ridgway, and to treat with him upon terms in accordance with that report. An arrangement was accordingly made, on the 22nd of June, between Wharton and Ridgway, that Ridgway should meet Crawter at Carshalton on the following Tuesday, the 26th of June, Crawter stating that on that day he was obliged to be at Carshalton on other business, and that he would then communicate with Ridgway upon the subject of his proposed new lease. The bill then stated, that the meeting accordingly took place, and that at that meeting Crawter agreed, on the part of the defendant, to grant him a lease for twenty-one years, which was to include this triangular piece of land. The bill stated, that it was not finally settled, and that there was to be a further communication from Ridgway, in order that Ridgway might state whether he would or would not agree to those terms of letting. On the 2nd of July Crawter wrote a letter to Ridgway in these words: "Please

to recollect you have not written to me with respect to the terms for the agreement as arranged when we met on Tuesday last at Carshalton. I cannot do anything till you do write."

Ridgway, on the 3rd of July, wrote this letter in answer: "Sir,—I beg to apologize for not writing to you before this, but it has been a subject of great consideration on my part; the shortness of the lease, the proposed outlay, and having worked very hard for the last fourteen years with so little profit or advantage, I certainly should feel very much obliged to you if you would allow me a longer time of lease, if not, I must submit to your terms, and will thank you to draw up the agreement, at once, as you proposed." On the 7th of July Crawter wrote thus to Wharton:—"I beg to inclose a copy of Mr. Ridgway's note, in reply to the terms recommended in my report, which I communicated to him verbally. He is very anxious to have the triangular piece, containing 0 a. 3 r. 12 p., included in the new lease; and as he agrees to lay out 600*l.* in building, and sinking a well, and the other terms, it is not an unreasonable request to have it included; and, under all the circumstances, I recommend you to do so, and should you approve, the agreement can be prepared in accordance with my report, but including the 0 a. 3 r. 12 p.; and on hearing from you I can, if it is your wish, furnish Mr. Gregson with the necessary particulars for the agreement." The bill alleged that Wharton, after this letter, had an interview with Crawter, and gave directions, in consequence of which Crawter, on the 30th of July, sent the particulars as instructions to Gregson to prepare an agreement. In the course of 1849 Wharton wrote a letter to Crawter on this business. In 1852 he received back this letter from Crawter, and destroyed it.

Nothing further passed until the latter end of August, when Ridgway not having heard any more, the bill stated that he wrote another letter to Crawter in these words: "Sir,—I have been expecting to receive from you a copy of the agreement; will you be kind enough to send it me at your earliest convenience." That letter was not answered till about three weeks afterwards; and on the 20th of September

1849, Crawter wrote a letter to Ridgway in these words: "Sir,—Mr. Wharton's solicitor had instructions from me long since to prepare the agreement, and I fully expected he had done so, but my absence from town has prevented my seeing him, but will do so in a day or two. Mr. Taylor has been trying to learn from Mr. Wharton the terms arranged with you, but with which neither he nor Messrs. Meux can have anything to do, and he seems to intimate that Messrs. Meux should have had the refusal of the premises, but I can remind Mr. Taylor that they had the offer of them, and he, on their behalf, declined. It strikes me the less communication you have with Mr. T. the better. Henry Crawter."

It was stated in the bill, and admitted by the answer, that between the last letter received by Crawter from Ridgway and the letter written by Crawter to Ridgway, on the 20th of September, Mr. Crawter had sent to Mr. Gregson, the solicitor of the defendant, this memorandum:—"Memorandum of terms for an agreement for a lease to be granted by the Rev. Mr. Wharton to Mr. Mark W. Ridgway. Premises situate at Sydenham, in the parish of Lewisham, Kent"; then there was a description of the premises, amounting altogether to four acres, including the triangular piece of land; "an agreement for a twenty-one years' lease, to commence at the expiration of Messrs. Meux & Co.'s term. Mr. Ridgway to lay out not less than 600*l.* in taking down and rebuilding part of the Greyhound Inn, viz., two parlours and rooms over, and in sinking a well. The lease to contain covenants to uphold and keep the whole of the premises in substantial repair, and so deliver up same. The rent 70*l.* clear. Tenant to insure, and pay all taxes.—N.B. Mr. Ridgway is about to arrange with Messrs. Meux & Co. for the remainder of their term, viz., three years at Midsummer 1849, and, therefore, the outlay would be immediate on the agreement being entered into; the draft of which please to send to Messrs. Crawter, 7, Southampton Buildings."

The bill stated that the plaintiff from time to time applied to Crawter for an agreement, but never obtained it, and that,

finally, in the beginning of the year 1852, a correspondence of an angry character took place, in which Ridgway insisted upon his right to a specific performance of that which he alleged to be an agreement, and that that was resisted upon the part of Mr. Wharton. At the end of the year 1852 the bill was filed by Ridgway claiming the specific performance of this alleged agreement.

That bill was resisted upon three grounds: first, it was said that there was no authority given by Wharton to Crawter to contract; secondly, that even if he had given Crawter authority to contract, no contract ever was entered into binding upon Wharton; and, thirdly, that at all events, there was no contract valid according to the Statute of Frauds.

The case was heard before Vice Chancellor Stuart, and he decreed in favour of the plaintiff, being of opinion that there was authority to Crawter to contract, and that he had entered into a contract which was valid according to the Statute of Frauds. The Lord Chancellor, on appeal, reversed that decision, somewhat doubting whether there was sufficient proof of authority on the part of Crawter, but considering that if such authority had existed, there had not been a contract actually made by him sufficient within the Statute of Frauds (1). The present appeal was then brought.

The case was twice argued, in 1856; before the Lord Chancellor and Lord Brougham; and, then, by one counsel on each side, in 1857, before the Lord Chancellor, Lord Brougham, Lord St. Leonards, and Lord Wensleydale.

Mr. Roundell Palmer and *Mr. Lewis* appeared for the appellant; and

Sir R. Bethell (*Solicitor General* and *Attorney General*) and *Mr. Bacon*, for the respondent.

The following cases were cited:—

Tawney v. Crowther, 3 Bro. C.C. 161.

Welford v. Beazeley, 3 Atk. 503.

Owen v. Thomas, 3 Myl. & K. 353; s. c.

3 Law J. Rep. (n.s.) Chanc. 205.

Morgan v. Holford, 1 Sm. & G. 101.

Fowle v. Freeman, 9 Ves. 351.

(1) 3 De Gex, M. & G. 677.

Gibbins v. the Board of Management of the North-Eastern Metropolitan Asylum, 11 Beav. 1; s. c. 17 Law J. Rep. (N.S.) Chanc. 5.
Saunderson v. Jackson, 2 Bos. & P. 238.
Jackson v. Lowe, 1 Bing. 9; s. c. 7 B. Mo. 219.
Allen v. Bennet, 3 Taunt. 169.
Dobell v. Hutchinson, 3 Ad. & E. 355; 4 Law J. Rep. (N.S.) K.B. 201.
Clinan v. Cooke, 1 Sch. & Lef. 22.
Howard v. Braithwaite, 1 Ves. & B. 202.
Duke of Beaufort v. Neeld, 12 Cl. & F. 248.
Mitford on Pleading, 3rd edit. 215.
Fonblanque on Equity, vol. 1. p. 183.
Cooth v. Jackson, 6 Ves. 12.
Skinner v. M'Douall, 2 De Gex & Sm. 265; s. c. 17 Law J. Rep. (N.S.) Chanc. 347.
Southcombe v. the Bishop of Exeter, 6 Hare, 213; s. c. 16 Law J. Rep. (N.S.) Chanc. 378.
Walker v. Jeffreys, 1 Hare, 341; s. c. 11 Law J. Rep. (N.S.) Chanc. 209.
Watson v. Reid, 1 Russ. & M. 236; s. c. 1 Tam. 382.
Eads v. Williams, 4 De Gex, M. & G. 674.
Wood v. Midgley, 5 De Gex, M. & G. 41; s. c. 23 Law J. Rep. (N.S.) Chanc. 553.
Boydell v. Drummond, 11 East, 142.

The LORD CHANCELLOR having stated the facts very fully, said, that the ground on which he had proceeded in the court below was that, even assuming *Crawter* had authority to contract, and that he had entered into a written contract, still that was not a contract binding within the Statute of Frauds. On the last point, he had now no hesitation in saying, that he then came to a wrong conclusion. He said this at once, because he thought it wrong in itself, and injurious to the suitors, for a Judge to endeavour to give the appearance of correctness to an error, by raising distinctions which did not exist. The cause of his error was, that he did not sufficiently advert to the fact, that the instrument sent to *Gregson* was a paper containing written instructions. These instructions being sufficiently referred to in another paper, parol evidence became admissible to shew what that other paper

really was, so as to make the two taken together a binding agreement within the Statute of Frauds. The cases of *Allen v. Bennet* and *Dobell v. Hutchinson* sufficiently established that proposition. So, that if here there was authority given to *Crawter*, and *Crawter* in the exercise of it had entered into and signed an agreement to grant a lease, though that agreement did not specify the terms of the lease, yet the agreement referring plainly to the instructions, parol evidence was admissible to shew what those instructions were, and that they were written instructions, so as to make the agreement valid within the Statute of Frauds. In the court below he had not deemed it necessary to decide whether there was authority to grant a lease, and whether an agreement to grant one had been made under that authority, because, assuming both things to be made out, he had been of opinion that there was no valid contract within the Statute of Frauds. In the view which he then took of the case, the inclination of his opinion was, that coupling the evidence with the other testimony, there was testimony as to something that had passed between *Wharton* and *Taylor* that would be sufficient to shew that there was authority to contract, if not a contract entered into. Of course, that was immaterial to the judgment, because his opinion was opposed to the plaintiff on another ground. In the court below, he had not fully examined the facts as to authority and a contract, because it was not material to do so; but had he done so, he was now of opinion that he should have come to a conclusion the opposite of that at which he then arrived, and should have thought that there was neither authority nor contract. On the first hearing in this House, that was the conclusion at which he had arrived, and at which also his noble and learned friend (Lord Brougham) had arrived. He was most anxious, however, to have the case re-argued on these points, and it had now been re-argued, in the presence of the noble and learned Lords, besides his noble and learned friend and himself. He had listened to the argument most carefully, and the conclusion at which he had arrived was, that there was not sufficient evidence of authority, or if of authority,

then of contract. He was of opinion, that Wharton had not given to Crawter any authority to bind him (Wharton) to any thing. He said this considering himself to stand in the position of a jurymen. Both Wharton and Crawter were examined on this point, and the former denied that he gave, and the latter denied that he received, any authority to enter into an agreement with the appellant.—[His Lordship here read the testimony.]—These being the only two witnesses examined, if the proceeding had been that of an action in a court of law, and the plaintiff had rested his case on them, he must have been nonsuited, for it was his duty to prove the existence of the authority. There was no doubt that Taylor's evidence was striking. Taylor went on behalf of Messrs. Meux, to ask for a lease from Wharton, but Wharton said he had finally agreed with another party. It was undoubtedly striking, but it never could countervail the direct negative given by Crawter and Wharton, as to the existence of any authority. He agreed with the observation often made by Lord Eldon, that the sort of statement attributed to Wharton when Taylor called upon him was to be very little depended upon, for it was frequently made by persons in order to get rid of the importunities of third parties. In that state of things, there was an end of the question, for there being no authority to enter into any agreement, the question, whether an agreement had been formally entered into became unimportant; but still the fact, that no such formal agreement did exist was not an immaterial circumstance in considering the case. There was a case of *Fowle v. Freeman*, in which, a rough draft of the agreement having been made, the mere transmission of that to a solicitor, with directions to him to prepare an agreement, was held to shew that an agreement had been concluded. But there the conditions were all enumerated, and the document which was transmitted was signed. No doubt could exist as to the correctness of that decision, but it did not touch this case. But in his opinion, the case of *Tawney v. Crouther* was not an equally correct decision, and he thought that in *Clinan v. Cooke* there were some very pertinent remarks made on it by Lord Redesdale.

He had no doubt that persons might be bound by an agreement, though not formally drawn up, if the facts shewed that in truth something conclusive had been determined between them, but generally speaking, the circumstance that parties did intend a subsequent agreement to be made, was strong evidence to shew that they did not intend the previous negotiations to amount to an agreement. The question then was, whether the appellant had shewn enough to establish the fact, that the respondent gave Crawter authority to make an agreement, and that Crawter had, in fact, made the agreement. On both points he was of opinion, that the appellant had failed; and, therefore, was disentitled to the relief now sought, not on the ground on which the judgment was put in the Court of Chancery, but on the ground that there was no authority to Crawter to contract, and that if authority was given, no contract had actually been made.

LORD BROUGHAM entirely agreed, but must in the first place express his very great satisfaction at the candid manner in which his noble and learned friend had dealt with the case as regarded the change in his opinion, on the question relating to the Statute of Frauds. He wished that all Judges would shew equal candour, and not attempt to maintain at the expense of the law and of suitors, their own apparent consistency. He thought that the case of the appellant failed here for want of proof of Crawter having had authority to contract, and also for want of proof (even assuming the authority,) that any complete contract had been entered into. He did not think *Fowle v. Freeman* applicable to this case. As to *Tawney v. Crouther*, he was of opinion that the result there could not be insisted on as a decision of the case, and he believed the comment made upon it by Lord Redesdale, in *Clinan v. Cooke*, which assumed it to be rather a compromise on the facts than a decision on the law, was well founded. The appellant had failed here on the facts, and the appeal must be dismissed.

LORD ST. LEONARDS had listened to this case most attentively, but could not come to the conclusion at which his noble and learned friends had arrived. He entirely agreed with what had been said as

to the candid and proper manner in which his noble and learned friend the Lord Chancellor had expressed his change of opinion upon the question of the Statute of Frauds, and that question might now be treated as out of the case. The points, therefore, at present to be determined, were, whether Crawter was proved to have had authority to contract, and whether if Crawter was proved to have had authority to contract, Crawter had in fact made a contract. For himself, he thought that both these questions must be answered in the affirmative. A letter by Wharton to Crawter soon after Ridgway's first application, shewed that in matters of business Wharton did form his faith on Crawter. The letter dated the 22nd of May 1849, was in the following terms:—
 "Dear Sir,—I am much obliged to you for your note of yesterday's date, and beg that you will see Messrs. Meux as soon as may be convenient to you. I think from what I have heard, that the gentleman who does such business for the firm, is accustomed to take ample care of their interest. I hope you will kindly remember this in any transactions with them, and will also remember that I am not anxious to take 'The Greyhound' out of their hands before the expiration of their term, and should not be disposed to do so but upon such terms as you may consider advantageous." This shewed the nature of the confidence placed in Crawter, and the other facts (which his Lordship very fully stated) shewed that Crawter had acted accordingly. His report, of course, concluded nothing, but the subsequent letters and interviews shewed that Wharton had adopted that report, and had consented to allow the triangular piece of ground to be included in the agreement, and had so consented upon Crawter's recommending it. Then there came the statement, made by Wharton to Taylor (Messrs. Meux's agent), who said that Wharton told him (Taylor) that "the house was irrevocably gone from us, and that he had let it to somebody else,"—an expression that did not seem to him capable of being frittered away into a mere evasive reply to Taylor, on the business on which Taylor had addressed him. It certainly made no such impression on the mind of Taylor, nor could it do so on the mind of any other

person under the same circumstances. Again, what occurred after the sending of the report to Wharton, and then the memorandum of instructions, which left the solicitor nothing to do but to prepare the lease according to those instructions, all shewed that up to that time all the parties had treated the affair as a finally concluded agreement. Though not formally reduced into writing, it was one which equity would execute. The delay in asking for the formal document arose from the fact, that Messrs. Meux's interest still existed. The decree of the Vice Chancellor appeared, therefore, to have been correct, and the decision now under appeal appeared to him to be erroneous.

LORD WENSLEYDALE concurred with the Lord Chancellor and Lord Brougham, in thinking that this appeal ought to be dismissed. His Lordship entered very fully into the facts of the case, and expressed his opinion, that Crawter's authority was merely to examine and report, but not to make an agreement—that Wharton had never bound himself by what Crawter had done—that the instructions could not be considered as final, for that there were covenants indispensable to a perfect lease, which were not introduced into those instructions, and yet which the solicitor must introduce before the lease could be said to be complete. If so, it shewed that those instructions were mere directions to prepare a formal instrument, the provisions to be contained in which had not been finally agreed upon, but were still open to modification by either party. He was, therefore, of opinion, that Crawter had not authority to make an agreement, and that in fact he had not made one, and that the decree of the Lord Chancellor was correct and ought to be affirmed.

Appeal dismissed. Decree of the Court below affirmed.

L.C. }
 Nov. 12. }

ELLIOTT v. INCE.

Practice — Creditors' Suit — Trial of Issue.

In a creditors' suit, leave was given to the plaintiff to try an issue as to the sanity of the debtor at a particular time. The

plaintiff subsequently declined to try the issue, and upon the application of other creditors they were permitted to be substituted for him, upon giving security for the costs of the trial.

Mr. Malins, on behalf of some of the creditors of the late Mrs. Cumming, applied for leave to try the issue as to her sanity, permission to try which had been given to Mr. Elliott—See 26 *Law J. Rep.* (N.S.) Chanc. 821. Mr. Elliott's suit was instituted by him on behalf of himself and all other the creditors of the late Mrs. Cumming; and he having declined to try the issue, the present applicants desired to be substituted for him.

Mr. Bacon appeared for Mr. Elliott.

Mr. Cairns and Mr. Burdon, for Mrs. Ince, opposed the application, and particularly as the present applicants represented a very small portion in amount of the debts which had been proved. If, however, it were considered that they were entitled to try this issue, security for costs ought to be given.

The LORD CHANCELLOR said, that he would grant the application, but security for the costs of the trial must be given. The costs of the present motion might be reserved.

L.C.
Dec. 8.

{ THE GOVERNORS OF THE
GRAY - COAT HOSPITAL
v. THE WESTMINSTER
IMPROVEMENT COMMISSIONERS AND OTHERS.

Practice—Supplemental Bill.

A supplemental bill, with the original bill annexed by way of schedule, permitted to be filed.

Mr. Bacon and Mr. G. W. Collins applied to the Court in consequence of an objection of Mr. Murray, clerk of records and writs, to file a supplemental bill, under the following circumstances. The decision of the Lords Justices in this case, reported 26 *Law J. Rep.* (N.S.) Chanc. 843, rendered it necessary to bring before the Court, by supplemental bill, certain judgment creditors and incumbrancers. As

the original bill was very long, and the new defendants might be entitled to traverse all the statements contained therein, it was thought advisable to annex the printed original bill by way of schedule, the supplemental bill containing a reference to it, and thus to avoid the expense of reprinting the lengthened statements already in print. Mr. Murray, however, objected to file the supplemental bill in this form, and upon an application being made to Stuart, V.C., his Honour declined to order it to be filed. The Lords Justices were then applied to, and Lord Justice Knight Bruce considered that the bill ought to be filed, but Lord Justice Turner doubted. The present application was, therefore, made to the Lord Chancellor, and it was urged that no additional expense would be occasioned to the defendants, but a considerable diminution of the plaintiffs' costs would be effected. It was the constant practice for schedules to be annexed to bills, and the nature of the contents of such schedules could make no difference. In *Lafone v. the Falkland Islands Company* (1) an answer, with a long printed document as a schedule, had been filed. Any objection as to this mode of dealing with the case as a point of pleading ought not to be raised upon the question whether the bill ought to be filed or not, but might be raised and discussed at the proper time afterwards.

Mr. Murray stated that his objection was, that this was an unusual course, from the adoption of which many inconveniences might arise. The 49th Order of the 26th of August 1841 provided, "that it shall not be necessary in any bill of revivor or supplemental bill, to set forth any of the statements in the pleadings in the original suit, unless the special circumstances of the case may require it." The course adopted in this case was entirely inconsistent with that order. The plaintiffs might have served or tendered copies of the original bill at the same time with the supplemental bill, but there was no necessity for the original bill to be filed.

The LORD CHANCELLOR said, that if such a course as that proposed had been adopted to create expense, the case would

(1) *Ante*, p. 25.

be different; but there appeared to be no such intention here. He should, therefore, simply state his opinion that this bill ought to be filed.

KINDERSLEY, V.C. }
June 11. } SIBLEY v. MINTON.

Cost-book Mining Company—Simple Partnership—Parties.

A shareholder in a cost-book mining company filed his bill against the managing committee and against a creditor of the company, to restrain an action at law brought against him by the creditor at the instigation of the managing committee. The bill also asked for an account as to the amount of the plaintiff's liability to the company. The Court granted an injunction to restrain the action by the creditor, but dismissed the bill as against the managing committee, on the ground that as the company was a simple partnership, formed under no act of parliament, it was necessary, in order to have an account, that all the members should be made parties to the bill.

The bill in this case was filed by one of the shareholders in the Wheal Gascus Mining Company, which was a company carried on upon the cost-book principle, against the managing committee and secretary, and against Robert Mitchell, a creditor of the company, who had commenced an action at law against the plaintiff for an injunction to restrain the defendants from proceeding with the said action, or any other action at law, against the plaintiff; and the bill also prayed that an account might be taken, and that the plaintiff's liabilities in respect of the company might be ascertained.

The bill stated, that in 1855 the plaintiff was the holder of 463 shares in the company; that by the rules of the said company it was provided that the committee of management should be formed of three persons, removable only at a special general meeting to be held at certain specified periods by such committee, who should at such times submit their accounts to the shareholders, who were to vote funds, make calls, and direct such other

acts as should be necessary for carrying on the concern. It was also provided, that no transfers of shares in the company should be permitted until all the calls due upon them should be paid up; and that after due notice should have been given, if there should be any arrears beyond a certain period, the shares should be declared to be forfeited, and they should then be vested in the managing committee, to be dealt with according to the directions of the general meeting of the shareholders. In the month of April 1855, the plaintiff was one of the committee of management, but he retired in June 1856. A call of 5s. per share was made in the month of December 1855, and between that time and July 1856 the plaintiff sold and transferred 336 of his shares, retaining still the remaining 127, and the transfer was duly entered and registered in the books of the company. The plaintiff not having paid up the call upon his shares, an application was made to him by a letter, written by A. Jeffree, the secretary of the company, for the sum of 115*l.* 15*s.*, being the amount due from him in respect of such call upon his 463 shares. The money still being unpaid, another application was made to the plaintiff in March 1856 for the amount due from him, and it was intimated to him that if payment were not made within a specified period, his name would be handed over to the creditors of the company in order that they might proceed against him for the recovery of their claims. In July 1856, at a general meeting of the shareholders, the 127 shares still remaining in the name of the plaintiff were declared to be forfeited, and they were thereupon sold by the committee, and notice of such sale was sent to the plaintiff, and the secretary was instructed to write to R. Mitchell, one of the creditors of the company, requesting him to bring an action against the plaintiff for his unsatisfied claim, amounting to the sum of 348*l.*

The bill alleged that the three defendants, who formed the committee of management, were directing the prosecution of the action against the plaintiff, and that the company was in the habit of suing and being sued in the names of such committee of management for the time being; and

it prayed that an injunction might be granted to restrain the prosecution of the action, and that an account might be taken, and the liabilities of the plaintiff ascertained.

The injunction was granted, on payment into court by the plaintiff of the sum of 115*l.* 15*s.*, the amount of the call made upon the plaintiff in respect of his shares, and the cause now came on upon motion for a decree.

Mr. Glasse and *Mr. Williams* appeared for the plaintiff.

Mr. Baily and *Mr. Elderton*, for *Mr. Mitchell*.

Mr. Roxburgh, for the three defendants, the managing committee, raised an objection on the ground that all the members of the partnership ought to be before the Court. He contended that the committee of management did not represent the company. This association was not formed under any act of parliament. The members were nothing more than a certain number of persons joined together in a partnership. The committee of management was changed from day to day, and the contracts which were entered into were not with the company or the committee, but with particular individuals. The only grounds for suing any one member was, that he might have entered into a particular contract. The shareholders generally were not bound by what the committee of management should do. They had no power to act separately for the shareholders in entering into contracts.

Mr. Williams contended that the company was sufficiently represented by the committee of management; and unless this were the law, it would be impossible for the plaintiff to obtain redress, since he could not make all the shareholders parties to the suit.

The following cases were cited:—

Meux v. Malby, 2 Swanst. 277.

Adair v. the New River Company, 11 Ves. 429.

Richardson v. Hastings, 11 Beav. 17; s. c. 16 Law J. Rep. (N.S.) Chanc. 322.

Clements v. Bowes, 1 Drew. 684; s. c. 21 Law J. Rep. (N.S.) Chanc. 306.

Walworth v. Holt, 4 M. & Cr. 619; s. c. 10 Law J. Rep. (N.S.) Chanc. 138.

In re the Bodmin United Mines, 26 Law J. Rep. (N.S.) Chanc. 570.

KINDERSLEY, V.C.—If it is necessary to take an account of the dealings of this concern, in which all the shareholders are interested, it is impossible to do so without having them all before the Court. This is a case of one shareholder calling upon the Court to decide, as between him and his co-partners, what is his liability as partner, and that involves the taking of the accounts. This is a simple partnership, and although I would have struggled hard to avoid the plaintiff's rights being defeated by his being obliged to make so many persons parties, yet as an account is requisite, the number does not prevent the necessity of their presence; and, therefore, no account can be taken in the absence of the shareholders in this mine. It is obvious that this is not a joint-stock company; it is a monster partnership, a mining adventure, and under no act of parliament. It does not appear why this bill should not have been filed against the creditor without making any of the shareholders parties, except that there is an offer to pay what may appear due on an account being taken. For such an account all the members must be present; but the plaintiff having the option not to insist upon the accounts, I think the bill should be dismissed as against the defendants, the committee of management, without costs. With regard to the defendant Mitchell, I think, on the merits of the case, that the injunction should be made perpetual against Mitchell, but without costs.

L.C. { LOCKHART v. REILLY.
July 15, 22. { REILLY v. LOCKHART.

Trust—Breach of Trust—Costs of Trustee—Specialty Debt—19 & 20 Vict. c. 97. s. 5.

A. and B. were trustees of a settlement, and a breach of trust was committed, B. being the guilty party. The trust fund was ultimately restored, and A.'s costs were

directed to be paid out of B.'s estate:—
Held, that these costs were not a specialty debt as against B.'s estate.

A. paid a sum on account of his costs, after the passing of the 19 & 20 Vict. c. 97, and it was held that the sum was paid in the character of surety, and therefore that, under the 5th section of that act, he was entitled to claim as a specialty creditor on account of it.

This was a petition of rehearing, presented by Maria Lee, formerly Maria Ellis, the defendant in a suit of *Ellis v. Ellis*. The particulars of the former hearing are fully reported in 25 *Law J. Rep.* (N.S.) Chanc. 697.

James Lockhart and Charles Ellis were trustees of a settlement, dated in July 1822, and Charles Ellis, having committed a breach of trust, a suit was instituted, under which the property was recovered; but costs were directed to be paid by Maria Ellis, the representative of Charles Ellis, and James Lockhart. The suit of *Ellis v. Ellis* was instituted in 1848 for the administration of the estate of Charles Ellis; and by an order, dated the 4th of June 1856, and made in the suit of *Lockhart v. Reilly*, it was declared that as between James Lockhart and Maria Lee, the costs of the suit of *Reilly v. Lockhart*, by the decree directed to be paid by the defendant Maria Lee and James Lockhart, and also all charges and expenses properly incurred by the said James Lockhart, as trustee, including his costs properly incurred in the several causes, ought to be borne by the defendant Maria Lee out of the assets of Charles Ellis, deceased, and accordingly directions were given for the taxation of such costs and payment of them out of a certain fund belonging to Charles Ellis, deceased, and for the transfer of the residue of such fund to the cause of *Ellis v. Ellis*. In the cause of *Ellis v. Ellis* the Master had found certain simple contract debts of Charles Ellis; and the question raised by this petition was, whether the claim of James Lockhart was entitled to priority over the simple contract debts, the effect of the order of June 1856 being to give such priority.

Mr. Malins and *Mr. Martindale*, in support of the petition.—The question

was, whether, as between two trustees, where a breach of trust had been committed, the one being more culpable than the other, the survivor was entitled to consider the costs incurred by him as a specialty debt against the estate of his co-trustee. In this trust-deed there was no contract to indemnify Lockhart, and, in fact, there was no legal obligation from Ellis to Lockhart—*Adey v. Arnold* (1). But by the Master's report in *Ellis v. Ellis*, made in 1854, it appeared that no claim was made by Lockhart; and assuming Lockhart to have been a specialty creditor, he must come within the rule of the Court that a specialty creditor, who had not obtained his judgment before decree, must come in with simple contract creditors. But Lockhart was no more than a surety, who was a mere simple contract creditor of his principal.—

Copis v. Middleton, Turn. & R. 224;
s. c. 2 *Law J. Rep.* Chanc. 82.

Jones v. Davids, 4 Russ. 277.

Caulfield v. Maguire, 2 Jo. & Lat. 141.

Mr. Wigram and *Mr. C. Hall*, for Mr. Lockhart, said that the law laid down in *Copis v. Middleton* was, in fact, repealed by the 19 & 20 Vict. c. 97. s. 5, which made a surety who discharged the liability entitled to the assignment of all the securities held by the creditor, and therefore as to 300*l.*, which had been paid by Lockhart, *Copis v. Middleton* would not apply. The declaration contained in the settlement, which was under seal, was an agreement between all the parties, *Baynard v. Woolly* (2), and therefore the claim of any one of the parties against the other arising under the settlement was a specialty—*Lingard v. Bromley* (3). Lord Eldon's decision in *Aldrich v. Cooper* (4), as to the right of marshalling assets, was applicable here. Reilly's demand was first against the trust fund, and then for the deficiency against Ellis's estate. Lockhart, therefore, had an equity to require Reilly to go against Ellis's estate, leaving the trust fund free for Lockhart. As to Lockhart's claim being a specialty demand, they also cited—

Mavor v. Davenport, 2 Sim. 227.

(1) 2 De Gex, M. & G. 432.

(2) 20 Beav. 533.

(3) 1 Ves. & B. 114.

(4) 8 Ves. 382.

Gifford v. Manley, Ca. temp. Talb.
109.

Benson v. Benson, 1 P. Wms. 130.

Mr. Malins, in reply.—It was said that all these funds must be considered as Lockhart's funds, because Ellis's estate had been brought into this cause.

[The LORD CHANCELLOR said, that the question as to this claim being a specialty debt need not be further argued; but it had been contended that the whole fund must be considered as a trust fund in the hands of Lockhart, out of which he was entitled to his costs.]

The decree did not say in what order the costs should be paid, but simply that they should be paid out of Ellis's assets. The payment of the money into court did not affect any rights. It appeared that Lockhart had paid, on the 1st of August, a sum of 300*l.*, and then claimed this sum as being paid by him as surety, the person primarily liable being Ellis or his estate. If the 19 & 20 Vict. c. 97. s. 5. was retrospective, it applied to this amount, but to this amount only.

The LORD CHANCELLOR said that this was an appeal from part of an order which was supplemental to an order made in the beginning of the year 1855. Mr. Lockhart and Mr. Ellis had been guilty of a breach of trust in having lent trust monies on improper securities; some of them being insufficient, and others second mortgages. There had been much litigation on the subject, and the result was, that the two trustees were considered guilty of a breach of trust, and liable to make good the same, and it was declared accordingly. But there were the securities, and his Lordship gave the trustees six months to realize them. The result was that the securities realized nearly enough to bring back the whole fund. Ellis was the guilty trustee, and therefore as between Lockhart and Ellis, Ellis was to indemnify Lockhart, Ellis being primarily and Lockhart secondarily liable. Ellis had previously died, and a suit was instituted to administer his estate. In that suit there were funds in court, amounting to between 3,000*l.* and 4,000*l.* Application was made that the funds in *Ellis v. Ellis* should be transferred to the cause of *Lockhart v.*

Reilly, in order to answer this debt. It was said that there were none but simple contract debts in *Ellis v. Ellis*, but that there was a specialty debt in *Lockhart v. Reilly*. His Lordship was surprised to find that this was a specialty debt; but upon examining the authorities, it appeared that a trustee having executed the deed, a breach of trust was a specialty debt. It turned out, however, that only a small portion of the fund was necessary. The mortgages realized the whole of the principal and arrears of interest, less 600*l.*, which was to come out of Ellis's estate, and Ellis's estate was to indemnify Lockhart for costs. It turning out that no more than 600*l.* was wanted, the question was, what was to be done with the residue? The decree said that the costs of Lockhart were to be paid out of the fund, and that would have been right if Lockhart's claim were a specialty debt. The first question then was, whether the principle making the debt due from Ellis, in respect of the breach of trust, a specialty debt, made the debt, in respect of costs incurred by Lockhart, a specialty debt also? It was said that it did, inasmuch as all parties executed the deed, and therefore as between the trustees a claim arising thereunder was a specialty debt. That, however, was an entire fallacy, because if it were so, *Copis v. Middleton* would have been wrongly decided. There was no pretence, therefore, for saying that this was a specialty debt. Then it was contended that this fund was in the same position as a trust fund, and must, in the first place, be liable to costs. But that was a fallacy, because the estate of Ellis was only, for convenience in this court, brought into the cause of *Lockhart v. Reilly*. Had it been known that only 600*l.* was required, that sum only would have been brought in; and if so, the question would have been whether, in *Ellis v. Ellis*, Lockhart would have been entitled to go in as a specialty creditor. The order must, therefore, be altered in this respect, and Lockhart should have liberty to go in as a creditor in *Ellis v. Ellis*. As to the 300*l.*, the 19 & 20 Vict. c. 97. applied, and therefore that sum must be paid out of the residue.

WOOD, V.C. }
 Nov. 12. } BAKER v. M'CLELLAN.

Practice — Dismissing Bill for Want of Prosecution.

A motion for an injunction having been ordered to stand over, with liberty for the plaintiffs to bring an action, an action was commenced, and shortly afterwards an answer was put in. No further proceedings having been taken in the action for nine months after answer, the bill was dismissed for want of prosecution.

Mr. Amphlett, on behalf of the defendant, moved to dismiss the bill for want of prosecution.

The bill was filed, on the 17th of July 1856, to restrain the infringement of the plaintiffs' patent. On the 31st of July a motion for an injunction was ordered to stand over, with liberty for the plaintiffs to bring an action.

The plaintiffs accordingly commenced an action on the 28th of August, and on the 8th of October the defendant put in his answer denying the infringement. No further proceedings were taken, either in the action or in the suit, until the 1st of August 1857, when notice of the present motion was served upon the plaintiffs.

By an affidavit, filed on the part of the plaintiffs in opposition to the motion, it was stated that the reason for their not having proceeded with the action was, that they were informed the defendant had discontinued the manufacture complained of; but that the defendant, having lately resumed the manufacture, steps were now being taken for immediately proceeding with the action.

Mr. G. L. Russell, for the plaintiffs, cited *Bell v. Bell* (1), in which the motion for an injunction was made on the 8th of May, and ordered to stand over, with liberty for the plaintiff to bring an action; the answer was filed on the 6th of June, and the motion to dismiss was made on the 7th of December. There *Rolfe, V.C.* considered that a reasonable time for the bringing of the action could not elapse until the defendant made his application.

Mr. Amphlett replied.

WOOD, V.C.—The plaintiffs have not even a plausible excuse for the delay that has taken place. The order retaining the bill, with liberty to bring an action, does not prevent the making of an order to dismiss for want of prosecution. The answer to this bill was put in on the 8th of October 1856, and by it the defendant admits that he is using the materials complained of. He expresses an intention of continuing to use them, and denies that he is infringing the plaintiffs' patent. The parties are at arm's length, the defendant is actually defying the plaintiffs; and yet for more than nine months after the answer is put in, the plaintiffs take no step. It would be very unjust if, after all this delay, the plaintiffs were to obtain at the hearing an account going back to the filing of the bill. They must file a new bill, and then the account will be from the filing of that, instead of the old bill. *Bell v. Bell* was very different in the matter of dates, which are most material. The bill must be dismissed, with costs.

KINDERSLEY, V.C. }
 April 29; }
 May 8; } CANNOCK v. JAUNCEY.
 June 24. }

Mortgage — Priority — Redemption — Judgment.

*A father and son entered into an arrangement by which the father contracted to sell to his son three different estates, all of which were subject to mortgages, one of these mortgages being for 880*l.*, which was also secured by a judgment confessed by both father and son. Upon the sale of the estate all the mortgages were paid off, and the son mortgaged the purchased property to three other persons for the purpose of raising the purchase-money. There was a further mortgage by the father of other property not included in the sale, to C, out of which the 880*l.* was paid off, and the judgment was assigned to C. by the mortgagee. Some time after the purchase the third mortgagee and the son gave six months' notice to the first mortgagee*

(1) 14 Jur. 1129.

to pay off the mortgage. Before the expiration of the notice the first mortgage was assigned to C, who then claimed priority in respect of his judgment, and refused to be paid off unless the 880*l.* were also discharged; and he advertised the property for sale. The same solicitors were employed in negotiating the whole transaction, and it was the understanding of all parties that the purchaser's three mortgagees were to take the property unaffected by any prior incumbrance. Upon a bill filed by the third mortgagee and the son to restrain the sale by C, and for redemption of the first mortgage,—it was held, that C. was not justified in claiming priority for his judgment over the three mortgages, and he must pay the plaintiff's costs. Decree to restrain the sale and for redemption.

The facts of this case, which were of a complicated nature, are fully stated by the Vice Chancellor in his judgment.

Mr. Rolt and Mr. G. M. Giffard appeared for the plaintiff.

Mr. Glasse, Mr. C. Barber and Mr. Bevir, for the defendants.

Mr. Rolt, in reply.

The following cases were cited :—

Burrowes v. Lock, 10 Ves. 470.

Turner v. Harvey, Jac. 169.

Whitworth v. Gaugain, 1 Phil. 728 ;
s. c. 15 Law J. Rep. (N.S.) Chanc. 433.

Kinderley v. Jervis, 22 Beav. 1 ; s. c.
25 Law J. Rep. (N.S.) Chanc. 538.

Watts v. Porter, 3 El. & B. 743 ; s. c.
23 Law J. Rep. (N.S.) Q.B. 345.

Bowles v. Stewart, 1 Sch. & Lef. 209.
Beavan v. Lord Oxford, 25 Law J.
Rep. (N.S.) Chanc. 299.

Sugden's Vendors and Purchasers, last
edit. 414.

Arnot v. Biscoe, 1 Ves. sen. 95.

June 24. — KINDERSLEY, V.C. — The facts of this case are as follows :—Cannock the elder was the owner of several small estates, one was called Wincoles, another Taylors, a small property consisting of two cottages, and another small property called the Lamb and Flag, and certain other

properties not necessary to be mentioned. These properties, or some of them, were subject to several mortgages, and in or previous to the month of April 1846 Cannock the elder contracted with his son Cannock the younger to sell to him three of those portions of properties, Wincoles, Taylors, and the two cottages, free from any incumbrance, at the price of 6,000*l.* There had been a previous agreement in writing entered into in July 1844, when the mortgages amounted only to about 4,800*l.* for the sale of the equity of redemption to Cannock the younger for 1,200*l.*, but subsequently to that agreement other mortgages had been effected to an amount exceeding 6,000*l.*, which sum was to be the purchase-money for Wincoles, Taylors, and the two cottages. The mortgages to which the property was subject in April 1846 were, first, a mortgage of Taylors for 1,600*l.* to the trustees of Mrs. Bassets, which became vested in May 1846 in Mr. Chamberlain, one of the defendants to this suit. The second mortgage affected Wincoles only ; that was for 2,200*l.* and was then vested in Mr. Thomas Higgins. A third mortgage, which affected Taylors and Wincoles, and some other property, for 1,200*l.*, was then vested in a person named Boulter ; a fourth mortgage, affecting Taylors and Wincoles only and some other property of Cannock the elder, for 1,500*l.*, was vested in the defendant Chichester ; a fifth mortgage, affecting the Lamb and Flag and the two cottages, for 880*l.*, was then vested in Elizabeth Higgins. The aggregate of the principal monies secured by these five mortgages amounted to 7,380*l.* As a collateral security for the 880*l.* a judgment had been confessed to Elizabeth Higgins by Cannock the elder and also by Cannock the younger, for 1,760*l.* The effect of the contract for the sale to Cannock the younger, of Wincoles and Taylors, and the two cottages, for 6,000*l.* was, that it imposed on Cannock the elder the necessity of discharging those properties from the mortgages affecting them. Cannock the younger not having 6,000*l.* to pay the purchase-money with, was under the necessity of borrowing that sum on the security of the property he was about to purchase, and for that purpose, on the 2nd of April 1846, he applied to Messrs.

Higgins and Chamberlain, solicitors, of Ledbury, to raise for him 4,000*l.*, and also he employed Messrs. Higgins and Chamberlain to investigate the title and to complete the purchase for him, and to prepare the necessary conveyances. Higgins and Chamberlain were not previously the solicitors of Cannock the younger. The firm of Higgins and Chamberlain at that time consisted of the defendants Francis Higgins and Charles Morton Berkeley Chamberlain, and J. Allen Higgins; but not long afterwards J. A. Higgins ceased to be a member of the firm.

In pursuance of the instructions which Higgins & Chamberlain received from Cannock the younger, they applied to, and succeeded in getting a promise from Mr. Jauncey, a client of their own, and the first defendant on the record, to advance 4,000*l.* on mortgage; and on the 30th of April 1846 they wrote to Cannock the younger, informing him that they had procured a client, Mr. Jauncey, to lend the 4,000*l.* at 4*l.* per cent. The 2,000*l.* which Cannock the younger wanted, in addition to the 4,000*l.*, to make up his purchase-money of 6,000*l.*, he hoped to procure from his wife's trustees, namely, John Stratford Collins, one of the plaintiffs in this suit, and a Mr. Jones, who has since died. Over the 2,000*l.* Mrs. Cannock had an absolute power of appointment. The trustees hesitated about the propriety of the advance, and that hesitation was communicated to Higgins & Chamberlain on the 9th of May 1846. On the 11th of May, Cannock the younger and his wife came to Higgins & Chamberlain, and had an interview with Mr. Higgins. Mrs. Cannock expressed her annoyance at the hesitation of the trustees to make the advance, as she had the absolute controul over the fund; and it was arranged that she should obtain a copy of her settlement from Mr. Collins, and send it to Messrs. Higgins & Chamberlain for their perusal. On the 14th of the same month Mr. Abell, a clerk of Higgins & Chamberlain, went over to Ross, where Mr. Collins and also Mr. and Mrs. Cannock resided, and had an interview with them as to the value of the estates that were about to be purchased by Cannock the younger, and which were the subject of the mortgages. Abell, on that occasion,

stated as his opinion that it was a beneficial purchase for Cannock the younger, but that the purchase could not be completed unless Cannock the younger procured the 2,000*l.*, and thereupon Mr. Collins intimated his readiness to consent to make the advance on mortgage. Afterwards, on the 28th of the same month, Abell went again to Mr. Collins, and then perused Mrs. Cannock's settlement, and saw that she had absolute controul over the fund. On the 8th of June 1846, Higgins & Chamberlain, at the request and by the direction of Cannock the younger, sent to Mr. Collins a copy of the draft mortgage which they had prepared for securing the 4,000*l.* to Mr. Jauncey, and promised to send the draft of the conveyance of the premises to Cannock the younger in a few days. The draft conveyance was never sent, and was never subsequently asked for by Collins. The draft of the intended mortgage for 2,000*l.* to Mr. Cannock's trustees was prepared from a copy of the draft mortgage to Jauncey. Some differences afterwards arose between Cannock the elder and Cannock the younger, the father insisting that the son ought, in addition to the 6,000*l.* purchase-money, to pay the further sum of 225*l.*; and it was ultimately arranged that Cannock the younger should pay to his father an additional sum of 200*l.* In order to provide that 200*l.*, and also for the expenses of the whole transaction, it became necessary for Cannock the younger to raise a further sum of 700*l.*; and accordingly it was arranged that Higgins & Chamberlain should procure, besides the 4,000*l.* from Jauncey, an additional loan of 700*l.* on a second mortgage. Mrs. Cannock and her trustees assented that the 2,000*l.* should be subsequent to the intended mortgage to Jauncey, and the intended second mortgage for 700*l.* Collins, the trustee of Mrs. Cannock, was a solicitor, and had a son, W. H. Collins, also a solicitor, and who was not in partnership with his father. They, however, carried on their business in the same offices, and employed very much the same clerks. W. H. Collins was the solicitor for Mrs. Cannock and her trustees in this matter, and he, on the 10th of July 1846, wrote to Higgins & Chamberlain, informing them that an unexpected

delay had arisen to prevent the 2,000*l.* being raised so soon as was expected, and at the same time he sent to them a copy of the draft of the proposed mortgage, which had been prepared by him for securing the 2,000*l.* to Mrs. Cannock's trustees. On the 15th of July Abell went to Ross, and saw Cannock the younger, Mrs. Cannock, and her trustees, Collins and Jones, and after some conversation about the proposed advance, on Mr. Abell's representation that the purchase would be a beneficial one for Cannock the younger, it was agreed that the advance should be made. The whole transaction was completed on the 25th of July 1846. The arrangement that was then intended and carried into effect was as follows:—that the existing mortgage of 1,600*l.* which was vested in Chamberlain, the mortgage for 2,200*l.* which was then vested in Thomas Higgins, the mortgage for 1,200*l.* then vested in Boulter, and 1,000*l.* part of the 1,500*l.* vested in Chichester, should be paid off. Those sums amounted together to the sum of 6,000*l.*, the amount of the purchase-money. There then remained of the existing mortgages 500*l.*, the residue of Chichester's 1,500*l.*, and the 880*l.* secured on the Lamb and Flag, and the two cottages, to Elizabeth Higgins. It was further arranged that Chichester should, in addition to the 500*l.* which would not be paid off, lend Cannock the elder a further sum of 1,332*l.*, making the sum of 1,832*l.*, and that that sum should be secured to him by a mortgage from Cannock the elder on the Lamb and Flag, and some other property not included in the contract of sale to Cannock the younger; and that out of the 1,332*l.* which was to be advanced by Chichester to Cannock the elder, the 880*l.* due to Elizabeth Higgins should be paid off, and that she should join in conveying the Lamb and Flag to Chichester, and also join in conveying the two cottages to Cannock the younger; and that the 4,000*l.*, 700*l.* and 2,000*l.*, which was to be lent to Cannock the younger, should be applied in paying off the 1,600*l.* to Chamberlain, the 2,200*l.* to T. Higgins, the 1,200*l.* to Boulter, and the 1,000*l.* (part of the 1,500*l.*) to Chichester, and also the 200*l.* which Cannock the younger was to pay to his father under the subse-

quent arrangement, and the expenses of the whole transaction.

Accordingly six deeds were prepared and executed on the 25th of July. The first of the deeds was a conveyance by way of mortgage to Chichester of the Lamb and Flag and other property of Cannock the elder not comprised in the sale to Cannock the younger, to secure 500*l.* residue of his former mortgage, and the further sum of 1,332*l.*, making 1,832*l.*, and out of the 1,332*l.* thus advanced, the 880*l.* was paid to E. Higgins. The parties to that deed who joined in conveying the property to Chichester were Cannock the elder, Cannock the younger, Boulter, E. Higgins, J. A. Higgins, Abell and Chichester. And by the same deed E. Higgins assigned to Chichester the benefit of the judgments which she held from Cannock the elder and Cannock the younger to secure the 880*l.*, by way of additional security to Chichester for the 1,832*l.*

The second deed which was prepared and then executed was the conveyance of Wincoles, Taylors, and the two cottages to Cannock the younger. The parties to that deed were Cannock the elder, Chamberlain, the Rev. Thomas Higgins, Boulter, Chichester, E. Higgins, Francis Higgins, J. A. Higgins and Cannock the younger. These deeds, though only executed on the 25th of July, were respectively dated the 7th of July 1846. The third deed was dated the 25th of July 1846, and was a mortgage by Cannock the younger of Wincoles, Taylors, and the two cottages to Jauncey to secure him his 4,000*l.* The fourth was a similar mortgage of the same date to the Rev. J. Higgins to secure to him the 700*l.* Those four deeds were prepared by Higgins & Chamberlain. The two remaining deeds which had been prepared and executed at this time were prepared by W. H. Collins, the solicitor for Mrs. Cannock and her trustees. The first of them was a deed-poll, by which Mrs. Cannock exercised her power of appointment over the 2,000*l.*, and authorized the advance of that sum upon this third mortgage, that is, subject to the prior mortgages to Jauncey for 4,000*l.*, and to the Rev. J. Higgins for 700*l.*; and the sixth deed was the mortgage by Cannock the younger to Collins and Jones, the trustees for Mrs. Cannock,

of the 2,000*l.* All the money thus advanced to Cannock the younger by his mortgagees, and the money advanced by Chichester to Cannock the elder, had been paid at the same time, and into the hands of Higgins & Chamberlain; and the result of the whole was, that Cannock the elder remained the owner of the Lamb and Flag and other property not comprised in the sale to Cannock the younger, discharged from all the prior mortgages, but subject to the new mortgage to Chichester for 1,832*l.*, and Cannock the younger became the owner of the Wincoles, Taylors and the two cottages, subject to the three new mortgages, that is, the mortgage to Jauncey for 4,000*l.*, to J. Higgins for 700*l.*, and to Mrs. Cannock's trustees for 2,000*l.* The expenses, together with the 200*l.* to be paid by Cannock the younger to Cannock the elder, exhausted the 700*l.*; and the 4,000*l.* and 2,000*l.* paid the purchase-money, and got rid of the prior mortgages, so far as Cannock the younger was concerned, subject to the effect of the question of the assignment of the judgment. About two years afterwards the Rev. J. Higgins died, and his executors transferred the mortgage to him for 700*l.* to a Mr. Seager. Not long after Mr. Seager died, and his administrators transferred that mortgage to Messrs. Jones and Powell. In June 1850 E. Higgins, who had become a trustee of the judgment for the benefit of Chichester, died, and the judgment was revived in the usual way by *scire facias* against the Cannocks, elder and younger. In November 1850 Cannock the younger delivered possession of the mortgaged premises to Jones and Powell, the holders of the mortgage for 700*l.* In September 1851 Cannock the younger became bankrupt, and Messrs. Nicholson and Carter, two of the defendants, were appointed his assignees; Jones and Powell and Mrs. Cannock's trustees desired to pay off Jauncey's mortgage, which was prior to them, and accordingly a notice, dated the 26th of September, was on the 13th served on Jauncey, and also upon Mr. Chamberlain, to the effect that they intended to pay off Jauncey's mortgage of 4,000*l.* in six months, and Cannock the younger confirmed that notice; and upon that it appears that Chamberlain, on behalf of Chichester, insist-

ed on the right of Chichester to have a prior charge on the premises by virtue of the judgment to the extent of 880*l.*, that is, prior to all three mortgages. Notwithstanding the notice that Jauncey had received of paying off his mortgage, he on the 23rd of June 1852 transferred his mortgage to Chichester. The offers to redeem the 4,000*l.* mortgage were repeated to Chichester, and refused, unless, in addition to the 4,000*l.*, they would pay him 880*l.*, which was insisted upon as the effect of the judgment; that is, the right to claim it was insisted upon by virtue of the judgment. On the 10th of April 1852 an action of ejectment was commenced to recover possession of the premises, and the lessors of the plaintiff in that action were numerous. It was thought expedient to include everybody who could by possibility be supposed to have any interest prior to the title of the persons in possession. There were demises by Francis Higgins, the trustee of a term, who was one of the firm of Higgins & Chamberlain; by J. A. Higgins, also a trustee of a term; by Jauncey the mortgagee for 4,000*l.*; by Chichester who had got the assignment and claimed the benefit of the judgment; and by Chamberlain and Mr. Williams. Mr. Williams was merely trustee of a term, and had no beneficial interest. That action would have come on for trial at the Summer Assizes of 1852, but the plaintiffs thought fit not to have the action tried; but afterwards, while that action was pending, the property was advertised for sale by Messrs. Higgins & Chamberlain on behalf of their clients, or some of them, and the time fixed for the sale was the 29th of September 1852, and in the particulars and conditions of sale it was stated there was an action pending to recover possession, and that possession could not be given until the result of that action was known; and accordingly, on the day before that sale was to be effected, this bill was filed for the purpose of establishing the right insisted upon by the plaintiffs to redeem the 4,000*l.* mortgage, and to postpone the judgment to all the three mortgages, and to restrain the intended sale as well as the ejectment.

The principal question, if not the only one, in the cause, is upon those facts, whe-

ther Chichester is entitled, by virtue of the judgment thus assigned to him as against Cannock the younger, to a charge on the premises mortgaged to Mrs. Cannock's trustees, in priority to their mortgage. This depends on the various transactions which occurred between the 1st of April and the 25th of July 1846. Now, there has been some controversy as to the character in which Messrs. Higgins & Chamberlain were acting with respect to some of the parties concerned. It appears to me that they were certainly acting as solicitors for all the persons who, previously to the conclusion of this transaction, were mortgagees of the property. They were solicitors for Chamberlain—in fact, he was one of the firm; they were solicitors for the Rev. Thomas Higgins, for Boulter, for Chichester, the intended mortgagee of Cannock the elder, and for E. Higgins. They were also the solicitors for Jauncey and the Rev. Joseph Higgins and Chichester. They were, in fact, solicitors for everybody except Cannock the elder and Mrs. Cannock and her trustees. They were solicitors for Cannock the younger—that is, they were distinctly employed by him to raise the 4,000*l.* from Jauncey, 700*l.* from Mr. Higgins, and to complete the transaction of the purchase and investigate the title, and do everything. Cannock the elder had for his solicitor Mr. Evans. As regards Mrs. Cannock and her trustees, the matter certainly presents a small degree of ambiguity. I am of opinion that they were not solicitors for Mrs. Cannock or her trustees in this transaction. If they can be considered to have acted for Mrs. Cannock at all, it was only to the extent of assisting her in inducing her trustees to lend the 2,000*l.*; and of course they acted as solicitors of Cannock the younger, who was wanting to complete this purchase, and for that object to raise the 2,000*l.*; and also solicitors for Jauncey, who was lending 4,000*l.* They were naturally acting in the matter for the purpose of inducing the trustees of Mrs. Cannock to advance the money, and when Mrs. Cannock complained to them that her trustees were impressed with the spirit of opposition, she undertook to procure, and did procure, the inspection of her settlement, to see whether she had not the full right to deal with

the property; but still it does not appear to me that Messrs. Higgins & Chamberlain were acting as solicitors for Mrs. Cannock or her trustees in respect of this mortgage for 2,000*l.* But Higgins & Chamberlain, who were solicitors for so many of the parties, were perfectly acquainted with all the circumstances, and with all the intentions of the parties. They knew everything that was intended to be done, and the whole matter being one transaction, completed together, and of which no part would be complete without the whole, it appears to me that their knowledge of all matters must be considered as the knowledge of the persons for whom they were respectively acting. Those clients were acting by them, and their knowledge, their acts, their omissions were the knowledge, acts and omissions of the persons for whom they were respectively acting.

Now, having regard to the nature and particulars of the arrangement carried into effect on the 25th of July 1846, and all the particulars of the then existing mortgages, and the intended mortgages, it is obviously quite necessary that the whole transaction should be carried out at once, simultaneously as one general scheme. No part could have been left incomplete without disturbing and preventing the completion of the whole: unless the existing mortgagees were either paid off or in some way satisfied, they would, of course, have refused to convey the premises to Chichester, the mortgagee of Cannock the elder, and they would have refused to convey the premises that were comprised in the sale to Cannock the younger to his mortgagee, and they could not be paid except by the money which was to be advanced by the new mortgagees. The new mortgagees would not advance their money without having their mortgages completed and discharged of the prior mortgages, and the whole of the several conveyances and mortgages and the advance and payment of the several sums of money must necessarily have taken place, and did take place, at the same time. It is unnecessary to consider whether it would have been practicable to have arranged the matter so as to have kept alive the existing mortgages, and so have given to the new mortgagees

the benefit of the interest held by those prior mortgagees, without doing what was done to convey the property discharged of the mortgages to Cannock the younger, and then create new mortgages. It is in vain to consider whether that might have been done.

Possibly the ingenuity of conveyancers might have devised a mode of doing it to some extent; but considering the complication of the mortgages—that some mortgages comprised only the property intended to be bought by Cannock the younger, that there were other mortgages affecting property that was not intended to be conveyed—it appears to me that it was exceedingly reasonable and convenient, and what I think an experienced conveyancer would have intended, that it should be done in the way it was done; that is, get rid of the existing mortgages so complicated, and let the property be conveyed to Cannock the younger, and then let him create the new mortgages. As far as I can make out, after investigating the thing very minutely, I think, even if it had been attempted to be done by a transfer of the old mortgages to the extent to which that was practicable, the effect would not at all have benefited Mrs. Cannock's trustees. But although all these transactions, these different instruments, these payments of money necessarily took place simultaneously, at the same time and at the same place, still, from the very nature of the instruments and of the contents of those instruments, we must consider some of them as being prior in point of execution to others of them. Thus, the mortgage to Chichester and the conveyance to Cannock the younger must be considered as having been executed before the mortgage to Jauncey and to the Rev. J. Higgins, and to Mrs. Cannock's trustees, because until Cannock the younger had got the fee in him he could not make a proper conveyance to the new mortgagees. Indeed, that is so obvious that they are made to bear a prior date—they are made to bear date the 7th of July, the other deeds not being completed or bearing date till the 25th of July. Cannock the younger, as I have said, could not convey to his mortgagees the property until it had been first conveyed to him, and some time (it

signifies not how short) must be considered to have elapsed after the estate was conveyed to Cannock the younger, and before he conveyed it to his mortgagees; and, however short you may suppose the period of time during which the property was vested in Cannock the younger, still it was long enough for the judgment against Cannock the younger to operate and take effect as a charge on the property, which had thus become the property of Cannock the younger.

The question is, whether in equity Chichester is entitled to the benefit of that? Now, I am quite satisfied, after going through all the pleadings and all the evidence, that it was entirely overlooked by Messrs. Higgins & Chamberlain at the time, and long after the time when this transaction was completed, that the effect of assigning the judgment to Chichester, and conveying the property to Cannock the younger, would be to make the judgment a charge on the property in the hands of Cannock the younger, which would have priority over the mortgages executed by him. I do not attribute to Higgins & Chamberlain a preconceived design of accomplishing that object. I am satisfied that they assumed and intended that the new mortgages were not to be subject to any prior charge on the property. They certainly assumed and intended so on behalf of their clients Jauncey and the Rev. J. Higgins, who were two of the mortgagees; and they were well aware that it was so assumed by W. H. Collins, the solicitor acting on behalf of Mrs. Cannock and her trustees. There is nothing in the evidence to lead me to the conclusion that either Mrs. Cannock or her trustees, or their solicitor, knew even of the existence of the judgment against Cannock the younger; and, at all events, even if they knew of its existence, they certainly were not informed of its being assigned or intended to be assigned to Chichester, or kept alive. And as that judgment was only a collateral security for the 880*l.* mortgage-debt to Elizabeth Higgins, which was not intended to be assigned, nor was assigned, but actually paid off, they might even, if they had known of the existence of the judgment, have well concluded that it was satisfied by the

discharge of the debt for which it had been given as a security. If Messrs. Higgins & Chamberlain did contemplate and intend that Chichester should, by means of the judgment being kept alive and assigned to him, have a charge on the property conveyed to Cannock the younger in priority to the new mortgages effected by him, it appears to me they were guilty of a gross fraud in not disclosing that intention, and disclosing the fact of the judgment having been kept alive and assigned to Chichester; and if I arrived at that conclusion, I should hold them responsible for the consequences of such conduct. But I am satisfied they had no such intention at the time. The worst I can attribute to them is a very venial legal blunder, which was common to all parties so far as the facts were known. It was merely an oversight as to the consequences of the several instruments they were causing to be executed. And I am sure that if it had occurred to them that such would have been the consequences, they would have taken measures to avoid them. It is because, and only because, they overlooked the legal point, that they can stand acquitted of a fraud. They did not communicate to the intended mortgagees of Cannock the younger the fact of the judgment having been kept alive and assigned to Chichester, because they did not consider that those mortgagees had or could have any concern with the fact; that is, they conceived and intended that their interests should be wholly unaffected by the judgment. Now, in assuming, as I do, that it was the understanding and intention of all parties that the intended mortgagees of Cannock the younger should take the mortgage property unaffected by any prior charge or incumbrance, I found my decision, in the first place, independent of any specific evidence of the fact, upon the very nature and circumstances of the transaction. It is hardly credible, when you look at all the facts and all the circumstances, that those new mortgagees, Jauncey and Higgins, and Mrs. Cannock's trustees—at least it is hardly conceivable, that Mrs. Cannock's trustees, the last of those mortgagees—should consent to advance their money on the security of the property if they had the least idea that

there were to be not only the two charges of 4,000*l.* and 700*l.* prior to the mortgage of Mrs. Cannock's trustees, but in addition to that, and prior to them all, another sum of 880*l.*

But another ground, *valeat quantum*, for coming to the conclusion that such was the understanding and intention at least of Higgins & Chamberlain that there was to be no such prior charge, is this—that if it were otherwise, I must, as I have already said, impute to them a deliberate fraud, that is, a suppression of their design of creating and effecting this prior charge. If that was their intention they ought to have communicated the fact, and have left Mr. Collins, acting for Mrs. Cannock's trustees, to judge what the consequences of that fact would be, and how far it would be expedient to lend money with the additional charge; and I do not see any sufficient ground for imputing that fraudulent intention to these gentlemen. But besides those general grounds, I think there are special proofs of the intention of all parties, and particularly the intention of Messrs. Higgins & Chamberlain acting for most of them. The instructions which they set out in their answer which they gave to their conveyancing counsel, though not at all conclusive on the subject, seem to me to point that way; for according to those instructions it is stated that all the incumbrancers are to join in the conveyance to Cannock the younger, and that the 880*l.* to Mrs. Higgins is to be paid off out of the money which is to be lent to Cannock the elder by Chichester, who is to become a new mortgagee to Cannock the elder, not affecting this property mortgaged to Mrs. Cannock's trustees. But the instructions state also that it is intended that the judgment is to be assigned to Chichester as a further security for the debt due to him from Cannock the elder. But what appears to me to shew more conclusively the understanding and intention of the parties is this, that the mortgage-deeds for securing the 4,000*l.* to Jauncey and the 700*l.* to the Rev. J. Higgins, which were prepared by Messrs. Higgins & Chamberlain, contained covenants on the part of Cannock the younger, which were entirely inconsistent with the supposition that Chichester was intended to have a prior charge over those

mortgages by virtue of the judgment assigned to him; because, in the first of these two mortgages, Cannock the younger is made to covenant that in default of payment of the mortgage-money of 4,000*l.*, the mortgagee may enter and enjoy the premises free from all charges and incumbrances. That is quite inconsistent with the supposition that he could only enter and enjoy subject to a charge of 880*l.* in favour of Chichester. And in the other of the two mortgages prepared by Higgins and Chamberlain, the mortgage to the Rev. J. Higgins for 700*l.*, there was a similar covenant, but with an express exception of the mortgage to Jauncey, and without mention of any other incumbrance, which of course would have been mentioned if it had been intended there should be any other excepted. But that is not all, for the mortgage to Jauncey—or rather a copy of the draft mortgage to Jauncey—which had thus been prepared by Higgins & Chamberlain, was by them, upon the application of Collins, the solicitor for Mrs. Cannock's trustees, sent to him in order that he might from that prepare the mortgage that was to be made to Mrs. Cannock's trustees; and it appears that the mortgage to Mrs. Cannock's trustees was actually prepared from the draft copy of the mortgage to Jauncey, and of course contains a similar covenant, but with the exception of two prior mortgages, that is, the mortgage to Jauncey and to the Rev. J. Higgins, but it contained no exception of or allusion to any other charge. I may further add, that the very draft of the mortgage prepared for the solicitor of Mrs. Cannock's trustees was also sent afterwards to Higgins & Chamberlain: whether actually perused and examined by them does not distinctly appear. These considerations lead me to the conclusion beyond a shadow of doubt that not only Mrs. Cannock and her trustees and their solicitor, Mr. W. H. Collins, but also Messrs. Higgins & Chamberlain, fully understood and intended that the trustees of Cannock the younger should take the premises unaffected by any prior charge. Higgins & Chamberlain were, I believe, acting *bona fide* in the matter at the time; but in their endeavour to carry out that intention they fell into a mistake of law—that is, they overlooked the point, or their

conveyancer overlooked it. There was no fraud or dishonesty in that, but the dishonesty consists in this, that, after the mistake was discovered, Mr. Chichester has endeavoured to avail himself of that benefit which the mistake has enabled him to claim, and which it never was intended that he should have; and I cannot but express regret that Messrs. Higgins & Chamberlain, whom I acquit of any preconceived fraud, should have been so active as they have been in assisting Mr. Chichester in carrying out this attempt. Now, although there was no precise and specific contract between Chichester and the mortgagees of Cannock the younger, yet Chichester being affected with all the knowledge which his solicitors acquired in the course of the transactions and in relation thereto, must be taken to have known that Mrs. Cannock's trustees were advancing their 2,000*l.* on the supposition that their mortgage was not subject to any prior charge other than the 4,000*l.* and 700*l.*; and Chichester being, as he insists, entitled to such prior charge, stood by without disclosing its existence; and not only so, but himself received payment of 1,000*l.* in part discharge of his 1,500*l.* mortgage out of the money advanced by Mrs. Cannock's trustees and by the other mortgagees of Cannock the younger. It appears to me to be quite against all equity that he should be permitted to set up his charge in priority to the mortgage to Mrs. Cannock's trustees.

It was insisted, on the part of Chichester, that the solicitors of Mrs. Cannock and her trustees were guilty of laches in not searching for judgments; and no doubt there is some ground for that observation. I think there was some negligence on the part of the solicitor for Mrs. Cannock's trustees. He not only did not search for judgments, but he seems never to have called for an abstract of title, nor even to have asked a single question about the title, but he contented himself with procuring a copy of the draft mortgage to Jauncey as a model or precedent from which to prepare the mortgage to Mrs. Cannock's trustees; but this negligence, or apparent negligence, may in some degree be accounted for by the consideration that the intended mortgagor was Mrs.

Cannock's husband, and that the title to the premises was at that time actually being investigated, or had just been investigated, by Messrs. Higgins & Chamberlain, as the solicitors of Cannock the younger, and that Jauncey and the Rev. J. Higgins, who were also clients of Higgins & Chamberlain, were interested in seeing that the property was free from incumbrances. Under such circumstances it is not very surprising, especially if there was an object to save expense, that the solicitor for Mrs. Cannock and her trustees should trust that Higgins & Chamberlain would do all that was necessary to protect the interests of Cannock the younger and his mortgagees; but, at all events, whatever degree of negligence is to be imputed to Mr. Collins, it could not justify Chichester or his solicitors, supposing they knew of the charge which Chichester thus obtained, in taking advantage of the other's ignorance or negligence, and being silent as to the effect of the charge; or assuming, as I do assume, that it did not occur to them, then it is contrary to equity that they should now attempt to set it up. Higgins & Chamberlain, acting for Chichester, either did or did not know that the judgment would give Chichester a charge on the property conveyed to Cannock the younger, prior to the mortgages granted by him. If they did know it, they committed a fraud on behalf of Chichester by suppressing the facts. If they did not know it—that is, if they overlooked the legal consequences of the facts, all of which were within their own knowledge—how can they object that the solicitor for Mrs. Cannock and her trustees was negligent in not acquiring a knowledge of the facts when even a full knowledge of them might not have enabled him, as it did not enable Higgins & Chamberlain, to perceive what would be the legal effect of those facts?

Being of opinion that Chichester is not entitled to set up his judgment in priority to the mortgage for 2,000*l.* to Mrs. Cannock's trustees, I must hold that Chichester was not justified in bringing the ejectment or proceeding to a sale after the repeated offers made to pay off the 4,000*l.* The injunction, of course, will be made perpetual, and Mrs. Cannock's trustees must have a decree entitling them to redeem the

two mortgages for 4,000*l.* and 700*l.* As this suit has been occasioned by what I consider the unjust claim on the part of Chichester to have this prior charge in respect of the judgment, I think Chichester must pay the plaintiff's costs, including the costs of Cannock the younger, which the plaintiff must pay him, as he is merely here in respect of his wife being plaintiff. With regard to those who lent their names in the ejectment, and particularly Jauncey, who thought fit to transfer his mortgage after he had received notice of being paid off, they are not entitled to costs. And with regard to Jones and Powell, who hold the second mortgage, and which will be redeemed now, there will be the usual direction that they shall add their costs to the mortgage, and they will be redeemed in the common way. I do not consider Messrs. Higgins & Chamberlain entitled to any costs.

[IN THE HOUSE OF LORDS.]

1857. } THE MAYOR, ALDERMEN AND
July 10, } BURGESSES OF BEVERLEY &
20, 24. } THE ATTORNEY GENERAL.

Charity—"Overplus"—Increase.

In 1652 a testator gave to the mayor and corporation of the town of B. for ever an estate (which he described as producing 47*l.* a year), on trust to pay to the lecturer of the town of B. 10*l.* a year, and to the schoolmaster of the said town 10*l.* a year, and to the testator's sister for her life 20*l.* a year, and after her decease the said 20*l.* were to be paid to three poor scholars of the town of B. for their maintenance at the University of Cambridge; to each one of them the sum of 6*l.* 13*s.* 4*d.* But if there should not always be three poor scholars of the town of B. at the University who should stand in need of that maintenance (for his will was, that no son of any alderman, or of any other of sufficient ability to maintain his son at the University, should be capable of that maintenance), he willed that, in the interim, so much as could be spared of the said 20*l.* (no poor scholar having above 6*l.* 13*s.* 4*d.* yearly) should be distributed amongst the poorest people of the town, and while the taxes for the maintenance of the army of

the Commonwealth should continue, "what the mayor, &c., could not spare out of the overplus of rent, viz. 7l.," should be deducted out of the 20l. given to the lecturer and schoolmaster, so that his sister should always have her 20l. yearly. An increase in the rents took place:—Held, that, subject to the specified charges, the increased rents went to the mayor and corporation.

Robert Metcalfe, Doctor of Divinity, formerly one of the Senior Fellows of Trinity College, Cambridge, by his will, dated the 9th of October 1652, after reciting that he had purchased a farm called Silliards, in Gilden Morden, in Cambridge-shire, with 101 acres of arable land, and $7\frac{1}{2}$ acres of pasture, with the appurtenances, yielding the yearly rent of 47l., gave and bequeathed the said farm to the mayor, aldermen and burgesses of the town of Beverley, in Yorkshire, wherein he was born, and to their successors for ever, upon trust that they, their successors or assigns, should employ the yearly rent of the said farm, &c., in manner and form following, and not otherwise, namely, that they should pay yearly for ever unto the preacher, as he was commonly called, or lecturer of the said town of Beverley, and his successors, the sum of 10l.; and to the schoolmaster of the said town, and to his successors, in like manner, the sum of 10l.; and to his (the testator's) sister, Prudence Metcalfe, during her life, the sum of 20l. yearly; and after her decease that they should pay the said 20l. yearly for ever unto three poor scholars of the school of Beverley, commonly called the Free School, naturally born in the said town, for their better maintenance at the University of Cambridge, viz., to every one of the three poor scholars, 6l. 13s. 4d., the said three poor scholars to be appointed and approved from time to time by the said mayor, aldermen and burgesses, and their successors, and the lecturer and the schoolmaster of the said town, and their successors; and the said maintenance to be continued to every of the poor scholars until the time that they should have taken the degree of Master of Arts; but if there should not always be three poor scholars at the University of Cambridge, or ready to go to the University, who should stand in need

of that maintenance, and be poor men's sons who should not be able otherwise to maintain their children there (for his will was that no son of any of the aldermen, or of any others who were of sufficient ability to maintain their children at the University, should be capable of that maintenance), then he ordained that in the interim, till there should be such poor scholars, poor men's sons, what could be spared of the said 20l. (no poor scholar having above 6l. 13s. 4d.) yearly, should be distributed amongst the poorest people of the said town, together with the money which, in his said will, he should thereafter mention. The will then proceeded as follows: "Moreover, my will and desire is, that so long as the taxes or rates to the Commonwealth for the maintenance of soldiers shall continue, what the said mayor, aldermen and burgesses cannot spare out of the overplus of rent, viz. 7l. (for the farm is now as was formerly signified, let for 47l. per annum, and so hath been let heretofore), shall be deducted equally out of the 20l. per annum which they are to pay to their lecturer and schoolmaster, that my sister may have 20l. yearly and every year wholly and entirely paid unto her." And, after certain other dispositions, he gave and bequeathed unto the mayor, aldermen and burgesses, and to their successors, the sum of 450l. for the purchasing so much free land as would yield yearly the rent of 22l. 10s.; nevertheless in and with this trust and confidence reposed in them, that they and their successors, by their assign or assigns, should distribute 20l. of the said rent yearly for ever amongst the poorest of the people of their town, upon the 20th day of December, or the day before or after, as should be thought most convenient by the mayor and lecturer of the town for the time being. And the will then proceeded as follows: "And my will is, that so long as the taxes and rates due to the Commonwealth for maintenance of soldiers shall continue, that unless they can spare anything out of the 50s. overplus the said rates be defrayed out of the said 20l. yearly." The testator afterwards executed a codicil before he purchased some property situate at Over, in the county of Cambridge.

By his codicil, which bore no date, after reciting the bequest of 450*l.* to the said mayor, aldermen and burgesses, and their successors, for the purchasing of 22*l.* 10*s.* in free lands, to be distributed yearly unto the poorest people of the town for ever, and that since the making of his said will that purchase had been made by him in Over, and because a great part of the land was copyhold so that he could not without the purchasing of a court dispose of it according to his desire and intent to the use of his will, he had also purchased a court for that purpose; his will was, that that gift or legacy should be disposed of according to the true intent and meaning specified in his will, there being no difference in anything, but only that then a great part of the land would be copyhold.

From the testator's death to the time of the filing of the information the several charities mentioned in the said will received only the several specific sums mentioned therein, and the net surplus had been from time to time retained by the appellants.

On the 24th of November 1851 the Attorney General filed his information against the mayor, aldermen, &c., of Beverley, praying that it might be declared that this surplus ought to be applied to charitable purposes. The defendants put in an answer, and the cause was heard before the Master of the Rolls, who in March 1852 made a decree, declaring the defendants entitled only to seven forty-seventh parts of the rents of Gilden Morden, and five forty-fifth parts of the estate at Over, subject to defraying all expenses, and that the charities were entitled to the residue. This decree was confirmed by the Lords Justices (1). The present appeal was then brought.

Mr. Lloyd and *Mr. E. K. Karlake*, for the appellants, contended that the real desire of the testator was to benefit the town of Beverley, which object was attained by applying the increase in the surplus to the borough fund. They cited—

The Thetford School case, 8 Co. Rep. 130 b.

Jack v. Burnett, 12 Cl. & F. 812.

(1) 24 Law J. Rep. (N.S.) Chanc. 374.

The Attorney General v. Mayor of Bristol, 2 Jac. & W. 294.

The Attorney General v. the Skinners Company, 2 Russ. 407.

The Attorney General v. Smythies, 2 Russ. & M. 717; s.c. 2 Law J. Rep. (N.S.) Chanc. 58.

The Attorney General v. Brazennose, 2 Cl. & F. 295, and

The Mayor, &c. of South Molton v. the Attorney General, 5 H. L. Cas. 1; s.c. 23 Law J. Rep. (N.S.) Chanc. 567.

And they distinguished the present case from *The Attorney General v. the Drapers Company* (2).

The Attorney General and Mr. T. H. Terrell, for the respondent.—This case depended on the intention of the testator, which was to be discovered from the peculiar words of his will. The principle that must govern it was that stated by Lord St. Leonards in the *South Molton case* (3), and the same principle had been previously explained by Lord Langdale, in *The Attorney General v. the Coopers Company* (4), and was that which governed the decision in *The Attorney General v. Caius College* (5).

July 24.—The LORD CHANCELLOR stated the facts, and then said that the general principle governing these cases had been established in the *Thetford School case*, namely, that if all the rents of an estate were given to charity the whole estate was given, and any increase in the rents would go to that charity. In *The Attorney General v. Johnson* (6), that principle was acted on, and it had, in fact, never been disputed. On the same principle, if a testator gave the whole of his estate to charities, and then went on to apportion the rents among them, but did it in such a way as not to exhaust the whole, still, the general intention being clear, the surplus would be applied in the same manner. *The Attorney General v. Arnold* (7)

(2) 4 Beav. 67.

(3) 5 H.L. Cas. 32; s.c. 23 Law J. Rep. (N.S.) Chanc. 570.

(4) 3 Beav. 29.

(5) 2 Keen, 105; s.c. 6 Law J. Rep. (N.S.) Chanc. 282.

(6) Amb. 190.

(7) Shower, P.C. 22.

was a case of that sort. These rules had been so long established and so constantly acted on, that they could not now be permitted to be questioned. But their application must depend on the construction to be put upon each particular will—*The Attorney General v. the Mayor of Bristol and The Mercers Company* (8), in the latter of which cases Lord Lyndhurst, who then held the Great Seal, said (9), “The case of *The Attorney General v. the Mayor and Corporation of Bristol* was referred to for the purpose of establishing this position. Now, the only principle established, or rather confirmed, by that case was, that where there is a surplus under circumstances similar to the present, that is, where there is an annual sum granted, and a part of that annual sum only is appropriated to special objects, and there is a residue which the trustees hold, that is evidence of the intention of the donor that the surplus rent should belong to the persons to whom this property is, in the first instance, conveyed; but it is only evidence of the intention: it is liable to be repelled by any other evidence arising out of the instrument upon which that fact appears.” In *The Attorney General v. the Coopers Company*, it was doubtful whether the ultimate surplus was not given to charity just as much as the other sums. The devise was of houses described as let for 11*l.* a year: 8*l.* a year were apportioned in small sums to charities, and then there was a surplus of 3*l.*, which the testator gave to the Coopers Company, to be disposed of as they thought fit, but subject to charges and to the obligations to keep the premises in repair. Lord Langdale held that the surplus was to vary in proportion to the other sums. If that could be justified, it could only be justified on the ground that though it was called a surplus, it was a proportion of the whole sum. However, that case was not under review now, nor did he feel it necessary to say whether he himself should have come to the same conclusion as that at which Lord Langdale had arrived. The next case was that of *The Attorney General v. the Drapers Company*, where the testator de-

vised lands of the annual value of 100*l.* and apportioned 96*l.* thereof to charities, and then as to the remaining 4*l.* he said, “The residue of the said sum of 100*l.* a year (being 4*l.* yearly) I entreat the four wardens of the Drapers Company to accept for their pains, to be equally divided between them.” If these persons could be treated as charities, then the bequest would be exactly within the *Thetford School* case. But if not, if they were personal devisees, none of the previous cases warranted that decision. In truth, every case must stand on its own ground. Acting on that rule, he must say that he considered the decision in the present case to be erroneous. The testator meant the word “overplus” in no other than its *prima facie* and ordinary meaning. Nobody would have doubted that, if the testator had not mentioned what was the amount of that surplus. But that fact did not vary the intention, and it was quite clear that if the rents had fallen off, the charities would not have abated so long as there were 40*l.* a year received from the estate. And, at all events, 20*l.* a year must have been paid to the sister. The mayor and burgesses would alone have borne the loss. But there were other cases of a similar kind. If there were no poor scholars, the money was to go to the poor of the town. On the other hand, as no poor scholar was to have more than 6*l.* 13*s.* 4*d.*, though the rents had increased, the gifts to those objects of charity would not have increased, for the testator had forbidden that. These various circumstances shewed that the gift of the overplus to the mayor and burgesses was a gift which, imposing on them the risk of loss, bestowed on them also the chance of benefit. The case must, therefore, be governed by the *South Molton* case, and the decree of the Court below must be reversed.

LORD BROUGHAM entirely concurred. The *Thetford School* case and *The Attorney General v. Arnold* proceeded on identically the same principle. If there was an estate in fee, and a testator gave to A. B. the whole rents and profits of the estate, the fee continuing of the same value as at the time of the gift, or increasing in value, the original rents or the increased rents would go to A. B. There was, in fact, no doubt

(8) 2 Bligh, N.S. 165.

(9) Ibid. 178.

about the principle; the only doubt was as to its application to a particular case. That question must be decided by what appeared to be the intention of the testator. Here the intention was clearly to benefit the corporation by the gift of a surplus, which would vary in amount, and the increase of which was intended to go to the donees, after the charges imposed upon it had been satisfied. The decision of the Court below must be reversed.

LORD WENSLEYDALE was also of that opinion, having no doubt whatever upon the question of the construction to be put upon the will of the testator. The charges were fixed: the surplus alone was variable.

Decree reversed.

Re Robion 57 L.J. Ch-339.

[IN THE HOUSE OF LORDS.]

1857.	{	PHILPOTT v. THE PRESIDENT
July 20, 21,		AND GOVERNORS OF ST.
23, 24.		GEORGE'S HOSPITAL.
		THE ATTORNEY GENERAL v.
		PHILPOTT AND OTHERS.

Charity—Mortmain Act.

*A. devised to B. a piece of land in the hamlet of N. He then declared that he had long contemplated erecting and endowing almshouses on some part of his estate in the parish of N, and if within twelve months after his decease any person should give a piece of land as a site for such almshouses then as soon as the same had been legally dedicated to charitable uses he directed his trustees to pay to the trustees of the intended charity 60,000*l.*, to be devoted to the purposes of the said charity, but so that no part should be applied to the purchase of lands for the same. B. within the twelve months duly dedicated to the purposes of the charity that land which had been devised to him. On a bill filed to have the 60,000*l.* applied for the benefit of the charity,—Held, that the gift in the will of that sum, as it expressly excluded the purchase of land, was a valid bequest, and was not affected by the 9 Geo. 2. c. 36.*

By the will of the Earl Beauchamp, made on the 18th of June 1847, a piece of land in the hamlet of Newland, in the county of

Worcester, was devised to the Hon. C. G. Scott, his heirs and assigns for ever.

The will then proceeded thus:—"And whereas I have contemplated erecting and endowing almshouses, either upon some part of my estate or elsewhere in the hamlet of Newland aforesaid, for the residence of twelve or such larger number of poor men and women, members of the Church of England, who shall have been employed in agriculture and have been reduced by sickness, misfortune or infirmity; now, in case I happen to die without effecting such object, and any persons or person should within twelve months after my decease, at their, his or her expense, purchase or give a suitable piece of land in Newland aforesaid as a site for such almshouses, and with intent that the same should be devoted to such purpose, then I empower and direct the trustees or trustee for the time being of this my will, when and so soon as such land shall have been legally dedicated to charitable uses, provided they, he or she shall approve the scheme of the intended charity, and the rules and regulations proposed for the government thereof, to pay to the trustees of the said intended charity out of such part of my personal estate as is hereinafter mentioned the sum of 60,000*l.*, to be by them devoted to the several purposes of the said charity in the manner to be determined in respect of the funds of the same, but so nevertheless that the said sum, or any part thereof, shall not be applied in or towards the purchase of any lands for the purposes of the said charity. And if and in case no such piece or parcel of land shall be found and provided as aforesaid, or being such, the scheme of the intended charity, or the rules and regulations for the government thereof, shall not in the opinion of the majority of my said trustees be in accordance with what they may consider my wishes upon the subject to have been, then I give and bequeath the said sum of 60,000*l.* to the trustees for the time being of St. George's Hospital, situate at Hyde Park Corner, in the county of Middlesex, to be by them applied to the purposes of that institution."

The will then vested the personal estate of the testator in C. G. Scott, Susan Kitching, and the Rev. Thomas Philpott (who

in a subsequent part of the will were appointed executors and executrix), and directed them to apply 20,000*l.* thereof to the use of the said Susan Kitching, and 8,000*l.* to the use of the Hon. Emily Price and her family, in the manner directed by the will, and after providing for certain other legacies gave the residue in two moieties, one to the said C. G. Scott and the other to the said Susan Kitching for her sole and separate use.

The testator died on the 22nd of January 1853, and left personalty to an amount more than sufficient to answer the purposes mentioned in his will.

On the 6th of December 1853 C. G. Scott, by an indenture duly executed, granted the piece of land at Newland to trustees as a site for the erection of the almshouses, and the other purposes of the intended charity. This deed was enrolled in pursuance of the provisions of the Mortmain Act.

A suit had been instituted by the Rev. T. Philpott, one of the trustees, against the President and Governors of St. George's Hospital, to have the trusts of the will carried into effect, and the Master of the Rolls held the bequest void within the Statute of Mortmain (1), and that the gift over failed because the events on which it was to take effect had not arisen. On the 5th of December 1855 the Attorney General intervened by filing an information, in which it was prayed that there might be a declaration of the Court that the bequest contained in the will for the erection of almshouses, &c. at Newland was a valid bequest.

The Master of the Rolls, on the 10th of March 1856, made a decree dismissing the information of the Attorney General, thereby in effect declaring that the bequest in favour of the parish of Newland was a void bequest, and could not be carried into effect.

The plaintiff in the suit of *Philpott v. St. George's Hospital* appealed against the decree in that suit, and the President and Governors of St. George's Hospital appealed against so much of it as declared that the bequest in their favour did not take effect. The Attorney General appealed

against the decree made on his information.

The Attorney General (Sir R. Bethell) and *Mr. G. M. Giffard*, for the appellant Philpott, contended, first, that the indenture of the 6th of December 1853 was a valid dedication of the land therein described to the purposes of the charity; secondly, that the bequest in the will of the 60,000*l.* was not void under the statute, the purchase of land being expressly excluded from it. They referred to—

Dixon v. Butler, 3 You. & C. 677.

Trye v. the Corporation of Gloucester, 14 Beav. 173; s. c. 21 Law J. Rep. (n.s.) Chanc. 81.

Dunn v. Bownas, 1 Kay & J. 596.

Edwards v. Hall, 6 De Gex, M. & G. 74; s. c. 25 Law J. Rep. (n.s.) Chanc. 82.

The Attorney General v. Bowles, 2 Ves. 547.

The Attorney General v. Tyndall, Ambl. 614; s. c. 2 Eden, 207.

Giblett v. Hobson, 3 Myl. & K. 517; s. c. 4 Law J. Rep. (n.s.) Chanc. 41.

The Attorney General v. Parsons, 8 Ves. 186.

The Attorney General v. Davies, 9 Ibid. 535.

Pritchard v. Arbouin, 3 Russ. 456; s. c. 5 Law J. Rep. Chanc. 175.

Mather v. Scott, 2 Keen, 172; s. c. 6 Law J. Rep. (n.s.) Chanc. 300.

Henshaw v. Atkinson, 3 Madd. 306.

The Attorney General v. Whitchurch, 3 Ves. 141.

Mr. R. Palmer and *Mr. R. Hawkins*, for the President and Governors of St. George's Hospital, contended that no land had been provided and legally dedicated as almshouses, as required by the will of the testator, the conveyance of the 6th of December 1853 being ineffectual for that purpose; and that such land not having been so provided the gift to the almshouses was void, and the gift to the hospital took effect. They cited—

Myers v. Perigal, 2 De Gex, M. & G. 599; s. c. 22 Law J. Rep. (n.s.) Chanc. 431.

The Attorney General v. Hinsman, 2 Jac. & W. 270.

(1) *Nem. Philpot v. St. George's Hospital*, 25 Law J. Rep. (n.s.) Chanc. 33.

Way v. East, 2 Drew. 44; s. c. 23
Law J. Rep. (N.S.) Chanc. 209.
Durour v. Motteux, 1 Ves. 321.
Vaughan v. Farrer, 2 Ibid. 182.

Mr. Lloyd and Mr. Cairns appeared for the residuary legatees, to contend that if the bequest to the almshouses was not valid, the money was to form part of the residue.

July 24.—THE LORD CHANCELLOR.—The question here depends on the construction to be put upon the 9 Geo. 2. c. 36, so far as it may affect the will of the late Earl Beauchamp. Before that statute there was no provision against the disposition, by will, of lands for charitable purposes, but that statute prohibits the gift, by will, of lands and of money to be employed in the purchase of lands. Then is this gift of this sum of 60,000*l.* within the prohibition of the statute? I think it is not. I think it is not money given to be applied in buying land. The Master of the Rolls did not himself so consider it, but he held the gift to be void as having a direct tendency to bring lands into mortmain. In one sense that is true, but that is not the way in which courts of justice ought to deal with prohibitory statutes. Such statutes prevent you from doing what it was formerly competent to you to do, and whatever substantially does what is thus prohibited is void, not because it comes within the spirit of the statute, but because such a thing is absolutely prohibited. *The Attorney General v. Davies* is a good illustration of the distinction. There the money was given to the Orphan School on condition that the school would convey certain lands, which was, in substance, a purchase of those lands, and, therefore, the gift was void. So here, if it had been found that the testator had said, "I will give you land by my will, but with the understanding that when I give you money to endow what you shall build you shall give the land for the purposes of the charity," it would have been void. But that is not a point raised here, and therefore I assume the gift of the 60,000*l.* to be an independent gift for the maintenance of certain almshouses, if within a year after the death of the testator somebody should give land to build such

almshouses. Now, that is not struck at by the express words of the statute. Has there been any course of decisions declaring that transactions such as this are avoided by the statute? for if so we must not inquire minutely into their origin, but take them as settled authority. On looking at all the cases, I do not find any such course of decisions; on the contrary, I think the cases run in the opposite direction. I do not, however, rest my judgment here upon any previous decisions, but upon my own construction of the statute, and the absence of any authority interfering with the literal meaning of the enactment. The first case decided on the statute was that of *The Attorney General v. Bowles*, which was a bequest of 500*l.* to be laid out in building a small school and house for the master, the purchase of the ground and expenses of the building not to exceed 200*l.*; and Lord Hardwicke held, that that sum might be lawfully laid out in building upon ground belonging, or which might belong, to the parish. I entertain no doubt that that decision has been very properly questioned. It was pointedly assailed by Lord Northington, just ten years afterwards, in *The Attorney General v. Tyndall*. It is true that Lord Northington, owing a grudge to Lord Hardwicke, liked to throw out observations against his judgments, and the mode in which he expressed himself may perhaps be attributable to that cause, but I quite agree with Lord Northington that Lord Hardwicke's decision is not to be reconciled with the statute. But Lord Northington himself, in that very case, treated the laying out of money so as to improve the realty as contrary to the statute, a doctrine which has been entirely overruled in subsequent times. Many decisions followed those cases, and in 1792 Lord Thurlow decided the case of *The Attorney General v. Nash* (2), where money was left to trustees to build a school-house, and the will went on to empower them to purchase land for the purpose. His Lordship properly decided against the validity of that bequest, observing, however, "I cannot conceive that it would disappoint the testatrix's intention if the whole land came

(2) 3 Bro. C.C. 588.

almshouse," but she had not made any provision upon that footing. Still the observation shewed Lord Thurlow's opinion that if the money was to be invested on land which had been acquired, but acquired *almshouse*, not in the purchase of the land itself, the bequest would be good. I do not think that the construction often put upon Lord Alvanley's decision in *The Attorney General v. Whitchurch* is justified by his expressions. He did not mean to intimate that a bequest to build upon land that should hereafter be given would be bad. There the gift was of four houses and a sum of money to be employed for their inmates. The first part of the gift—that of the four houses—was bad, and the second part therefore fell with it. The two could not be separated from each other; the Court could not repudiate so much of the bequest as related to the purchase of land, and retain the other, which directed the building. In modern times this seems to have been universally taken for granted. *The Attorney General v. Parsons* confined the word "erect," in gifts to "erect almshouses," to its simple and natural meaning, denying Lord Hardwicke's construction, which was, that "erect" might mean "establish, constitute," and laid down the rule that where such words are used, and there is nothing to shew on what land they are to be erected, the gift must mean that land is to be purchased for the purpose, and consequently that such a gift is bad: if the land could be otherwise acquired or was already in mortmain, it would be good. Then came the case of *The Attorney General v. Davies*, where the Master of the Rolls first and Lord Eldon afterwards expressed a clear opinion that a gift of money to be employed in building upon land, if such land should be afterwards given, would be good; that if the land could be begged or otherwise acquired by the person intrusted with the money without his laying out money in the purchase of it, it would be a perfectly good bequest. Then came the case of *Henshaw v. Atkinson*. There money was left to erect a blue-coat school at Oldham and establish a blind asylum in Manchester, but the testator expressly directed that the money should "not be applied in the purchase of land or the erection of buildings," and on that ground Sir J.

Leach held the bequest to be good. A part of the bequest there was, that if the land should not be given by other persons, the money was to be applied for men who were already in almshouses; and it was argued that as there was no limitation of time fixed, the gift was void. But Sir J. Leach thought that the cases of *Downing College* (3) and *The Attorney General v. the Bishop of Chester* (4) afforded an answer to that argument. However, it is not necessary here to consider that point. The Master of the Rolls here referred to the cases of *Pritchard v. Arbouin*, *Giblett v. Hobson* and *Mather v. Scott*. In the first two of these the direction was to erect buildings, without more being said, and that has always been construed as a direction to acquire the land on which the buildings are to be erected, and therefore void; and in the last, though there was a suggestion of another mode of acquiring the land, there was nothing to exclude the trustees from purchasing the land. The bequest was, therefore, void. I have gone through all these cases in order to shew that they do not point to any conclusion contrary to that which seems to me to be the true construction of the statute. I think that there has been a miscarriage in the Court below, and I therefore move that the decree be reversed.

LORD BROUGHAM entirely concurred. The act forbade a purchase of land but not a bequest of money, though that might ultimately tend in its effects to the purchase of land. If the cases were opposed to this confined construction no doubt they ought to be followed, unless they were wrong in principle, but they were not opposed to this construction. There was no reason to depart from the decision in *Giblett v. Hobson*, but that did not warrant the inference which the Master of the Rolls drew from it. That case shewed that a bequest of money to be laid out in building houses, if nothing further was found in the gift, would be bad, as houses could not be built except upon land, but that did not affect the case of houses to be built on land which was already in mortmain, although cer-

(3) Ambl. 550.

(4) 1 Bro. C.C. 444.

tainly Lord Northington had seemed to intimate that such a gift would be bad. That intimation, however, went too far. Then *Giblett v. Hobson* also shewed that if it appeared from other circumstances—from the will itself, or even from matter *dehors* the will—that the money was to be laid out simply in building upon land then in mortmain, or at least upon land to be acquired otherwise than by the aid of the money so given, the gift was good. There was no doubt about either of these propositions of law, but neither of them supported the decision of the Master of the Rolls in this case. Nor did *The Attorney General v. Parsons* have that effect. A doubt had been raised upon *The Attorney General v. Davies*, as if Lord Eldon had there confined himself to the building upon land already in mortmain; but that doubt was entirely without foundation, as the previous case of *The Attorney General v. Parsons* clearly shewed. On the whole, it appeared quite plain that the present case did not come within the provisions of the Mortmain Act, and the decision of the Court below must be reversed.

LORD WENSLEYDALE was of the same opinion. Whatever might be the amount of suspicion as to any supposed trust on the part of Col. Grantham Scott to devote to the purposes of the almshouses the land devised to him, there was nothing on the face of the will to justify that suspicion, and the Court could only act on what appeared on the face of the will. A secret trust of that kind would, he thought, if its existence could be proved, make the bequest void. But as matters stood here, that point must be dismissed from consideration. The words of the statute must receive their natural and ordinary meaning, and that meaning did not affect the present gift. The prohibition did not apply to money to be laid out in building upon land, but to money to be laid out in the purchase of land. No money was given here for the latter purpose. Though in several of the cases there were *dicta* which appeared to give a meaning to the words of the statute different from what they ordinarily bore, yet when those cases came to be carefully looked into, they did not lay down any doctrine at all inconsistent with the ordinary meaning of the words to

be found in the statute. If a testator gave money to be laid out in building for charitable purposes, but at the same time declared that no part of it was to be expended in the purchase of land, or if he pointed to land already in mortmain as that on which the building was to take place, the gift would be perfectly valid. The case of *Pritchard v. Arbouin*, or that of *Giblett v. Hobson*, did not in the least degree impugn this doctrine. The ordinary meaning of the words used in the statute must be applied to them here, and if so, it was clear that this was not a case in which money was given "to be laid out or disposed of in the purchase of any lands," and consequently the gift here did not fall within the prohibition of the statute, but was a valid gift.

The Attorney General suggested, and the House adopted the suggestion, that the order made should direct the decrees of the Court below in the two causes to be reversed, except as to costs; that the gift of the 60,000*l.* (taking the words of the will) should be declared a valid gift; and that as there was nothing here to construe, but the error was made by the Court below with regard to the validity of the bequest, the costs of all parties should come out of the fund which was the subject in dispute.

Ordered accordingly.

WOOD, V.C. }
July 7, 8, 24. } CARTER v. CARTER.

Vendor and Purchaser—Purchase for Valuable Consideration without Notice—Legal Estate obtained from a Trustee—Mistake—Forfeiture—Estoppel—Mortgage—Priority—Delivery of Title-Deeds to Mortgagee.

*A testator gave all his real estates to three trustees, of whom his brother J. C. was one, upon trust, amongst other things, to pay to each of his brothers the annual value of 100*l.* during his life, or until he should take the benefit of any act for the relief of insolvent debtors, or become bankrupt, or do any act which, but for that condition, would have the effect of giving the benefit of his annuity to any other person, and in the event*

of either of such last-mentioned events happening, then his annuity should from thenceforth cease; and upon trust, after paying certain other annuities, for the benefit of the testator's sisters, to pay the whole of the surplus rents and profits to J. C. for his life, with remainders in trust for the children of J. C. and in default of such issue, upon trust to pay the same unto and equally between such of the testator's brothers and sisters as might be then living, and the survivors and survivor of them during their respective lives, but subject to the same restrictions respecting bankruptcy and insolvency and against alienation as therebefore contained with reference to the annuities. This will not having been discovered for several years after the death of the testator, another will was acted on in the mean time, whereby the testator had given all his real estates equally amongst his brothers and sisters; and acting on the belief that this was the last will, J. C. joined some of his brothers in mortgaging all their interest in the testator's estate:—Held, first, that the whole interest given by the last will passed by the mortgage; and secondly, that the annuities given by the will to such as joined in the mortgage, ceased upon the execution of the mortgage.

The doctrine of estoppel by deed only applies between the parties to the deed and to matters arising out of the deed. In collateral matters, the deed would be evidence, but no estoppel.

A purchaser for valuable consideration, without notice, getting in the legal estate from a trustee, takes it subject to all those trusts upon which the trustee held it, and appearing upon the face of the instrument under which the trustee takes.—Faussett v. Carpenter (1) observed upon.

J. C. being a trustee of real estate under a will, and being also beneficially interested in the same estate under the same will, mortgaged his interest and delivered the title-deeds to the mortgagee. The mortgagee afterwards handed back the title-deeds to J. C. who executed other mortgages, delivering the deeds to the subsequent mortgagees:—Held, that the first mortgagee had not lost his priority, the deeds having been properly delivered up to J. C. as a trustee.

Edwin Carter, by his will, dated the 25th of April 1846, after directing the payment of his debts and funeral and testamentary expenses, gave to Warren Hurdman Jane and Odiarne Coates Lane, and his brother John Carter the younger, all his freehold, copyhold and leasehold messuages, lands and hereditaments, wheresoever situate or being, to hold to them, their heirs, executors, administrators and assigns for ever, upon trust to pay to his mother Hannah Carter the clear annual sum of 400*l.* during her life, and also to pay to each of his brothers Edward Thomas Bridgen Carter, George Carter and Charles Carter, the clear annual value of 100*l.* during his natural life, or until he should take the benefit of any act for the relief of insolvent debtors, or become bankrupt, or do any act which, but for that condition, would have the effect of giving the benefit of his annuity to any other person, and in the event of either of such last-mentioned events happening, then his annuity should from thenceforth cease and be no longer payable; and after payment of an annuity of 100*l.* to the separate use of each of his three sisters, without power of anticipation, upon trust to pay the whole of the surplus rents and profits unto his brother John Carter the younger, and his assigns, or otherwise to permit him and them to receive and take the same for his and their own absolute use and benefit during his natural life; with remainder, subject to the payment of the said several annuities, or such and so many of them as might be then subsisting, in trust for all such of the children or child of his said brother John Carter the younger as should live to attain the age of twenty-one years, if more than one, in equal shares, and their, his or her executors, administrators and assigns for ever as tenants in common, and in default of such issue upon trust to pay the same rents and profits (subject to the annuities) unto and equally between such of his said brothers and sisters, Edward Thomas Bridgen Carter, Eliza Lasbury, Frances Carter, George Carter, Charles Carter and Louisa Carter, as might then be living, and unto the survivor and survivors of them during their, his or her respective natural lives, but as to his said brothers, subject to the same restrictions respecting bankruptcy

(1) 2 Dow & Cl. 232.

and insolvency and against alienation as he had thereinbefore made and provided with reference to the aforesaid annuities bequeathed to them respectively, and as to his sisters, to their like separate and inalienable use as he had provided for with regard to their annuities; and after the decease of the last survivor of them, his said brothers and sisters, upon trust to sell the premises, and distribute the entire produce unto and equally between all such of the children of his said brothers and sisters, E. T. B. Carter, E. Lasbury, F. Carter, G. Carter, C. Carter and L. Carter, as should attain the age of twenty-one years, equally between them share and share alike, and to be paid to them respectively *per capita*. And he gave all his residuary personal estate to John Carter the younger.

The testator died on the 31st of January 1847.

This will was not discovered for some years after the death of the testator.

In the mean time, an earlier will, dated the 12th of January 1846,—by which the testator gave and bequeathed all his freehold, copyhold, leasehold, and residuary personal estate unto his brothers and sisters, the survivors or survivor of them, the proceeds of the rentals, &c. to be equally divided among them, share and share alike,—was proved and acted upon.

There were eight brothers and sisters of the testator living at his death, John Carter the younger being one.

At the death of the testator there was a mortgage for 3,000*l.* upon a part of his freehold estates, vested in Henry Higgins.

By indenture, dated the 1st of June 1850, John Carter the younger mortgaged his life interest in the freehold, copyhold and leasehold estates to John Carter the elder, for 3,110*l.* This mortgage was afterwards transferred to J. S. F. B. Bromage, J. P. Snead, and J. B. Snead.

On the 28th of June 1852 John Carter the younger joined one of his brothers in mortgaging the life interest in two undivided eighth parts of a portion of the freeholds to W. P. Chillcott and Alfred Chillcott, for 1,200*l.*

The next mortgage was by indenture, dated the 10th of September 1852, by which, after reciting the will of January

1846, and that the testator had died without having revoked or altered the same, John Carter the younger and three of his brothers conveyed their life interest in four undivided eighth parts of such part of the estate as is therein comprised, to James Prosser, by way of mortgage for 2,000*l.*, and in aid of this mortgage a conditional surrender was made of four-eighths of such of the copyhold estates described in the deed as were situate in the manor of Liswerry and Libneth; and Prosser was admitted.

In September 1854 John Carter the younger created an equitable mortgage on his life interest in two undivided eighth parts of such other parts of the leasehold estate as are therein mentioned, to Messrs. Chillcott, for 350*l.*

On the 4th of January 1853 he mortgaged his life interest in such part of the estate as consisted of the leasehold tithe rent-charge of the chapelry of St. Lawrence, with eight acres of land and wood lying beside the chapel, to William Tiley, for 250*l.*

On the 16th of October 1854 he conveyed, assigned and covenanted to surrender his life estate in the whole of the freehold, copyhold and leasehold estates to P. F. Aiken and W. G. Coles, by way of mortgage, for 4,000*l.*

Having afterwards obtained a renewal lease of the tithe rent-charge, he assigned it to Tiley, to secure his mortgage debt of 250*l.*

The chief clerk found that all these indentures were executed at the time that John Carter the younger supposed the will of the 12th of January 1846 to be valid, and all the indentures were so expressed as to pass the life interest, to which he was, in fact, at the time entitled under the last will.

The surrender to James Prosser was made by John Carter the younger and three of his brothers, all and each of whom purported by attorney to surrender four-eighths, and all other shares of them and each of them, and to which they had been admitted on the 14th of August 1852; but the attorney by whom the surrender was made was only authorized by each of the four parties to surrender his one-eighth, and by the admission on the 14th of August 1852,

the four brothers, with their other brother and three sisters, were admitted as devisees under the first will to the estate in the manor of Liswerry and Libneth, as tenants in common. Ann Prosser, the administratrix of James Prosser, claimed under the surrender and admission of James Prosser to be legally entitled to four-eighths of the estate, and this question was, at her request, reserved for the decision of the Court.

Edward Thomas Bridgen Carter, at the time he supposed he was entitled to one-eighth of the estates under the first will, executed a deed, by which he purported to convey and assign and covenanted to surrender all his parts or shares, present and expectant or future, vested or contingent, of and in all the estates of, in or to which the testator was seised or entitled, and which passed or were devised or bequeathed by the said will, and all his estate, interest, term and terms for years, and for life or lives, benefit, claim and demand whatsoever, both at law and in equity, of, in, to or out of the same hereditaments, to Charles Carter, by way of mortgage.

George Carter, who joined in the deed of the 10th of September 1852, executed also a deed of the 30th of April 1853, whereby he conveyed, assigned and covenanted to surrender all his parts or shares, both present and expectant, or future, vested and contingent, of and in all the estates, messuages, farms, lands, rents and hereditaments whatsoever, of or to which the testator was entitled at his death, and which passed under the will of 1846, and all the estate, right, title, interest, use, trust, inheritance, term and terms of years, and for life and lives, property, possession, claim and demand whatsoever, both at law and in equity, to Charles Carter, by way of mortgage.

Charles Carter, by deed of the 1st of June 1850 conveyed, assigned and covenanted to surrender his one-eighth in the estates, and all his estate, interest, claim and demand in the whole of the testator's estate, to John Carter the elder, by way of mortgage.

Another question reserved for the consideration of the Court was, whether, but for the condition in the last will of the testator, these deeds would have had the

effect of giving the benefit of the annuities and reversionary life interests under the last will of the parties executing them to another person.

Charles Carter became bankrupt in February 1856.

The priority of the incumbrances on the life interest of John Carter the younger was stated by the chief clerk to be as follows:—The mortgage of the 1st of June 1850 was the first incumbrance upon all the estates, except the one-eighth of part of the copyhold estate surrendered to Prosser, and except the leasehold tithe rent-charge and land comprised in Tiley's mortgage, and was the second incumbrance on those excepted copyhold and leasehold estates. Tiley's mortgage of the 21st of November 1854 was the first incumbrance upon the leasehold tithe rent-charge and land therein comprised. The mortgage to W. P. Chillcott and A. Chillcott of the 28th of June 1852, was the second incumbrance on two-eighths of the freehold estate therein comprised. Prosser's mortgage of the 10th of September 1852 was the first incumbrance on one-eighth of the copyholds, and the second on the three other eighths surrendered to him, and also on the four-eighths of the other copyhold estates, and of the freehold and leasehold estates therein comprised. The equitable mortgage to the Chillcotts of the 1st of September 1854 was the second incumbrance on two-eighths of such part of the leasehold estate as was therein comprised, and the mortgage to Aiken and Coles of the 16th of October 1854, was the last incumbrance on the whole of the estates. The Chillcotts, Prosser, Aiken and Coles, however, respectively claimed priority in respect of their respective mortgages over the mortgage of the 1st of June 1850 to John Carter the elder, on the ground that John Carter the elder, after the mortgage to him, gave the title-deeds back to John Carter the younger, and such of those deeds as related to the estates in their respective mortgages were delivered to the Chillcotts and Prosser, who had no notice of the prior mortgage to John Carter the elder.

Ann Prosser contended that, by virtue of the surrender and admission of James Prosser to four-eighths of the copyholds,

he became seised of the legal estate therein, and being a purchaser for valuable consideration, without notice that the will had been revoked, claimed to be entitled thereto, as against all persons claiming under the will, until redeemed.

The suit was instituted by the infant children of John Carter the younger, for administration of the testator's estate.

With regard to the delivery up of the title-deeds by John Carter the elder to John Carter the younger, the following affidavit was made by Messrs. Aiken and Coles:—"We believe that a deed of mortgage, bearing date the 1st of June 1850, was made between or by such parties as in the affidavit of John Carter the younger and others filed in this cause on the 29th of February 1856, in that behalf mentioned, so far as the same is therein set forth; but we say that we had no notice of any such indenture of mortgage at the time of the date of the mortgage to us hereinafter mentioned, and we believe that the title-deeds of the properties comprised in the mortgages to Messrs. Chillcotts and Prosser, mentioned in the affidavit, were, on the occasion of those mortgages being made, handed over by the defendant John Carter the younger to the solicitor of Chillcott and Prosser respectively; and we say that we have been informed and believe that such title-deeds were at that time in the possession of the defendant John Carter the elder, and that the defendant John Carter the elder gave such title-deeds to the defendant John Carter the younger, to effect the mortgages to the said Messrs. Chillcott and Prosser respectively, and that we were, at the time of the execution of the mortgage to us hereinafter mentioned, informed by the solicitor to Messrs. Chillcott and Prosser that the title-deeds of the said properties so mortgaged as aforesaid to Messrs. Chillcott and Prosser respectively, were in their possession respectively, and that he had been informed by John Carter the younger that the said properties were not subject to any other incumbrances than those to the said Messrs. Chillcott and Prosser respectively. We say that we are informed and believe that the defendants, John Carter the elder and John Carter the younger, immediately after the decease of the said Edwin Carter, were informed, and we

believe by the late Francis Short, a solicitor in Bristol, that the said Edwin Carter had made a will later than, and revoking the will of the 12th of January 1846, and that in the year 1848 the defendant John Carter the younger was furnished by the said Francis Short with a copy of the said will."

The following explanation of the transaction was given by John Carter the elder, upon cross-examination:—"When my son Edward Thomas Bridgen Carter signed a mortgage to me for 500*l.*, I did not ask for the title-deeds of the property so mortgaged: Mr. Short" (that is, the solicitor for both parties) "had them. In June 1850 my sons John Carter the younger and Charles Carter made a mortgage to me, and the deeds relating to the property so mortgaged by them were not asked for by me; they were then in the hands of Mr. Short, as my attorney, and he made the mortgage. They were delivered to Mr. Short by my son John. Mr. Short gave the deeds back to my son John, saying it was proper that he should have them, as trustee under the will."

The several questions now came on to be argued in court.

Mr. Willcock and *Mr. Amphlett* appeared for the plaintiffs.

Mr. Cairns and *Mr. C. M. Roupell*, for John Carter the elder, E. T. B. Carter and the assignees of George Carter.—The mortgage to John Carter the elder is entitled to priority. The delivery up of the deeds by him is explained, and is not sufficient to postpone him.—

Colyer v. Finch, 26 Law J. Rep. (N.S.) Chanc. 65.

Hewitt v. Loosemore, 9 Hare, 449; s. c. 21 Law J. Rep. (N.S.) Chanc. 69.

Allen v. Knight, 5 Ibid. 272; s. c. 15 Law J. Rep. (N.S.) Chanc. 430; 16 Ibid. 370.

To disentitle him to priority, there must be *mala fides*, which is not shewn here. Besides, the mortgagee in this case had no right to hold the title-deeds, and they were rightly delivered up to the trustee under the will. As to E. T. B. Carter and George Carter there was no forfeiture of their annuities, the deeds

being only intended to pass their interests under the earlier will, which contained no clause of forfeiture.

Mr. C. Barber, for Bromage and the Sneads, cited *Yarnold v. Moorhouse* (2).

Mr. W. M. James and *Mr. Martindale*, for Ann Prosser.—When the mortgage to Prosser was executed he had no notice of the prior mortgage, and having obtained possession of the deeds the Court will not deprive his administratrix of any advantage so gained; and, by the same rule, having obtained from John Carter a conveyance of all his estate, without notice, and having, in fact, been admitted to the copyholds, he was entitled to hold them discharged from the trusts in the will of Edw. Carter.—

Jones v. Powles, 3 Myl. & K. 581.

Maundrell v. Maundrell, 10 Ves. 246.

Ex parte Knott, 11 Ibid. 609.

Seaborne v. Powell, 2 Vern. 11.

Waldron v. Sloper, 1 Drew. 193.

Saunders v. Dehew, 2 Vern. 271; s.c. 2 Free. 123.

A purchase for valuable consideration, without notice, is a defence as well against a legal as an equitable title—*Joyce v. De Moleyns* (3). John Carter the younger, having conveyed his whole estate and interest, every estate vested in him passes by the conveyance, although not vested in him in the character in which he became a party to the conveyance.—

Drew v. the Earl of Norbury, 3 Jo. & Lat. 267.

Noel v. Bewley, 3 Sim. 103.

Jones v. Kearney, 1 Dru. & W. 134, 158.

He and all claiming under him are estopped from disputing anything that appears upon the face of the deed of the 10th of September 1852.—

Doe d. Gaisford v. Stone, 3 Com. B. Rep. 176; s.c. 15 Law J. Rep. (n.s.) C.P. 234.

Bowman v. Taylor, 2 Ad. & E. 278; s.c. 4 Law J. Rep. (n.s.) K.B. 58.

Young v. Raincock, 7 Com. B. Rep. 310; s.c. 18 Law J. Rep. (n.s.) C.P. 193.

Right d. Jefferys v. Bucknell, 2 B. & Ad. 278; s.c. 8 Law J. Rep. K.B. 304.

(2) 1 Russ. & M. 364.

(3) 2 Jo. & Lat. 374.

Carpenter v. Buller, 8 Mee. & W. 209; s.c. 10 Law J. Rep. (n.s.) Exch. 393.

Bensley v. Burdon, 2 Sim. & S. 512; s.c. 8 Law J. Rep. Chanc. 85.

Stroughill v. Buck, 14 Q.B. Rep. 781; s.c. 19 Law J. Rep. (n.s.) Q.B. 209.

Mr. Karslake, *Mr. Briggs* and *Mr. Batten* appeared for the Chillcotts, Tiley and Aiken and Coles respectively.

Mr. Osborne, for the assignees in the bankruptcy of John Carter the younger and Charles Carter, upon the questions arising out of the clause of forfeiture in the will, cited—

Egerton v. Brownlow, 4 H.L. Cas. 1; s.c. 23 Law J. Rep. (n.s.) Chanc. 348.

Clavering v. Ellison, 3 Drew. 451; s.c. 25 Law J. Rep. (n.s.) Chanc. 274.

Mr. Willcock, in reply, for the plaintiffs.

Mr. Cairns, in reply, for E. T. B. Carter and the assignees of G. Carter.

July 24.—WOOD, V.C.—The circumstances of this case are certainly very singular and unusual, and after a great deal of examination I have not been able to find any case which is precisely in point as regards the principal question which has been argued. The circumstances are these: The testator made a will, by which he gave an annuity of 400*l.* to his mother for life, charged on property which, subject to the annuity, he devised, with the rest of his property, equally among his brothers and sisters, who are eight in number; the consequence of which would be, that as long as that will stood, subject to the annuity which was thus created, the property would become vested in eighths, in each of the brothers and sisters. It appears now, but it was not discovered until after the transactions in question in this cause, that this was not his last will, though proved and acted upon for a long period as his last will, and that in effect his will was one of a totally different character, by which he devised all his estates to three trustees, one of them being his brother, John Car-

ter the younger, on certain trusts: the first being for the payment of an annuity to the mother for life; after that, upon trust to pay annuities to his brothers and sisters, subject to their ceasing on alienation, in the manner described by his will; and, subject to that, he gave a life interest to his brother, John Carter the younger, with divers trust estates over for the benefit of the children of John Carter the younger, and other parties.

In the intermediate time, while it was supposed that the first will was operative (and I may observe that although fraud has been suggested, none has been established, nor am I aware, after all the consideration that I have been able to give to it, that it would have made much difference if I had assumed, as I am not entitled to assume upon the evidence before me, that John Carter the younger had a knowledge of this second will at the time of the several transactions mentioned), several indentures were executed by the different members of the family on the strength of their assumed interests under the first will. They appear to stand thus:—First, the legal estate in the bulk of the freehold property was outstanding in a mortgagee anterior to all the persons who afterwards took interests under the will; that mortgage did not affect the copyholds, and did not affect the tithe rent-charge. The estate being so situated, John Carter the younger's first mortgage upon the property was of his supposed one-eighth. He conveyed all his estate and interest, whatever it was, to his father, John Carter the elder, by way of mortgage. That mortgage is now vested in the defendants Bromage and the Sneads. The next incumbrance in point of date, is an incumbrance created in favour of Mr. Prosser, under a deed executed by John Carter the younger and three of his brothers, Alfred Thomas Bridgen Carter, George Carter, and Charles Carter; after reciting the supposed last will, and that the testator had died without having revoked or altered that will, all joined in one conveyance, and conveyed four eighth parts of the freeholds, as to which of course,—subject to an observation I shall presently make as to the effect upon the interest of John Carter the elder, of his having given back, as it is said, the deeds

to the mortgagor,—no question arises as to the priority; but as to the copyholds, there was a covenant on the part of all the four brothers to surrender the copyholds of their one-eighth shares, or of the four eighth shares, but the power of attorney which they executed was a power to make a surrender of these copyholds in eighths, and a surrender was made by each of them. The attorney exceeded his power, but that was admitted by Mr. James to be a matter that he could not rely on, and the effect of the surrender would be, that had the will been valid the separate eighth part or share of each of the four brothers would have passed to Mr. Prosser. Then, the next incumbrance that is necessary to be adverted to in respect of priorities, is the charge created in respect of Mr. Tiley, which is the first charge on the leasehold interest, on the tithe rent-charge, and tithe leaseholds; and subject to these charges, certain other charges have been created in favour of two gentlemen named Chillcott, represented by Mr. Batten, who came in after these various charges to which I have referred.

The great and important question, as far as Mr. Prosser is concerned, is this:—First, it was contended, and I think rightly contended, that all the interest that John Carter had must pass by this conveyance. In fact, as to that, there appeared to be little doubt. I apprehend that no reasonable doubt could be suggested upon it, even on the authority of *Faussett v. Carpenter* (4); a case which, in the course of this inquiry and looking through all the authorities on the subject, I have had occasion to examine, and with which much fault is found by Lord St. Leonards. Only two law Lords were present, Lord Tenterden and Lord Wynford. The question was as to the legal effect of a conveyance in which the parties were thus situated: one party, Palmer, happened to be under a settlement a trustee for one of the parties to the conveyance, Mrs. Catherine Newcomen. He, also, in right of his wife, who was a sister of Catherine Newcomen, had himself a beneficial interest in one-third, and a sale was made of all the three parts to a purchaser, all the parties conveying,

(4) 2 Dow & Cl. 232.

Catherine Newcomen conveying and Palmer conveying at the same time; and the House of Lords held, that the effect of the deed was not to pass in law the interest which Palmer held as trustee under Mrs. Newcomen's settlement. No doubt it was a case of considerable difficulty, and Lord St. Leonards said it had been a subject of conversation whether it would not be necessary to have a short act of parliament to reverse it (5). That course was never taken, and if that case were like the present, I should hold myself bound by it. The case, perhaps, might have been supported (except for one circumstance) on one ground on which the Court proceeds, when it says that a devise of real estates, with charges created upon those real estates, will not pass such estates as are held by the testator on trust. Possibly that case might be supported on that ground, if the circumstances had been simply these: that Palmer had only a beneficial interest in one capacity, and under the other deed had nothing but a trust estate. But there is a difficulty that was possibly overlooked in the case, and one which appears to be an insuperable difficulty in supporting the case, notwithstanding the high authority of the Court which pronounced the judgment, namely, that this very gentleman was literally trustee for one of the parties who intended to pass her beneficial interest by the conveyance, and, according to the doctrine of the House of Lords, the purchaser did not get the legal interest, although the trustee and the *cestui que trust* had both joined in the conveyance: a difficulty that must be very great, if the case can be ever reconsidered.

In this case no such question arises, because in truth, if you are allowed to say a mere trust estate did not pass by that which purported to pass for valuable consideration a beneficial interest, yet John Carter the younger had a beneficial interest under the will, as well as the trust estate, and therefore it seems impossible to hold that the whole of his interest under the second will, and which was only vested in him through the operation of the will that conveyed to him the legal estate, did not pass.

Holding, therefore, as I do, that that interest passed, the really serious question arises as to what ought to be the result of Mr. Prosser's thus obtaining the legal estate accidentally, if I may so term it, and certainly without notice, in point of fact, of the trusts upon which it was held. I have had occasion upon this to look through the whole class of authorities with reference to the protection which this Court affords to purchasers without notice, and the cases have unquestionably gone to a very considerable length. The earlier cases have, perhaps, gone to a greater length than would be supported by more modern decisions. *Sherley v. Fagg* (6), a decision of Lord Nottingham's, is reported in 1 *Chanc. Cas.*, without the circumstances which are mentioned in the narrative of the case in *Vernon*, of the actual fraud which appears to have existed, and according to which the case is an authority to its full extent, that even a fraudulent act on the part of a purchaser without notice would be supported in order to maintain his title. *Vernon*, in narrating the case, states that Sir John Fagg, on walking into a room and seeing some deeds which he thought of value, possessed himself of them, evidently without any authority—in fact stole them—and was, nevertheless, supported in the possession of those deeds. That fact does not appear as the case is narrated in the more full report in 1 *Chanc. Cas.*, and I should apprehend it is sufficiently clear that a case to such an extent as that would never be upheld. There are several cases in *Vernon* which go very far, and in many of them there are a whole string of authorities given in the course of the discussion. In one of those cases there was clearly no title then existing at all, as the law then regarded it, being a parliamentary title during the usurpation. Nevertheless, the purchaser was held to be protected, and having got the legal estate he was not interfered with by this Court, and there are other cases of that description. There is an earlier case in *Viner*, which shews the great length to which the doctrine has been carried (7). The case is narrated very shortly in 22

(5) 3 Jo. & Lat. 284.

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(6) 1 Chanc. Cas. 68; cited 1 Vern. 52.

(7) Turner v. Buck, 22 Vin. Abr. 21, pl. 5.

Vin. Abr. 21, and it appears that a person was in effect held to be in possession as a mere disseisor ; his son had conveyed to a purchaser without notice of any other title, and afterwards, the disseisee being a trustee, the *cestui que trust* applied to this Court to compel the disseisee either to proceed to recover the estate or to allow him, the *cestui que trust*, to proceed in his own name. The Court said that the disseisee ought to do it, but it would not give relief against the purchaser by compelling him to do it, or allowing the *cestui que trust* to use his name if he would not.

There are numerous cases of persons, from accidental circumstances, having an advantage in getting possession of the deeds in a legitimate manner. *Wallwyn v. Lee* (8) was a case of that kind, where Lord Eldon thought that protection was given to purchasers, and where the deeds were handed over by the settlor, who was simply a tenant for life, the persons entitled under the settlement afterwards coming to this court to get back the deeds, which they insisted must be regarded as unduly in the possession of this person, who had no interest in the estate. Lord Eldon, after considerable deliberation, held that the Court would not interfere to that extent, but that a person was to be protected in the advantage which he had so obtained by getting the deeds, and that no course could be taken against him, in respect of his being a purchaser for valuable consideration, without notice.

Jones v. Powles, where a great many of the cases of which I have been speaking may be found, was cited before me in argument. That was a case of the grossest description as regarded the vendor. The vendor had forged a will, and sold under the forged title. He then found out that there was a satisfied mortgage. Of course, the mortgage having been satisfied, the mortgagee was a trustee for the owner of the estate. The vendor procured the mortgagee to convey to the purchaser, and the purchaser was held to be entitled. Sir John Leach laid it down (and I apprehend that he did not exceed the authorities referred to in that case) that a title derived from a person in possession without notice of any other charge will always be pro-

(8) 9 Ves. 24.

tected in this court against the *cestui que trust*, where the legal estate has been procured to be assigned from the trustee of a term or the mortgagee of a satisfied mortgage, subject to one observation which I shall have to make, and which has some bearing on the case before me : that observation is suggested by Lord Eldon's remarks in *Maundrell v. Maundrell* and *Ex parte Knott*, and several other cases. It is this : on looking through the authorities you find that the assignment obtained from a trustee as from a trustee, either from a mortgagee who becomes a constructive trustee on the mortgage being satisfied, or from a trustee simply for a term to attend the inheritance, the question who is or is not entitled to the inheritance may be a question that may, in some degree, affect him as to the conveyance he may make, but at the same time there is no direct notice afforded by the document in the hands of the trustee or mortgagee of any ulterior trust beyond this, that he is to hold for the persons entitled. Lord Eldon asks this question in *Maundrell v. Maundrell*, and repeats it in *Ex parte Knott*. After going through the doctrine, from which he says he has considerable aversion, he searches with great jealousy into the cases, and says he has not been able to find a case where a purchaser without notice has been entitled to obtain from the trustee of an outstanding interest the conveyance of a trust estate, when the trustee himself had notice of the intervening incumbrance ; and I must say, having now examined a great number of authorities, I have not been able to find a case of that description. There are several cases where a purchaser has been allowed at the last moment, after payment in full and up to decree, to get in an earlier mortgage, and there is no breach of duty in a person assigning his mortgage to anybody who pays him. Any purchaser is entitled to hold that which, without breach of duty, has been conferred upon him. But the case put by Lord Eldon is this : could the purchasers insist on any benefit to be derived by that which would be a breach of duty or breach of trust ? It strikes me that if the purchaser is entitled to hold the estate discharged of the trust, I ought to hold that the trustee is pro-

tected in the act which he has committed. Whether that is or is not the doctrine that will ultimately be held, it is not perhaps extremely important for me at this present moment to say; but I must say, on looking through an amazing number of volumes of the earlier and later authorities, I have not found any such case as Lord Eldon has stated, of a mere dry trust in which the trustee had notice, when he made the assignment in favour of a third party, of an intervening charge or incumbrance.

The case that is at present before me is one of an extremely different character from any case to be found throughout the authorities. Mr. James says there is in substance no difference between the case of *Jones v. Powles*,—in which a man, having no title whatever, or, what is worse, having himself forged the title, asks the holder of a mortgage term, when the mortgage has been satisfied, to convey to the purchaser, and gives the purchaser the benefit of that term, when it is clear the term itself is only held for the benefit of those entitled to the inheritance,—and the case which I have now before me, where the purchaser, taking the conveyance under one will, supposed by all parties to be really the last will of the testator, finds himself driven to rely on another and a second will, which contains on the face of it all the trusts which the testator has created. In that point of view I certainly have found no case analogous to this. In *Saunders v. Dehew*, although it had long been settled that the second incumbrancer had a right at any period, however long after notice, to get in any outstanding interest which could be *bond fide* assigned to him, such as that of a prior mortgagee who is paid off, yet it was held that he could not, after the notice of the incumbrance, take an assignment of a trust estate held upon express trusts, and then, having got the legal estate, squeeze out the intervening interest. He, having no notice of those trusts at the time of making the advance, no notice of the instrument creating the trusts, was a *bond fide* purchaser without notice for valuable consideration; but finding that there were other trusts, he got the party who held the trust estate to hand over that trust estate to

him. The case before Lord Eldon was the case of a trustee, who had knowledge of the rights of his *cestui que trust*, and made a title to the purchaser for value. In that a transaction of that kind could not be supported. The case before me would be an absolute combination of the two. The purchaser, to save himself, would be inducing the trustee to commit a fraudulent breach of trust. *Saunders v. Dehew* has been followed in *Allen v. Knight*.

That is the extent of the authorities I have yet found on the subject, and they bring it to this—that although you may get in any outstanding interest which a person may *bond fide* assign to you, you having notice of the intervening incumbrance, and he not having any such notice, you cannot get an assignment from a trustee who himself has another duty to perform, and makes over to you that estate to protect you against those interests which he was bound to protect. That is so rational, that one wonders the question should have arisen twice.

But in this case it is an admitted fact, that Prosser, when he took his mortgage, had no notice of the other will, and I must assume that J. Carter the younger had no notice. They both intended, the one to pass, and the other to take, the interest under the supposed last will. I have already held, that the interest which he took under the real last will did pass.

Then comes this question, which seems to me to be one of very grave importance, and I confess I felt pressed a good deal by the view in which Mr. James presented it to me, but which I have not been able to satisfy my mind is the correct view. He says, I was a purchaser for value without notice; I plead purchase for value without notice. What was the case? In *Wallwyn v. Lee* the question was, whether it was necessary to shew that the mortgagee had taken possession, and Lord Eldon said, you must plead possession, to make out that you purchased for valuable consideration without notice. Mr. James says, "I took a conveyance from a person in possession; I find myself in possession of the legal estate, and how can a Court of equity interfere to deprive me of the benefit of the legal estate?" But the legal

estate he can avail himself of is a legal estate under a conveyance, which on the very face of it betrays the trust; and the question is, whether, if you are obliged to admit you have no other conveyance or title than this, you can escape from the trusts so appearing on the face of the title. How could you, on a plea of being a purchaser for valuable consideration without notice, insist upon the benefit of this devise, and say, I have got the benefit of the devise, but I got it in so peculiar and strange a manner, that I am to be held unaffected by the contents of the very instrument under which I claim? No case has ever been brought up to that, and looking to the distinction drawn between the case of a trust expressed on the face of the instrument, and the case where there is merely the general trust for the persons ultimately entitled, two cases of an extremely different character, it does appear to me, that if you are driven to rely for your title on that which on the very face of it, when produced, exhibits the equities, you cannot be heard to claim a benefit under the instrument, and disclaim everything that appears upon the face of it.

So far from thinking it an easy or simple case, I confess I have thought it a case of considerable doubt and difficulty, novel altogether in its circumstances, and, of course, open to this observation, that it may be said the equity can only fasten upon the conscience. I have got the legal estate, and although true it is that the very instrument which creates it affords direct notice of these trusts, nevertheless my conscience was unaffected by it, and how can you fasten upon me any consequences of the legal estate so vested? It seems to me, nevertheless, to be a case in which a person driven to the necessity of saying he relies on his getting that interest under the instrument, is in effect saying this:—At the execution of this instrument, what passed to me was the estate vested in J. Carter under this will. But the moment you look to see what is the estate that is vested under the will, the very same instrument which you are obliged to produce to make out your title, is the identical instrument describing the trusts that may be enforced against you.

As to the doctrine of estoppel, which is the second point that Mr. James relied upon, that is clearly disposed of by the case of *Carpenter v. Buller*, which lays down the doctrine of estoppel, and shews that the mistake has long since been corrected at law which was fallen into here. An estoppel always arises upon a proceeding on the deed, and on any collateral action there is no estoppel, as *Parke, B.*, puts it in *Carpenter v. Buller*. He says, "If a distinct statement of a particular fact is made in the recital of a bond or other instrument under seal, and a contract is made with reference to that recital, it is unquestionably true that, as between the parties to that instrument and in an action upon it, it is not competent for the party bound to deny the recital, notwithstanding what Lord Coke says on the matter of recital in *Co. Litt.* 352 *b*; and a recital in instruments not under seal may be such as to be conclusive to the same extent. A strong instance as to a recital in a deed is found in the case of *Lainson v. Tremere* (9), where in a bond to secure the payment of rent under a lease stated, it was recited that the lease was at a rent of 170*l.*, and the defendant was estopped from pleading that it was 140*l.* only, and that such amount had been paid. So, where other particular facts are mentioned in a condition to a bond, as that the obligor and his wife should appear, the obligor cannot plead that he appeared himself, and deny that he is married, in an action on the bond—1 *Roll. Abr.* 873, *c.* 25. All the instances given in *Com. Dig.* 'Estoppel,' A, 2, under the head of 'Estoppel, by matter of writing, (except one which relates to a release) are cases of estoppel in actions on the instrument in which the admissions are contained. By his contract in the instrument itself a party is assuredly bound, and must fulfil it. But there is no authority to shew that a party to the instrument would be estopped in an action by the other party not founded on the deed, and wholly collateral to it, to dispute the facts so admitted, though the recitals would certainly be evidence; for

(9) 1 *Ad. & E.* 792; *s.c.* 3 *Nev. & M.* 603; 4 *Law J. Rep. (N.S.) K.B.* 207.

instance, in another suit, though between the same parties, where a question should arise whether the plaintiff held at a rent of 170*l.* in the one case, or was married in the other case, it could not be held that the recitals in the bond were conclusive evidence of these facts."

In this case, if an action of ejectment were brought by John, or those claiming under him, in respect of the shares of the other three brothers, that being a matter wholly collateral to this deed, and not in action of the deed, the deed would only be evidence, and no estoppel. As far as that point is concerned, I think it is sufficiently clear. The other point I thought far from clear; and it is not until after great consideration that I have taken the view I now take of it.

Those really were the two main points. There was a third point, which is worthy of some consideration, whether or not J. Carter, the father, had lost his priority in respect of his having given back the title-deeds to the son who made the mortgage. Now, upon that, I think I may take it as conclusively settled that, in order to postpone a prior incumbrancer, the onus is on the party seeking to postpone him of shewing, not merely that he has the deeds, but that through gross negligence the prior incumbrancer has not got them. In *Allen v. Knight* the deeds had got into the hands of the mortgagor, and he parted with them. There was no evidence as to how they got into his hands, and Wigram, V.C., first, and Lord Cottenham, afterwards, held that the burthen of proof was on the person seeking to postpone the other, and no gross negligence would be presumed from the mere fact of possession.

In *Colyer v. Finch* the doctrine was fully and completely settled, as it appears to me, and Turner, V.C., in *Hewitt v. Lossemore*, lays it down clearly and precisely, that there must be gross negligence, and that making no inquiry would be gross negligence. But even then, according to *Allen v. Knight*, you are bound to shew that no inquiry was made, because, it was said there, that there being no evidence either way, you could not presume that no inquiry was made.

In this case, the contest being between

co-defendants, there is no evidence one way or the other, as to the circumstances under which the deeds were left; but two of the subsequent mortgagees, Aiken and Coles, make this affidavit.—[His Honour read the affidavit as set out above.] They charge distinct fraud on J. Carter the younger, although it is not proved. Then, what do they extract from Carter the elder on cross-examining him? They only extract this.—[His Honour read the evidence of J. Carter the elder on cross-examination.]—That was quite a sufficient excuse. If the deeds were given back to the trustee he had a right to hold them. He was under the last will the right person to hold the deeds; and in *Farrow v. Rees* (10) it was held, that a tenant for life must retain the deeds, where there were terms for raising portions. Even if you take the supposed interest under the first will, I have a strong inclination of opinion, although I am not obliged so to hold in this case, that where there are tenants in common and one of them mortgages his share, it would be impossible to say that there was such gross negligence in not taking the deeds as amounted to fraud on the part of the mortgagee. I do not think the case can be put so high as that; for if Short had notice of this will, or suspected it, he handed them rightly back, and this gentleman would very wrongly have held them.

That disposes of the main question in the cause, though there remain unfortunately an enormous number of small points; but I think it will not be difficult to arrange them when the main question is settled. One is, what is the effect of the several incumbrances made by the sons on their shares? I hold, as I held in J. Carter the younger's case, that they passed all the interest they could pass under some of the deeds, and whenever that has been the case, I hold it passed all the arrears of the annuity then due, and upon their executing the deeds their interest ceased. I am in some difficulty as regards E. T. B. Carter, because the certificate only finds that there was a deed executed, by which he assigned all the estates and interests

which passed under the first will, which is not now the real will. Having merely assigned all the estate and interest which passed under that will (which was nothing) with the words "all the estate, right, title and interest in the same property and premises hereby granted and assigned," I cannot upon that hold that he has passed his interest under the second will. But I find this on the certificate, that several other deeds were executed by the said E. T. B. Carter which have not been produced, and as to that there must be some inquiry.

The decree contained the following declarations, amongst others:—That A. Prosser, as the administratrix of J. Prosser, deceased, was, by virtue of the surrender of the 4th of December 1852, and of his admission, the first incumbrancer on the life interest of J. Carter the younger, in one undivided eighth part of the copyhold estates of the testator, E. Carter, to which he was admitted on the 22nd of December 1852, and the only incumbrancer on the life interest of J. Carter the younger, in the leasehold premises described in the second schedule to the certificate, to contain 3 perches, and in the occupation of J. Guest, but subject nevertheless to the prior trusts of the will of the said testator. That J. Prosser was a trustee of the legal estate of the said one-eighth part of the said copyhold estates, and of the leasehold premises for the purposes of the will. That Tiley was the first incumbrancer on the life interest of J. Carter the younger in the renewed lease of the tithe rent-charge, without prejudice to any further claim he might make in respect of his said assignment. That Bromage, Snead and Best, as sub-mortgagees of John Carter the elder, under the deeds of the 1st of June 1850, and the 13th of April 1855, were the first incumbrancers on the life estate of John Carter the younger, in all the freehold, copyhold, and leasehold estates of the testator, other than the one-eighth of the copyholds and leaseholds of which the legal estate was vested in Prosser, and the tithe rent-charge and premises of which Tiley was the first incumbrancer, subject to the prior trusts contained in the will of the testator, and subject also, as to the here-

ditaments comprised in the mortgage by the testator, to that mortgage. That Messrs. Bromage and Snead were trustees of the legal estate in the freehold, copyhold and leasehold estates of which they were the first incumbrancers, other than the parts comprised in the mortgage of the 16th of August 1844, for the purposes of the will of the testator. That Messrs. Bromage and Snead were the second incumbrancers on the life interest of John Carter the younger, in one-eighth of the copyholds and leaseholds of which the legal estate was in Prosser, and in the leaseholds of which Tiley was the first incumbrancer. That John Carter the elder was, under the deed of the 1st of June 1850, the next incumbrancer on the life interest of John Carter the younger in all the freeholds, copyholds and leaseholds of which Messrs. Bromage and Snead were the first and second incumbrancers, but subject to the trusts of the will; and the priority of the other incumbrances was as mentioned in the fifteenth paragraph of the chief clerk's certificate. That the annuities were charged on the corpus of the freeholds, copyholds and leaseholds, but that the life interest of John Carter the younger is primarily liable thereto. That George Carter's annuity and reversionary life interest ceased from the date of the indenture of the 10th of September 1852, and that the arrears of the annuity then due were assigned to Prosser. The decree also contained a similar declaration with respect to the annuities and reversionary life interests of C. Carter and E. T. B. Carter.

WOOD, V.C. }
Nov. 11, 12. } HARE v. BURGESS.

Lease for Lives—Covenant for Perpetual Renewal.

A lease for three lives contained a covenant that in case the lessee should, upon the decease of either of the cestuis que vie (naming them), be desirous of taking a renewed lease for another life, and should nominate a person in the room of the deceased cestui que vie, the lessor or the person entitled in reversion would execute a further lease for

the life of the person so to be nominated, and the lives of such of them, the original cestuis que vie, as should be then living, and of the survivors and survivor of them, at and under the same yearly rent, and with and subject to such and the same covenants, provisoes and agreements, "including this present covenant," as were therein contained:—Held, that this was a covenant for perpetual renewal, and must, mutatis mutandis, be entered into by the reversioner for the time being on every fresh renewal.

By indenture, dated the 14th of July 1836, Paul Methuen, afterwards Lord Methuen, demised to the plaintiff some pieces of land at Bedminster, in Somersetshire, during the natural lives of Charles Bowles Hare, Robert Leonard and Thomas Harris, and the survivors and survivor of them, at a yearly rent of 67*l.* 2*s.* 6*d.*, payable quarterly; and the lease contained a covenant on the part of the lessor that in case the plaintiff should, upon the decease of either of them, the said C. B. Hare, R. Leonard and T. Harris, be desirous of taking a further or renewed lease of the said demised premises for another life, and should within the space of twelve calendar months give notice in writing of such desire unto the said Paul Methuen, or the person or persons for the time being entitled to the reversion, and should nominate any person in the room or stead of the person who should have so departed this life, he, the said P. Methuen, or the person or persons for the time being entitled as aforesaid should and would at the request and at the costs and charges of the plaintiff, and on the surrender of this lease (such surrender to be at the like costs and charges), and payment of the sum of 134*l.* 5*s.* by way of fine or premium for such renewal, forthwith duly make and execute unto the plaintiff a new and further lease of all and singular the premises thereinbefore demised, for and during the natural life of the person so to be nominated, and the lives of such of them, the said C. B. Hare, R. Leonard and T. Harris, as should be then living, and of the survivors and survivor of them, at and under the same yearly rent, and with and subject to such and the same covenants,

provisoos and agreements, "including this present covenant," as were therein contained.

C. B. Hare, one of the lives named in the lease, died on the 3rd of August 1855; and on the 4th of March 1856 the plaintiff served upon the defendant, who had purchased the reversion of the premises, a notice of his death and of his desire to take a renewed lease, and nominated a new life.

The bill was filed for specific performance of the covenant for renewal, and a decree having been obtained it was referred to chambers to settle the form of the renewed lease. The question that now arose and was adjourned into court was, as to the form of the covenant for renewal to be contained in the new lease; it being contended, by the plaintiff, that the covenant in the original lease was a covenant for perpetual renewal; and, by the defendant, that it was only a covenant to renew on the dropping of each of the original lives. It was also objected by the defendant, that, being an assignee, he could not be compelled to enter into a covenant which would bind himself personally.

Mr. Cairns and *Mr. Wickens*, for the plaintiff.—The plaintiff is entitled to a repetition of the covenant for renewal, the present owner having been a purchaser with notice of the original covenant—*The Copper Mining Company v. Beach* (1) and *Hodges v. Blagrove* (2). And the new covenant must be in the same form as the original, which is a covenant for perpetual renewal—*Baynham v. Guy's Hospital* (3), *Sadler v. Biggs* (4), *Atkinson v. Pillsworth* (5) and *Moore v. Foley* (6). It never was the rule that this Court would lean against such a construction of a covenant as involved a perpetual renewal; but if so, this is such a covenant, even according to the strictest construction.

(1) 13 Beav. 478; s.c. 1 Law J. Rep. Chanc. 84.

(2) 18 Ibid. 404.

(3) 3 Ves. 295.

(4) 4 H.L. Cas. 435.

(5) 1 Ridgeway's Parl. Cas. (Irish), 449.

(6) 6 Ves. 232.

Mr. Dart, for a mortgagee, supported the plaintiff's view, and referred to the form of covenant for perpetual renewal in 4 *Bythewood's Conveyancing*, by *Jarman*, p. 566, and *Ibid.* 394, n.

Mr. Batten, for the defendant.—*The Copper Mining Company v. Beach* is an authority that trustees are not bound to enter into a personal covenant of this nature, and for the same reason an assignee is not bound. The plaintiff is entitled to a renewal of the lease, but it is impossible to say that a purchaser with notice of such a covenant is bound to enter into a new covenant rendering himself personally liable—*Keppell v. Bailey* (7) and *Hodges v. Blagrove*. The original covenant is not a covenant for perpetual renewal. In order that a covenant may be so construed it "must be clear, plain and distinct, and in such terms that will not bear any other construction"—*Brown v. Tighe* (8). There is a reasonable way of construing the covenant without going the length of a perpetual renewal, by making it a covenant to renew only on the dropping of each of the original lives. It would be absurd to follow precisely the words of the covenant, because, if so, the new lease to be made on the decease of C. B. Hare must contain a covenant to renew on the decease of C. B. Hare. He cited also *Iggulden v. May* (9).

Wood, V.C. considered that, according to the plain and natural construction of the words, the meaning of the covenant was that, omitting the absurdity of putting into the new deed a life which had already dropped, the new lease should contain the same covenant for renewal *mutatis mutandis*. Where there was a covenant in a lease to grant a new lease, subject to all the covenants contained in the old lease, the Court had treated these words as exclusive of the covenant to renew; it would not infer the right of the lessee to such a covenant without words indicating a plain intention, because if he could insist on the covenant

for renewal being inserted, it would be equivalent to a perpetual right of renewal, and such a sweeping operation ought not to be given to a general covenant for the insertion of all the covenants in the lease. Therefore, where it was intended to give a right to a perpetual renewal, conveyancers had adopted a special form for that purpose, and accordingly this identical form of words was given in *Jarman*. It was true the covenant might have been more dextrously worded, for instance, by using words descriptive of the *cestuis que vie* instead of naming them; but, upon the whole, it was impossible to say the intention was not sufficiently clear. As to the other point upon which *The Copper Mining Company v. Beach* had been cited, it was argued, for the defendant, that in no case could a party impose upon an assignee the necessity of entering into a personal covenant; but there seemed to be no good reason why this should not be done: when the assignee had granted the lease at the expiration of the first life he became free, the perpetual obligation affecting only the land and the person for the time being entitled in reversion. *The Copper Mining Company v. Beach* came only to this, that there were cases of specific performance in which the Court would not compel the assignees to do what it would not compel trustees to do; but that rule was not universal, for if a person contracted to sell property, and before completion it came into the hands of parties who were beneficially interested, they would be obliged to covenant for title, though that would not be so in the case of trustees. The true rule was, that the Court would deal with the party according to the nature of his interest, and if he were a bare trustee, it would endeavour to discover some means of giving the lessee the benefit of his covenant without imposing a personal liability on the trustee. In this case there was no reason why the covenant should not be inserted; but as both questions were new, there would be no costs on either side.

(7) 2 Myl. & K. 517.

(8) 2 Cl. & F. 396, 416.

(9) 9 Ves. 325; a. c. 7 East, 237.

M.R. } STANTON & THE CARRON
July 8, 9, 10, 20. } COMPANY.

Accounts—Statute of Limitations—Principal and Agent—Acquiescence—Shareholders.

If a company does not discover, and has not the means of discovering, the correctness of entries in a succession of accounts rendered by their agent, they are not after the decease of the agent precluded by lapse of time, or by certain shareholders omitting, against opposition, to press for explanations previously asked, from shewing that such entries are not only erroneous but fraudulent.

Where the accounts of an agent acting for a company have been improperly kept or mystified, and not duly rendered and explained when asked for, the Court will direct them to be taken through a period of twenty-five years, though accounts sent in had been acted on, and though shareholders who asked for further information and explanations on such accounts did not persevere to obtain them.

The manner in which the Court will direct the accounts to be taken.

The bill in this case was filed by Henry Tibbats Stainton, James MacLaren and Henry Dawson, against the Carron Company and William Dawson, praying that the Carron Company might concur in all things necessary for transferring to the plaintiffs, as executors and trustees of the will of Henry Stainton, deceased, and enabling them to dispose of the testator's shares in the company. It also prayed that accounts might be taken of what at the decease of the testator was due to him from the company in respect of his shares, and of what had since accrued, and of what was now due from the company to the testator's estate; and also an account of what at the testator's decease was due to him from the company, and of what was due from the company to his estate in respect of the open account or otherwise, and that the company might pay to the plaintiffs the amounts found due upon such accounts to the estate of the testator. The bill also prayed that the defendants might pay the costs of the suit, and that the company might be decreed to take

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and concur in all proper measures to put an end to the action and proceedings they had instituted in Scotland, and to relieve the testator's estate from the effects thereof including the costs incurred thereby; and further that the company might be restrained from selling the shares of H. Stainton, or declaring them forfeited, or doing any act in relation thereto, and from prosecuting any new action, &c., in Scotland, or continuing the inhibition or arrestment, or from commencing or prosecuting any other action in Scotland or elsewhere, against the plaintiffs in respect of the debt, which the company claimed as due from the testator, or from suing out, laying on, using or continuing any arrestment or inhibition, or other diligence or process in Scotland, for attaching the heritable or moveable, real or personal estate of the testator in Scotland, and from preventing the plaintiffs from dealing with such property.

The Carron Company was established in Scotland for the manufacture of iron goods. H. Stainton was a holder of 101 shares in the company; he was also a director, and in 1808 he was appointed the manager of the business of the company in London. From the time of his appointment until 1825 he was paid a commission of 5*l.* per cent. upon all ready-money sales and cash collected by him on open accounts. On the 10th of May 1826 the company resolved that the salary of H. Stainton should be fixed at 2,000*l.* from the 30th of June 1825 to the 30th of June 1826, with the use of the dwelling-house attached to the warehouse, and allowances for coals, candles and taxes.

H. Stainton died on the 5th of December 1851, having by his will appointed the plaintiffs his executors and trustees.

The Carron Company alleged, that the company's resolution of the 10th of May 1826 deprived the testator of all commission from that time, and substituted 2,000*l.* a year for his future services; but the plaintiffs insisted that the resolution continued for a year only; that it was never renewed, and that it never included a sum of 250*l.* allowed as Woolwich expenses; and they insisted that the testator was a creditor of the company for 4,018*l.* 10*s.* 1*d.*

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The company, on the contrary, insisted that the testator was a debtor to them for 69,617*l.* 1*s.* 6*d.*, and they claimed in addition 38,623*l.* 4*s.* 9½*d.*, on account of interest from time to time due up to the 31st of December 1857.

Several suits were instituted in England to obtain an administration of the estate of the testator.

The company also took proceedings in Scotland to obtain payment of their claim, and to attach the heritable or moveable estate of the testator in Scotland, and proceedings for this purpose were now pending.—

Maclaren v. Stainton, 16 Beav. 279; s. c. 22 Law J. Rep. (N.S.) Chanc. 274.

The Carron Company v. Maclaren, 5 H.L. Cas. 416; s. c. 24 Law J. Rep. (N.S.) Chanc. 620.

Stainton v. the Carron Company, 18 Beav. 146; s. c. 23 Law J. Rep. (N.S.) Chanc. 299.

Stainton v. the Carron Company, 21 Beav. 500; s. c. 25 Law J. Rep. (N.S.) Chanc. 577.

This suit was finally instituted against the Carron Company. The plaintiffs insisted that monthly accounts had been settled with the company; that the same had been the subject of discussion at the meetings of the company in Scotland; that explanations had been given to the inquiries of shareholders, and to Messrs. Todd & Romaine in particular; that the books of the London agency were always open to the shareholders; that H. Stainton had handed over to the company a large secret fund, which had arisen out of certain transactions carried out and concluded by H. Stainton, as the London agent, and that nothing was due from his estate to the company. The defendants, on the contrary, alleged that the testator had retained in his hands large sums beyond the amount of his salary, and they denied that any proper account had been sent to Scotland; that they were not aware of the errors in the accounts, and had no means of discovering them or of sanctioning them by approval.

From the affidavits made on behalf of the defendants by an accountant, and by

the bookkeeper of the company, it appeared that the books kept at the office of the London agency consisted of the expense books, disbursement books, which contained a column for figures referring to vouchers for the payments entered, share journals, cash books, sale books, invoice books, pass books to the bank account, and ledgers. The expense books contained daily entries of petty payments, as portorage, booking parcels, porters, day labourers, and weekly servants' wages, tolls, and other small payments, as low as 2*d.*, from time to time made in conducting the business of the London agency. All other payments in conducting such agency were entered in the disbursement books, and at the end of each month the payments in the expense books were classed under various heads and under the direction of Henry Stainton; the totals were posted into the disbursement book for the time being in use. At the end of each month all the entries in the disbursement book were carried into the journal under two heads, viz., payments "on account of the Carron Company," and payments on account of "wares." The entries under the latter head purported to be payments relating to and being charges on the London business of the company, while the entries under the former head purported to be payments made by the London agency on account of the company, but not chargeable against the London business. The cash books contained entries of all cash received, and the discounts and abatements allowed to customers. In these books sums received relating to the London business were entered in black ink, and sums received not relating to the London business were entered in red ink. The journals and invoice books contained the usual entries necessary for keeping the books upon the system of double entry. In these books the entries from the different books used in the agency, except the ledgers, were arranged under their proper heads, and from the journals and invoice books the accounts were posted into the ledgers. The invoice books were, in fact, journals, in which all journal entries relating to the sale of goods were made.

Accounts were rendered half-yearly, on

the 30th of June and the 31st of December, and they consisted of six monthly accounts, one for each month of the preceding half-year, and of a statement or balance sheet, purporting to shew the state of every account in the ledger at the end of the half-year.

From these affidavits it further appeared that the books of the London agency, with the exception of the disbursement book, contained no entry whatever which shewed the charges occurring in the monthly accounts under the head of "wares," as "portorage," &c., and other charges occurring therein under the head of Carron Company, as "sundry charges and expenses;" that the disbursement books contained entries against the Carron Company of the items which in the monthly accounts appear under the term "sundry charges and expenses." That upon an examination of the disbursement books it appeared that the sums in the monthly accounts rendered subsequent to the 30th of June 1825, charged as for "portorage," &c., were the aggregate of various items, which were entered separately in the disbursement books; and that upon comparing such books with the expense books, it appeared that the larger number of these items so entered separately in the disbursement books were transferred from the expense books, but that in almost every instance a portion of the sums entered as "portorage," &c., in the monthly accounts was not transferred from the expense books, and that with one exception, occurring in December 1825, the entry in the disbursement books of so much of the charges contained in the monthly accounts for "portorage," &c. as did not consist of items posted from the expense books, was in the form of a charge for "sundry charges and expenses for wares," or "sundry charges and expenses"; and, with the exception of the entries in the disbursement books, there was no entry whatever in the books of the London agency which purported to shew that the sums, or any part thereof, entered in the expense books, or the sums, or any of them, or any part thereof, charged in the monthly accounts, by means of the items mentioned, were paid, expended or applied on account of the company in the business

transacted at the London agency, and that there was nothing in the books of such agency which in any way explained or supported the entries in the disbursement books.

The affidavit then pointed out one or two instances from which conclusions were drawn that entries in the disbursement books posted from the expense books had been altered, and that sums had been charged against the company larger in the aggregate than ought to have been, and that so much of the charges for "portorage," &c. when not explained by the expense books, was entirely fictitious and improperly debited against the company. It was also pointed out that the disbursement books contained other entries charged in the monthly account against the company, which were wholly unsupported or unexplained by any corresponding entry in the other books of the London agency.

The private cash books of Henry Stainton were also examined, and each page of these, both on the debit and on the credit side, was stated to contain three columns; that the first or left hand column on the debit and credit sides respectively related to receipts and payments on H. Stainton's own private account; that the second column on the debit and credit sides respectively related to bills received and paid on account of the Carron Company; and that the third or right hand column on the debit and credit sides of the account respectively related to cash received and paid on account of the Carron Company; that in the first or left hand column of the debit side of these books sums were debited (improperly as assumed) against the company, which, with some few exceptions, were entered as cash receipts by H. Stainton on his own account, and that it was done at or about the dates under which the sums were charged against the Carron Company, in the books of the London agency, and it was believed that there was not on the payment or the credit side of these private cash books, or in certain memoranda connected with them, any entry of any payment which purported to shew that the sums so entered in the first column of the debit side of the books as received by H. Stainton on his own account, or any of them, or any part thereof, were or was

expended on account of the Carron Company. The private cash books also contained in the first column of the debit side an entry, "journey per wares, 115*l.* 15*s.* 6*d.*," and in the first column of the credit side of the same book is an item, "journey 100*l.*," from which it was assumed that H. Stainton put that sum into his purse on the occasion of a journey: this sum of 115*l.* 15*s.* 6*d.* being one of the sums stated as improperly charged against the company.

There were other instances of credit taken for journeys, but with these exceptions there was no entry on the credit side of the same books in any way corresponding with the entries on the debit side. The private cash books also shewed that previous to the 30th of June 1825 sums were entered as taken for a journey to Scotland, but that in none of these instances was there a corresponding entry on the debit side of the private cash book, or any entry either in those books or in the books of the London agency, which charged the Carron Company with the amount taken by H. Stainton for his journey, or represented that he received such amount from the company. After the 31st of December 1825 there was no entry in the private cash books or memoranda which mentions or refers to commission, "Woolwich salary," or "Woolwich expenses," and from an examination of the private cash books it was surmised that all the entries marked as improperly debited by H. Stainton were retained by him for his own use.

The cause now came on upon a motion for a decree.

Mr. R. Palmer, Mr. Selwyn and Mr. Kenyon, for the plaintiffs.—The defendants would open no less than fifty-two half-yearly accounts, which had been duly sent to Scotland and settled there. If any account was to be taken, it must be most ample, but it would in effect be deciding on a question of fraud.—

Pattison v. Mills, 1 Dow & Cl. 342; s. c. 2 Bligh, N.S. 519.

Don v. Lippmann, 5 Cl. & F. 1.
3 & 4 Will. 4. c. 27.

Story on Conflict of Laws, p. 282.

Reimers v. Druce, 23 Beav. 145; s. c. 26 Law J. Rep. (N.S.) Chanc. 196.

The MASTER OF THE ROLLS.—An account must be taken: the only question seemed to be the form in which it must be done. It was impossible to treat the documents sent to Scotland as settled accounts without giving the company leave to surcharge and falsify.

Mr. Rolt, Mr. Follett and Mr. Cotton.—The defendants were clearly entitled to a general account. It was the duty of the testator as manager to render correct accounts, and to state them in such a manner as to represent items under their true description. The accounts which were to be laid before the company from all the agencies were previously submitted to Mr. Stainton, and he made alterations in them; the accounts settled, as it was said, never in fact afforded materials for the company to ascertain if the agent had been rightly credited. The company then had a right to a general account. It was in such a case nothing to say that the company could have called for vouchers; and as for any acquiescence, there was none. Up to June 1825 the books explained themselves, everything was clear, and though in the subsequent accounts every class of disbursement remained the same, still there arose a class of extra charges which had never been made while he was in receipt of commission, and many of these entries were made at times which nearly corresponded to those made in a book relating to his private income. Upon the evidence, therefore, it was clear that no proper account had been either kept or tendered, and the defendants were entitled to what they asked, a general account.—

Willis v. Jernegan, 2 Atk. 252.

Tickel v. Short, 2 Ves. 239.

Earl of Hardwicke v. Vernon, 14 Ves. 504; s. c. 4 Ibid. 411.

Coleman v. Mellersh, 2 Mac. & G. 309.

Allfrey v. Allfrey, 10 Beav. 353; s. c. 1 Mac. & G. 87; 1 Hall & Tw. 179; 17 Law J. Rep. (N.S.) Chanc. 30.

Clarke v. Tipping, 9 Beav. 284.

Stratford v. Twynam, Jac. 418.

The defendants were also entitled to compound interest on the money retained. The Courts here, however, did not give it, but the Courts in Scotland did. If money

was improperly withheld, the *lex loci contractus* must prevail, and not the *lex loci solutionis*. The English Court would never say, I will exercise a foreign jurisdiction, if you will come here and have your cause determined; this Court also could not determine the questions upon the Statute of Limitations with reference to foreign law.

Mr. R. Palmer, in reply.

July 20.—The MASTER OF THE ROLLS.
—The accounts between the testator's estate and the Carron Company ought, no doubt, to be opened. The testator was not only a partner in the company, but he was the manager of its business in London, and also its agent; he had no other business, and devoted the whole of his time to this; so far therefore it was the ordinary case of a trading firm abroad sending one of its members to another country to conduct any business they might have there. Had the testator been alive, what would have been his position with respect to the accounts now produced? They shew that he received sums varying from 2,000*l.* to 3,000*l.* a year on behalf of the company without shewing any discharge; he produces no vouchers and gives no explanation whatever: an account in such a case, therefore, would be a matter of course, but he would, no doubt, have all proper allowance made to him in respect of them. The claim, however, is made against the persons beneficially interested in his estate. They are entitled to say that no claim was made until after the death of H. Stainton, and that he might have been able to explain what they cannot, and that they are entitled not only to the benefit of every explanation which can possibly be suggested consistent with the course of dealing between him and the company, but also to the most liberal construction that can be put upon it.

The testator was evidently a man of business, methodical and careful. He kept careful accounts, and scrupulously preserved vouchers for the smallest payments, all duly arranged; but there are no vouchers for the items in respect of which it is sought to open the account. This is unfavourable to the testator's estate. It is not pretended that any of the vouchers have

been lost or destroyed. As far, however, as a negative can be proved, it appears that there never were any vouchers. It was his duty to preserve the vouchers and evidence of payments and sums received. In *Haig v. Gray* (1) I stated the principle which must govern these cases as follows:—"It cannot be too generally known or understood amongst all persons dealing with each other in the character of principal and agent, how severely this Court deals with any irregularities on the part of the agent, how strictly it requires that he who is the person trusted shall act in all matters relating to such agency for the benefit of his principal, and how imperative it is upon him to preserve correct accounts of all his dealings and transactions in that respect, and that the loss, and still more the destruction of such evidence by the agent, falls most heavily on himself." These observations, however, apply only in the present case to the necessity of keeping correct accounts of the application and receipt of money; here no accounts were kept of these particular items, which of itself is sufficient to open the accounts, making just allowances; but if it could be shewn that the allowances exceeded the unvouched items, the Court, upon the evidence before it, might not think it proper to go into the accounts. The explanations, however, which have been given are highly unsatisfactory. There is the remuneration of the testator; no question can arise upon that. The testator clearly understood that his salary was to be 2,000*l.* a year for the future, and nothing more, with the exception of the allowance for coals and candles, and the house rent free. The unvouched items for "portage," after the salary was fixed, are not explained; the excess was not charged as commission. The salary is out of consideration; and it cannot be suggested that it was commission that went to make up one of these items of "portage," since he did not understand that he was to have commission, and though reluctant, he was compelled to take the salary. What is there then beyond to explain the unvouched excess of from 2,000*l.* to 3,000*l.* a year above the salary?

(1) 20 Beav. 219.

Nothing. Many suggestions have been made: expenses at Woolwich, for instance, but up to 1825 they never exceeded 600*l.* a year, and that business was suspended for two or three years after that time. Then there are the casual expenses of travelling and other expenses, journeys to Carron and the like; but that also is quite insufficient to meet this amount; and, in addition, if he is to be treated simply as an agent, these journeys to Carron as an agent not sent for by the principal, but who goes for his own convenience to see the principal, would not be allowed; and in the accounts no charge is made for these journeys. Should it be regular, and the accounts settled between them, without any such entry being made in taking the accounts, the charge of such a journey would not be allowed. It would, however, be allowed, if the accounts were to be taken on a different principle; but it would be under a different head. The case, however, would be treated liberally; suggestions would be attended to; and so would entries in a private journal or diary, though the defect was caused from the testator's not having kept proper accounts, though it seems tolerably clear that it was applied to his own use. It is then said, that these are settled accounts, duly rendered, and acquiesced in and allowed by the Carron Company. If so, that would prevent their being opened, notwithstanding such an item as this, because if cognizant of the fact for many years, without questioning it till after the testator's death, it would be very doubtful whether the Court would entertain the question after a lapse of time and after his death. Here every half-year the testator sent accounts to the manager of the Carron Company; and he acted with respect to them as the testator directed. Accounts were generally laid before the company at their general half-yearly meetings, but there was nothing stated on them which could expose this particular fact now brought to light. In what character did the testator stand to the company? He was not a mere agent, but a member of the partnership, and one of the partners carrying on the business of the partnership in London for the benefit of the partners, at a salary; and practically the testator and the manager at Carron

filled the same character towards the shareholders that directors of a railway company hold towards the ordinary shareholders. It appears in evidence that they regulated the affairs of the company and conducted the business as they pleased, and rendered such accounts as they liked, subject to having questions asked by shareholders at general meetings. The testator and his family certainly seem to have had such a preponderance of votes, that it would have been difficult, if any one of the shareholders had desired it, to remove these gentlemen from being directors or managers, and to put other persons in their places. No such intention, however, existed; the case, therefore, is to be regarded as that of a company, where there having been a change made in the direction, an investigation into the conduct and accounts of the late manager is insisted on. This case in many respects reminded me of *The York and North Midland Railway Company v. Hudson* (2), as to the principle upon which the account must be taken. The correspondence teems with the alarm which the testator felt at the possibility of the partners inspecting, or sending anybody to inspect the accounts. He took counsel's opinion, and was prepared to resist it to the utmost; and he said that nothing short of a decision of the House of Lords would induce him to permit any shareholder of the company to examine any of the accounts he was keeping. The testator, therefore, was not only in the position of a director giving such information as he pleased to the company; but he was also in a situation, in which he contended that the company had no right to any more information than he thought fit to give to them, or such as he and Mr. Dawson together thought fit to give them, and that he was prepared to resist such claims by every species of legal obstacle. Under these circumstances, Messrs. Todd & Romaine, who wished for such investigation, very wisely upon the evidence which they had, abstained from further molestation. The company was prosperous, and was increasing in prosperity, and a slight increase was made to the dividend.

(2) 18 Beav. 70; s.c. 23 Law J. Rep. (N.S.) Chanc. 695.

The testator held out to them the evil and the consequences of dissension, and the probability of a rival company; and it is not too much to say that, being ignorant of facts, they acted wisely in forbearing to press the matter.

Is it possible then to say, that the accounts sent to Mr. Dawson at Carron have been acquiesced in and approved by the company, or that Mr. Dawson, the manager at Carron, can be treated as the company, or that he can be allowed by his acquiescence to bind the excluded shareholders, who were kept at arm's length, and were allowed to know nothing but what the testator had really sanctioned? It is quite impossible. It would be less startling to hear it said, that Mr. Dawson might be treated as a director who ought to have investigated these matters fully, whose duty it was to investigate them more fully, and that he might possibly have been made liable for what, if anything, in taking the accounts, should not be found forthcoming from the testator's estate; but to treat him or his silence on the subject as binding the company, some of the shareholders of which were endeavouring to see the accounts and to ascertain the matter, and were carefully excluded, and none of whom saw more than they were permitted to see, seems impossible. I make no comment on the testator's letters, in one of which he says, "You must give them just what is sufficient to satisfy and avoid details, and no more."

The accounts sent, therefore, do not affect the rights of the defendants, the Carron Company, and neither time nor settled accounts affect this question; and if on my decree I treat the account as partially settled, it is only to avoid the expense and delay that would be occasioned by taking the accounts from the beginning. It might possibly be found to be an instrument of delay and expense and prevent the final adjustment of this matter. I propose, therefore, to have all these items thoroughly inquired into, to charge the testator with the receipt of the sums appearing in the books to have been received by him, and then to allow those who represent the testator to discharge his estate in the best manner they can, but giving to them all just allowances. Such being my object,

take an account of the dealings and transactions of the testator on behalf of the Carron Company from the 30th of June 1825 until his decease, and in taking such account the books of the deceased are to be admitted as evidence for both sides, and are to be treated as conclusive between both parties except as hereinafter mentioned. Then the defendants, the Carron Company, are within six weeks from the date of the decree to deliver to the plaintiffs a list of such items appearing in the books, as they desire to have vouched or accounted for, and thereupon an account is to be taken of such items, and in taking such account all just allowances are to be made to the testator. In all other respects the accounts appearing in the testator's books are to be treated as settled accounts, but with liberty to the plaintiffs and defendants respectively to surcharge and falsify as they may be advised. In addition I think it proper to direct that if any balance appears to be due from the testator in taking such accounts at the end of each year, the same is to be stated, in order that the Court may deal with them when the case shall come back on further consideration. I express no opinion whether the law of England or Scotland is to be considered as governing the mode of taking these accounts; that must be considered in chambers, when particular questions may be raised with respect to the accounts themselves; but if by the result of the account it shall appear that considerable balances have been annually retained by the testator, not merely as agent but as director and trustee, it would be difficult to persuade me that his estate can avoid accounting for interest on sums which would have been paid to the shareholders or would have borne interest for the company in his hands if he had kept his accounts in the open and proper manner he ought to have done, and which the shareholders had no opportunity of seeing, and also if it shall appear that these sums which were belonging to the company and were in his hands produced interest or profit.

My decree should be considered. It inverts the position of the parties, turns the plaintiffs into defendants and the defendants to plaintiffs. I think it therefore necessary to warn the parties that if this decree is not

prosecuted by the plaintiffs, which is probable or very possible they may not think it desirable to do before me, I cannot compel a party to prosecute a decree; and should the defendants not think fit to prosecute it until after the proceedings in Scotland have been concluded, I shall as far as I am able throw every impediment in the way of their proceeding with the decree at all. It is highly objectionable that a decree should be kept hanging over the heads of persons, and I will endeavour to prevent it.

Mr. Palmer.—There can be no question now upon the authority of the Court to stay the proceedings in Scotland: the prayer of the bill extends to it, and it would be manifestly not for the interest of either party that they should go on.

THE MASTER OF THE ROLLS.—There is difficulty. I am bound to consider that the House of Lords was right in coming to a different conclusion to what I did when I granted an injunction.

Mr. Palmer.—That was an interlocutory application.

THE MASTER OF THE ROLLS.—True. As regards the interests of these parties, it was an unfortunate decision. It was not a case in which it was proper to stay the proceedings; I am convinced the result will only be to lead to delay and expense. But I have doubts as to the view of the House of Lords in that case, and on a subsequent occasion when the matter was brought before me again. If not consented to, it must be brought expressly before me for consideration.

Mr. Palmer.—Should an order to stay the proceedings be made it would be till further order; so that in the event, which I assume will not happen, of there being any negligence on the part of the plaintiffs in prosecuting the decree, it would be competent for the Court to give liberty to resume the proceedings.

THE MASTER OF THE ROLLS.—I must have a substantive application; I wish to do nothing that might lead to an appeal

on that point: an appeal on the merits would be quite different.

Mr. Palmer.—An appeal on merits will no doubt not be thought of, and as far as we are concerned the persons beneficially interested have the real conduct of the suit. The nominal plaintiffs will take what course they think fit.

KINDERSLEY, V.C. $\left\{ \begin{array}{l} \text{In re THE} \\ \text{ST. GEORGE'S BENEFIT} \\ \text{BUILDING SOCIETY.} \end{array} \right.$
July 10.

Winding-up Acts—Building Societies.

Upon a petition for winding up a benefit building society, which had been duly enrolled under the provisions of the act 6 & 7 Will. 4. c. 32, it was held, that such societies came within the operation of the Winding-up Acts.

This was a petition that the St. George's Benefit Building Society might be wound up under the Winding-up Acts. The society was formed in the year 1854, with the objects of erecting freehold and leasehold villas and houses, which were to be allotted to the members of the society; and of the investment of savings and the division of profits among the shareholders; and also the loan or advance of money to such persons as should erect houses under the rules of the society, such advances to be secured by mortgage of the land and houses. The rules of the society were duly certified, and it was enrolled under the provisions of the statute 6 & 7 Will. 4. c. 32. The persons who promoted the society and became partners in it exceeded seven, and it was agreed that a capital should be raised by the creation of 25*l.* shares, for the purpose of carrying on the operations of the society. No specific amount of capital to be raised was stated. By the rules it was provided that the society should be managed by an executive committee, and that in every third year a general account should be prepared shewing the receipts, expenditure and assets; and the surplus, after payment of the liabilities, was to be ap-

propriated by the directors, at a special meeting to be called within a time limited, equitably and equally between the investing and borrowing members. A register book was kept, and the entire sum which had been paid up on the shares amounted to 85*l.* 1*s.* 11*d.* The society had now ceased to carry on business, and many of the shareholders had neglected to pay up the instalments upon their shares. Various actions had been brought against the members by creditors of the society, and the petitioner, who was the holder of ten shares, had been obliged to pay large sums to the creditors, in excess of his just share, and there was still money due to some of the creditors.

Mr. Swanston, jun., appeared in support of the petition for a winding-up order, and cited *The Sherwood Loan Society* (1). In this case, Lord Cranworth, when Vice Chancellor, had decided that a loan society came within the meaning of the Winding-up Acts. It was contended, that a building society was of a similar nature, and the petition must, therefore, be granted. The statute 12 & 13 Vict. c. 108. s. 1. was cited.

Mr. Foot opposed the application, and submitted that all building societies which had been enrolled under the act of 6 & 7 Will. 4. c. 32. were exempted from the operation of the Winding-up Acts. The 1st section of the 11 & 12 Vict. c. 45. enacted, that the act should apply to all companies, associations and partnerships, to be formed after the passing of the act, whereof the capital or the profits were to be divided into shares, and such shares transferable without the express consent of all the co-partners. By the 2nd section of the same act, it was provided, that all associations or companies formed for the purpose of working mines or minerals, and all benefit building societies other than such as were duly certified and enrolled under the statutes in force respecting such societies, should be liable to the operation of this act. By the 2nd section, therefore, building societies which were enrolled were expressly excluded from the act; and by these societies being mention-

ed, it was evident that the framers of the act did not intend that they should be included in the 1st section. It had also been decided, in the case of *The St. James's Club* (2), that clubs were not within the provisions of the Winding-up Acts.

The following authorities were also cited:—

Bright v. Hutton, 3 H.L. Cas. 341.

Terrell v. Hutton, 4 Ibid. 1091.

Silver v. Barnes, 6 Bing. N.C. 180;
s. c. 9 Law J. Rep. (N.S.) C.P. 118.

KINDERSLEY, V.C.—If it had not been for the cases already determined, I should have entertained considerable doubt upon this question; but, looking at the authorities which have been cited, I am bound to hold that the Winding-up Acts were intended to embrace societies of this nature. By the 1st section of the act 12 & 13 Vict. c. 108, it is enacted, "that, notwithstanding anything contained in the Joint-stock Companies Winding-up Act of 1848, importing a more limited application thereof, the same shall apply to all partnerships, associations and companies, whereof the partners or associates are not less than seven in number, whether incorporated or unincorporated, and whether formed or subsisting before or after the passing of the said act or this act, other than and except railway companies incorporated by act of parliament, to which companies such act shall not apply." The question then is, whether this society comes within the words, "partnerships, associations and companies." I think there is no doubt that it does come within these general words; and if so, I can see no reason why there should be a restrictive meaning put upon the act, so as not to include a society of this nature. It has been argued, that as enrolled building societies are expressly exempted under the 2nd section of the act 11 & 12 Vict. c. 45, therefore it could not have been the intention to include them in the 1st section of that act. I do not think that argument is tenable, because the 1st section is not general, but applies to companies and associations where the shares

(1) 1 Sim. N.S. 165; s. c. 20 Law J. Rep. (N.S.) Chanc. 177.

(2) 2 De Gex, M. & G. 383.

are transferable without the consent of all the co-partners. I find that, in the case of *The Sherwood Loan Society*, the present Lord Chancellor (when Vice Chancellor) decided, that loan societies were within the meaning of the Winding-up Acts, and I cannot see any such distinction between loan societies and societies of this nature as to induce me to say that they do not also come within the acts. The application must consequently be granted; but as it was quite right to have this question determined, in order to escape, if possible, from the effects of a winding-up order, I shall direct the costs of both sides to come out of the estate.

KINDERSLEY, V.C. }

July 4;

Aug. 1.

} *In re DON'S ESTATE.*

Descent — Legitimacy — Scotch Law —
3 & 4 Will. 4. c. 106.

An ante-nuptial son, born in Scotland, of Scotch parents, who was legitimized according to the law of Scotland by the subsequent marriage of his parents, settled in England and purchased freehold property. The son died intestate and unmarried, leaving his father surviving him:—Held, that the father was incapable, under the act 3 & 4 Will. 4. c. 106, of inheriting real estate from his son, although that son was legitimate by the law of England as to his personal status. The property, therefore, escheated to the Crown.

This was a petition for the payment of money out of court; and it stated that, in the year 1817, the petitioner, David Don the elder, who was a native of Scotland and domiciled there, cohabited with Elizabeth Hogg, spinster, also a native of, and domiciled in Scotland; that on the 23rd of January 1818, a son was born in Scotland as the fruit of that connexion, namely, David Don the younger; that in December 1819, David Don the elder and Elizabeth Hogg were married in the parish church of Dunfermline; that David Don the younger went to England, and settled at Newcastle-on-Tyne, where, in January 1854, he purchased certain freehold pro-

perty, and died, on the 20th of May 1855, intestate and unmarried; that David Don the elder thereupon took possession of this estate in the character of heir-at-law to his son. That the corporation of Newcastle being desirous of purchasing the land in question under the powers of their local improvement act, contracted with David Don the elder, for the sale to them of the property for the sum of 730*l*. Before the completion of the contract and during the negotiation, a doubt was raised as to whether David Don the elder was the legal heir of his son, and on that ground the purchasers paid the money into court. The petition, which was presented by David Don the elder, and by his wife in respect of her claim to dower, was for payment of this money out of court to them.

Mr. Anderson and Mr. Toller appeared in support of the petition, and submitted that David Don the elder was legally entitled to this property as the heir of his son, David Don the younger. By the law of Scotland, an *ante natus* son was made legitimate by the subsequent marriage of his parents, and was therefore considered legitimate by the laws of this country. Then, by the statute 3 & 4 Will. 4. c. 106. s. 6, it was provided "that every lineal ancestor shall be capable of being heir to any of his issue; and in every case where there shall be no issue of the purchaser, his nearest lineal ancestor shall be his heir in preference to any person who would have been entitled to inherit, either by tracing his descent through such lineal ancestor, or in consequence of there being no descendant of such lineal ancestor, so that the father shall be preferred to a brother or sister, and a more remote lineal ancestor to any of his issue, other than a nearer lineal ancestor or his issue." Under this section, it was clear that the petitioner was entitled to inherit real estate from his son, and was therefore the person to whom the money in question ought to be paid.

Mr. Lee and Mr. Wickens appeared for the Crown, and contended that although David Don the younger would be recognized as legitimate by the laws of this country for the purpose of taking personal property, he was not entitled to inherit

freehold estate under the terms of the 3 & 4 Will. 4. c. 106.

The following cases were cited :—

Rose v. Ross, 4 Wils. & S. 289.

Doe d. Birtwhistle v. Vardill, 5 B. & C. 438; s. c. 9 Bligh, N.S. 32.

1 *Coke's Inst.* 93.

Edwards v. Champion, 2 De Gex, M. & G. 202; s. c. 23 Law J. Rep. (N.S.) Chanc. 123.

Smith v. Adams, 5 Ibid. 712; s. c. 24 Law J. Rep. (N.S.) Chanc. 258.

Munro v. Munro, 7 Cl. & F. 842.

Aug. 1. — KINDERSLEY, V.C. — The question upon this petition is, whether the petitioner is entitled to a certain sum of money, which has been paid into court under the Lands Clauses Consolidation Act. The facts of the case lie within a very narrow compass. The petitioner, D. Don, a Scotchman, and Elizabeth Hogg, a Scotch woman, both domiciled and resident in Scotland, cohabited together; the fruit of that cohabitation was a son, D. Don the younger, who was born to them in Scotland on the 23rd of January 1818. In December 1819 the parents intermarried together in Scotland. By the law of Scotland D. Don the younger was legitimated by that marriage. D. Don the younger purchased land in England, and died seised of that land on the 20th of May 1855 intestate and without having been married, leaving his father and mother him surviving. Upon the death of D. Don the younger, D. Don the father entered into possession of the land in England. The corporation of Newcastle, under the powers of their improvement act, required the land, and contracted with D. Don the elder to purchase it for 730*l.*, but doubting the title of D. Don the elder, they paid the money into court under the Lands Clauses Consolidation Act; and this is a petition by D. Don the elder, and Elizabeth his wife, who joins in respect of the right to dower in the land, to have the money paid out to D. Don the elder. These are the simple facts of the case, as to which there is no controversy whatever, the question being entirely with respect to the law to be applied to these facts.

Now, I have deliberated long and anx-

iously upon this case, not only by reason of the novelty of the question, but also by reason of the importance of it; not, indeed, that the facts which give rise to this question are likely to be of very frequent occurrence, but still the question is of considerable importance in itself, as involving points with regard to the right of inheritance to real estate in England. I have endeavoured to find authorities, directly or indirectly bearing upon the question, and I might almost say, that there is an entire absence of authority bearing precisely upon the question.

The petitioners, Don and his wife, insist that, on the death of D. Don the younger, seised of the land in England, intestate and without issue, that land descended upon his father, D. Don the elder, as his heir, under the act of the 3 & 4 Will. 4. c. 106.—the Act for the Amendment of the Law of Inheritance. The Crown, on the other hand, insists that D. Don the younger died without an heir, and that therefore the land escheated to the Crown. The question undoubtedly turns upon the effect of the statute that I have referred to; but before I proceed to consider that act and the provisions of it in detail, it may be expedient to advert to some points as preliminary to the consideration of the act.

The first question for consideration is, as to the personal *status* of D. Don the younger with reference to the question of legitimacy or illegitimacy. Was D. Don the younger the legitimate child of D. Don the elder? That is, does the law of this country regard him as the legitimate son of D. Don the elder? That he was the legitimate son of D. Don the elder in Scotland there is no doubt. In what light then does the law of this country regard him with respect to his personal *status* upon the question of legitimacy or illegitimacy? Now, upon consideration of the different authorities bearing upon this question—most of which are derived from the opinions of foreign jurists—it appears that the principle applicable to the question is this :—that the legitimacy or illegitimacy of any individual is to be decided by the law of that country, which is the country of his origin—in other words, that if a man is legitimate in his own country, according to the law of that country, all

other civilized, at least all other Christian, countries ought to regard him as legitimate. Of course questions may arise whether the law which is to be applied for the purpose of determining the legitimacy or illegitimacy of an individual is the law of the country where he was born, or the law of the country where his parents intermarried, or the law of the country of the domicile of his parents, or whether, supposing the two parents had different domicils, it is to be the law of the domicile of the father, or the domicile of the mother? All those questions might possibly arise, but are not to be found in this case; because it so happens, that here the country where D. Don the younger was born, the country where his parents intermarried, and the country where both his parents were entirely and without any interval of exceptions domiciled, was one and the same country, viz. Scotland. If the question had arisen, having regard to the decision of the House of Lords in the case of *Munro v. Munro*, it would have appeared to me that the view of the House of Lords (which of course I should follow if it were necessary to determine the question) was this—that it turned on the law of the domicile of the father. In that case a Scotchman domiciled in Scotland, and the owner of considerable property in Scotland, left that country and came to England in the year 1794. He remained resident in Scotland up to the year 1802, when he returned to Scotland, and the House of Lords held, that, under the circumstances, he had never lost his Scotch domicile, and that he throughout continued to be a domiciled Scotchman. Shortly after his coming to England he formed an illicit connexion with an English woman domiciled in England, cohabited with her, and had a son born in England by her, and after the birth of that son intermarried with her in England, and then in 1802, having still, according to the decision of the House of Lords, preserved his Scotch domicile throughout, he returned to Scotland with his wife and this child; and it was determined that that child was in Scotland the legitimate child of the father. But, as I have said, it is not necessary to determine that question, because, in the case

before me, Scotland was the country where both the parents were domiciled, where the child was born, and where the marriage took place. I consider, therefore, that in Scotland D. Don the younger (and that is one of the data of the case) was clearly the legitimate child of D. Don the elder, and in Scotland not only capable of taking personalty in that character, but also according to the law of Scotland capable of inheriting real estate in Scotland; and the rule which this country applies to such a question is, that if he be legitimate according to the law of his own country, and comes into this country, the Courts here will also regard him as legitimate. That is, that his personal *status* is the *status* of the legitimate son of his father.

Now I put out of consideration for the present the act of 3 & 4 Will. 4, but it does not follow that because D. Don was the legitimate son of his father D. Don the elder, he would therefore be entitled according to the general law of this country to inherit real estate in England, of which D. Don the elder might have died seised. On the contrary, the law of this country holds that there are certain rules and laws of inheritance of real estate which are irrespective of the personal *status* of the individual, and, as it were, annexed to the very nature and quality of real estate itself, which would prevent D. Don the younger from being entitled to inherit any real estate which D. Don the elder might have died seised of, although legitimate.

Now that question arose in the case of *Doe d. Birtwhistle v. Vardill*, so much commented on in the course of the argument—a very important case, and which received perhaps more consideration than almost any other case that has ever come before the Courts of this country. In that case a person being a domiciled Scotchman had cohabited with a woman, and during that cohabitation had a child born in Scotland, and afterwards married the mother. The father died intestate, seised of real estate in England, and the question was whether the child being legitimate in Scotland, and regarded as legitimate so far as respected his personal *status* in this country, was entitled to inherit the real estate of which his father had died seised? The case first

came before the Court of Queen's Bench, reported in 5 B. & C. 438, and there the four Judges of the Court, (Lord Tenterden being at the head of the Court) all expressing their individual opinions upon the case, agreed in considering that he was not entitled to inherit; and although the grounds on which they proceed are not so clearly enunciated, and at such full length as they are in the subsequent consideration of the case when it came before the House of Lords, still it appears to me that they all proceeded more or less upon this view—that, admitting him to be legitimate, something more than mere legitimacy is required to entitle him to inherit; that there was, by the rule of law annexed to real estate in this country, that which precluded him from inheriting. That case came before the House of Lords, and the House of Lords propounded certain questions to the Judges, stating the facts of the case, and putting the question to them whether the son was entitled to inherit under the circumstances stated. The Judges came to an unanimous opinion that he was not entitled to inherit. That unanimous opinion of the Judges was delivered, to the House of Lords, by Alexander, C.B., in a most able and perspicuous judgment, and clearly enunciating the grounds on which the Judges unanimously came to that conclusion. That is reported in the 9th volume of *Bligh, N.S.* p. 32, and also in 2 Cl. & F. p. 571. Some noble and learned Lords, then taking part in the proceedings, particularly Lord Lauderdale and Lord Brougham, whose general feelings on questions of that sort would naturally and must necessarily have been more or less affected by the circumstance of their habitual connexion with Scotland and the law of Scotland, still entertained doubts whether that was a sound conclusion, and they desired that the matter should be re-argued before the Judges, and that the Judges should again be asked to give their opinion. Accordingly, after the lapse of some few years, the case was re-argued before the Judges, and the Judges again came to an unanimous opinion to the same effect as that which had been delivered by Alexander, C.B. This second opinion of the Judges was delivered by Tindal, C.J. who, if I

am not mistaken, had argued the case on the side which was adverse to the conclusion at which he and the other Judges arrived in their judicial capacity. Beyond all doubt, then, as the law stood before the passing of the 3 & 4 Will. 4. c. 106, D. Don the younger, although recognized as legitimate in this country, could not have succeeded as heir to his father if his father had died seised of real estate intestate; and it is particularly to be observed that the ground and the reason of that decision was that, irrespective of any question of the personal *status* of the individual, there are, by the law of this country, attached to the land itself certain rules and canons, with regard to inheritance, which cannot be departed from, and that no comity of nations, in respect to the personal *status* of the individual, can induce the Courts of this country to depart from them. Now, although I confess I am unable to find any authority deciding that particular point, I apprehend that previously to the passing of the 3 & 4 Will. 4. c. 106, if the converse case had happened which happened in *Birtwhistle v. Vardill*—if, in other words, the precise case had arisen which arises in the present case, the parties being Scotch in every character, if the *ante natus* son died seised of land in England, intestate and without any issue of his own, no collateral relation could have inherited to him—of course his father could not, because, under any circumstances, the land could not go to the father. I do not understand it has been contended that it could be so. On the contrary, I think the whole argument proceeded upon the admission, or at least the assumption, that if it had not been for the passing of the act of the 3 & 4 Will. 4. c. 106, no individual could have succeeded as heir to a person legitimized in the way that D. Don the younger was, except his own issue. I have searched in vain for any authority determining that question, but it appears to me that it is indirectly recognized as a general principle in all the text-books, and in all authorities which enunciate the rules of inheritance in this country. A person, in the condition of D. Don the younger, is always spoken of in our law books as a *bastard*—that is, using the term “*bastard*” in its

purely technical sense, for we are apt to use the term "bastard" in the popular sense of his being illegitimate, because a person who is a bastard in this country (that is, if he is an Englishman) always is illegitimate, and if he is illegitimate he is a bastard; but the strictly technical sense of the term "bastard" is one who is not born in lawful wedlock. A person may be legitimate (as D. Don the younger was, who was not born in lawful wedlock) by the subsequent intermarriage of his parents, the whole family being domiciled where the same laws prevail, viz. Scotland; but a bastard, strictly speaking, is one who is not born in lawful wedlock, and it is a clear rule of our law that no one can inherit to a bastard, except his own issue. Of course if he has legitimate issue, he may have an heir; but according to the general law prevailing before the passing of the act of 3 & 4 Will. 4. c. 106, no one could be his heir, except issue sprung from his own loins by a legitimate marriage.

Now I assume that proposition as the basis of the conclusion at which I arrive. I assume that D. Don the younger, being legitimate according to the law of his own country, namely Scotland, is legitimate all over the world; at least the Courts of this country will regard him as legitimate; but that by the law of inheritance in this country, he could not have succeeded to his father or to any other ancestor, because he was not born in lawful wedlock. In other words, he was a bastard, and being a bastard, that is, not born in lawful wedlock, nobody could succeed to him with respect to lands or inheritance in England.

Now, assuming those propositions, I proceed to consider the state of the law as I conceive it stood at the time of the passing of the 3 & 4 Will. 4. c. 106, and the effect of this act upon the question. But before I proceed to that, I think it as well, for the purpose of making my reasons more intelligible, to advert to certain rules of the law of inheritance, quite apart from those which I have hitherto been considering, not because there is any question or doubt about them, but referring to them may help to explain the view which I take with regard to the effect of this act. One of the rules of law in this country is this: supposing a person seised of lands

in England devises those lands in such a way that he gives some estate or interest by devise expressly to A. B. Whether he devises the whole interest to A. B., or devises a certain interest with remainder to A. B., or devises to A. B. for life with remainder to other persons, as a general rule A. B. takes by purchase—he does not take by descent, he takes by purchase; but if A. B. happens to be the heir of the testator, even though not so described in the will, then, according to the law as it existed before this statute, A. B. took by descent—they disregard the devise, and hold that what was devised was not devised, but descended to him as heir. I do not regard that as a question in doubt, but I mention it only to observe that this is the rule with regard to the devise or inheritance of lands in England. Another rule was this: that between brothers the descent was immediate, but as between other collateral relations you traced up to the common ancestor and down again, in order to see what the descent was. It is not very easy, perhaps, to say why it should be so, except from some principle of feudal law, but the rule was, that between brothers the inheritance was immediate, that it was one single descent—one step only in the pedigree. A third rule was, that land could not ascend—rather, perhaps, I should more strictly say, descend—upon any lineal ancestor; it could not go to the father or to any progenitor in the direct ascending line. It is not necessary to enter into the reasons for that general rule; there was that rule beyond all question, and rather than go to the father it would escheat to the lord. Another rule was, that no relation of the half-blood, however near, could inherit. If there were two brothers by different mothers, or by different fathers (which is the same thing), and one died seised of land without issue, and there being no other relations to be found, the land would escheat to the lord rather than go to the brother of the half-blood. Another rule was, that attainder so entirely corrupted the blood of the person attainted, that not only could no person inherit from him, but no person could inherit through him—that is, by tracing his descent through him—the effect of which

was this: that if there were grandfather, father and son (three generations), and the father—that is, the intermediate generation—was attainted, and the grandfather died seised of lands in fee, the attainted father being dead in the mean time, the grandson could not have inherited to the grandfather. Why? Because he must trace his descent through a person whose blood was attainted. I have mentioned those five rules for convenience only. There were many others, which it is not necessary to mention, all more or less of importance, but those five existed at the time when the statute of the 3 & 4 Will. 4. c. 106. passed.

Now, having adverted to these rules, let us consider the act in question. What was the purport of that act? What was its intention? As the act does not contain a syllable of preamble, I have not the means of finding out what the original intention of the legislature was—what the mischiefs were, or what the evils (real or supposed) were, which the act was intended to cure. I am obliged, therefore, to derive my understanding of what the object of the legislature was in passing that act entirely from the several enactments; and after carefully reading through the act, for the purpose of arriving at a conclusion in the present case, it appears to me clear that the purpose of the legislature in passing this act was this: there are certain existing rules with regard to the inheritance of land in England which, however they may have been justified in their origin by reference to the principle of the feudal law, are no longer practically of any useful operation in this country as a body of laws, and as these rules are rules which, in the opinion of the legislature, and I believe in the opinion of the great mass of lawyers, as well as of the community at large, were not based upon any principle of natural justice; on the contrary, some of them at least, being gross violations of the plainest principles of natural justice, and such as never would have been arrived at, and never would have been established if resort had been had to the principle of natural justice, or to the convenience, or to what is right for the benefit of mankind at large: the object of the legislature was to alter those rules,

and to do no more than cure those mischiefs which they found existed according to the law as it then stood.

Now, with regard to those five rules to which I have adverted as beyond all doubt existing at the time of the passing of this act, if I refer to the different sections of the act it will be found that each in succession applies itself to the cure of one or other of those evils. I mean the evils resulting from one or other of these rules. For example, take the first of these rules, that if lands are devised to a person who is the heir of the testator, he does not, as other persons would, take by purchase, but by descent. It seems very absurd, and we know, as lawyers, that very often considerable difficulties and inconveniences resulted from that law. The legislature thought it was desirable to cure and prevent those evils and difficulties and to alter the law in that respect; accordingly, the 2nd section fixes the persons from whom the descent is to be traced: by that section it is enacted, "that in every case descent shall be traced from the purchaser; and to the intent that the pedigree may never be carried further back than the circumstances of the case and the nature of the title shall require, the person last entitled to the land shall, for the purposes of this act, be considered to have been the purchaser thereof unless it shall be proved that he inherited the same, in which case the person from whom he inherited the same shall be considered to have been the purchaser, unless it shall be proved that he inherited the same; and in like manner the last person from whom the land shall be proved to have been inherited shall in every case be considered to have been the purchaser, unless it shall be proved that he inherited the same." The 3rd section enacts, "that when any land shall have been devised by any testator who shall die after the 31st of December 1833, to the heir or to the person who shall be the heir of such testator, such heir shall be considered to take the land as a devisee, and not by descent; and when any land shall have been limited by any assurance, executed after the said 31st of December 1833, to the person or to the heirs of the person who shall thereby have conveyed the same land, such person shall be considered to have acquired the same as a

purchaser, by virtue of such assurance, and shall not be considered to be entitled thereto, as his former estate or part thereof." And the 5th section applies to the rule of the old law, that "descent between two brothers would be considered an immediate descent." By that section it is enacted, "that no brother or sister shall be considered to inherit immediately from his or her brother or sister, but every descent from a brother or sister shall be traced through the parent." The rule that land could not ascend to the father, is cured by the 6th section.—[His Honour read the section.] That section is meant to cure the evil formerly resulting, and provides that no longer shall the land escheat to the lord rather than go to the father of the person dying seised, but that it shall go to the father, and it points out in what order of succession he shall be inserted in the pedigree of inheritance. Then, the rule that no relation of the half-blood could inherit, is cured by the 9th section. By that section the half-blood is allowed to inherit, and it points out in what order the half-blood shall come into the succession. The last rule I adverted to was, that attainder so corrupted the blood of the attainted party, that nobody could inherit by tracing his descent through him; that is cured by the 10th section. By that section it is enacted, that when the person from whom the descent of any land is to be traced shall have had any relation who, having been attainted, shall have died before such descent shall have taken place, then such attainder shall not prevent any person from inheriting such land who would have been capable of inheriting the same by tracing his descent through such relation, if he had not been attainted, unless such land shall have escheated before the 1st of January 1834.

I confess I cannot feel the least doubt that the intention of the legislature in passing this act, was only to cure the mischiefs arising, or supposed to arise, from the existence of those rules to which I have adverted, and from certain other rules to which I have not adverted. Whether the intention of the legislature has been carried out or not, I shall have to consider; but the original intention of the legislature was not to make the smallest

difference in that rule of inheritance which existed, which precluded a person not born in lawful wedlock from inheriting from his father, and which precluded any collateral relation (a brother, for example) from inheriting, to a person who died seised, who was himself born out of lawful wedlock. The legislature did not advert to or intend to touch that rule, excepting as it may be found in the words to which I shall have to advert in the 6th section. There is nothing in the whole act which alludes to or refers to that question at all; and I am satisfied that the legislature meant to leave the law with regard to persons in the situation of D. Don the younger precisely in the condition in which it stood at the time when the act passed. If D. Don the younger had been born in lawful wedlock, then it did mean to alter the law, and to make his father capable of inheriting to him if he died without issue, but it did not mean in the slightest degree to touch or allude to the question with respect to those rules of law which resulted from the circumstance of the person being *ante natus*, and although legitimate by the law of his own country, and considered so in respect of his personal *status* in this country, yet he could not have inherited to his father, or have transmitted his inheritance to any of his collateral relations. It is only by virtue of the language of the 6th section that it is attempted to be contended that D. Don the younger could transmit an inheritance to his father or brother or any other collateral relation. Now, what is the language of this section? "Be it enacted," &c.—[His Honour read the section.]—That enunciates the proposition of the capability of inheriting. Now, stopping there for a moment, I may observe that as to the meaning of the word "ancestor," it is clearly there used in its popular sense. I think I find in this act traces of what one finds in almost every act of parliament, and perhaps in every legal document, viz., the use of words sometimes in one sense and sometimes in another, than which there is not a more fertile source of difficulty and doubt; not that I think in this case it does give rise to any. I have said "its popular sense," for it is quite obvious that the word "ancestor" has two distinct meanings. Then,

what do you mean, in the popular sense, by a man's ancestor? You mean his progenitors, the persons from whom he derives his existence in a direct line of descent,—his father, his grandfather, his great-grandfather, and so on. But there is a still looser popular sense, which is, when you mean *all* his predecessors; for example, his great-uncle or his great-great-uncle; but, perhaps, the more correct popular sense is, that it means his progenitors, and that appears to be the sense in which it is used here. There is another sense (not a popular sense, but a technical sense), a sense in which the law of this country uses it with regard to inheritance, in which case a younger brother may be the ancestor of an elder brother. That is, the word "ancestor" is put as apposite to the word "heir." If B. is the heir of A, then, in that sense, A. is the ancestor of B, and it signifies nothing whether A. is the father or the lineal progenitor, for the great-nephew may be the ancestor to the great-uncle, the younger brother to the elder brother, and so on; but that is in its purely technical sense, and here the word is clearly used in its popular sense—*every lineal ancestor*. It might be argued that it would have been just as well to have said that any person shall be capable of being heir to any of his issue. However, they have used the words "lineal ancestor," clearly meaning progenitor in the direct lineal ascending line. Now, that part of the clause enunciates that a progenitor or lineal ancestor shall be capable of being heir to any of his issue.

The argument upon that section, on the part of the petitioner, is this:—D. Don the younger, you admit, was the legitimate son of his father. You admit that he was his legitimate son according to the law of his origin and domicile, and according to the law of Scotland; and you admit that if he was legitimate according to the law of his own country, you must recognize him to be legitimate in this country; he, therefore, is the issue, nay, the legitimate issue of his father, D. Don the elder, and you recognize him to be the legitimate issue of his father. Well, then, if he was the legitimate issue, his father is his lineal ancestor in the direct ascending line. Therefore, it comes pre-

cisely within the words here used, "that every lineal ancestor shall be capable of being heir to any of his issue." D. Don the younger was the issue of D. Don the elder, and D. Don the elder is the lineal ancestor of D. Don the younger; *ergo* D. Don the elder, by express enactment, is capable of being heir to D. Don the younger, that is, to inherit real estate in England from him. Now, I confess, I was very much struck with that, and I felt during, and I may say subsequently to the argument, a great deal of doubt whether it was possible to escape from that conclusion; but it appears to me that it is not tenable. In what sense is the word "issue" used here? for that is really the root of the question. Now, one rule plainly applicable to the construction of any words in an act of parliament, or in any written document, is this: that if you find the same word clearly used in a given sense in the act, you would, *primâ facie*—I do not say conclusively—arrive at the conclusion that it was intended to be used in the same sense in another part of the act, unless you see from the whole context that it is intended to be used in a different sense. I have adverted to the unfortunate habit of using the same words in different senses; still, I am not to conclude that I am to assume the same words are ordinarily used in different senses in different parts of an act of parliament. *A fortiori*, if I find the same words used not only in the same act, but in the same clause of the act, in a sense which is undoubted, I should at least, *primâ facie*, and with a strong conviction of the justness of the opinion (though still liable to the possibility of arriving at a contrary decision), arrive at the conclusion, that the words were used in the same sense when I find them so used in two branches of the same clause, and more particularly when I find them again in two branches of the same sentence. We have the word "issue" used twice in the 6th section, for immediately following the words I have read, comes another branch of the same clause, joined by the conjunction "and," in which the word "issue" occurs; and now I apply myself to consider in what sense the word "issue" is used in that branch. The way in which

the clause stands is this : " Every lineal ancestor shall be capable of being heir to any of his issue, and in every case where there shall be no issue of the purchaser, his nearest lineal ancestor shall be his heir." Now, in what sense is the word "issue" used in that latter paragraph? Issue of the purchaser. It appears to me, for the reasons I will mention, that the word "issue" in that latter branch of the sentence was intended to be used in the sense of issue capable of inheriting according to the law of this country. In every case where there shall be no issue of the purchaser his nearest lineal ancestor shall be his heir, so that the lineal ancestor will not be his heir if the purchaser leaves issue. If D. Don the younger had left issue, the very terms of this clause would preclude his father from being his heir,—and why? Because the issue would be the heir. The issue was to be his heir if he left issue, and it was only in the event of his not leaving issue that the father was to be the heir. Then, does not the word "issue" there mean issue capable of inheriting? Now, to illustrate this, let me put this case:—supposing D. Don the younger, with all the circumstances that occurred in this case, being a domiciled Scotchman like his father, but seised of these lands in England, had followed his father's example and cohabited with a woman in Scotland, had had a son born during that cohabitation, and then had afterwards married the mother of that son. That child would have been in Scotland the legitimate child of D. Don the younger, just as D. Don the younger was the legitimate child of his father, and being legitimate in Scotland, the law of this country would also regard him as legitimate. Then, supposing D. Don the younger having that child *ante natus*, and having no child born subsequent to the marriage with the mother, if that child had died seised of this land leaving surviving him his father D. Don the younger, he could not inherit to him. Now apply this section to that case. The words of the act are, "in every case where there shall be no issue of the purchaser." The contention on the part of the petitioner is, that there was issue of D. Don the younger, because the word "issue" means legitimate issue. Now,

then, see what the consequence would be. In that case D. Don the younger's land would not go to the father, and why? Because the act says it is only to go to the father in case there is no issue of the purchaser; but here, according to the construction put on the word "issue" by the argument for the petitioner, he has left issue. If it is not to go to the father, can it go to the issue? No. He was legitimate, but he was not born in lawful wedlock, and by the law of this country cannot inherit; and there is nothing in this act which says that a bastard child, although legitimate according to his personal *status*, can inherit. Then, what would be the consequence? Why, that the land would escheat to the lord, and that was the very evil which the act meant to cure. It was thought it ought to remain in the family rather than go to the lord,—not, indeed, that it should go to a bastard, for, in that respect, it meant to leave the law as it stood.

The question is, whether you must not interpret in this second branch of the sentence the word "issue" to mean not merely lawful issue in the sense of being lawful according to the law of his own country, and so, therefore, here as to his personal *status*, but whether you must not use that word in the sense of issue capable of inheriting? It appears to me clearly that you must, and that in that second branch of the sentence, when the legislature spoke of there being no issue of the purchaser, it clearly meant issue capable of taking by inheritance. Then, if that is so, and I think I have no hesitation in concluding that to be the sense in which the legislature used the word "issue" in the second branch of the sentence, when I find the same word used with reference to the question of inheritance, must I not take it to be used also in the same sense? It appears to me that I must, and then the language will run thus:—"That every lineal ancestor shall be capable of being heir to any of his issue who shall be capable of inheriting from him, and in every case where there shall be no issue of the purchaser capable of inheriting to the purchaser, his nearest lineal ancestor shall inherit."

Now, there appears to me to be another

reason why, upon the construction of this statute, I ought to arrive at that conclusion, and it is this:—The second branch of the sentence points out in what order the lineal ancestors shall take, and in effect it is: if the purchaser dies leaving any lineal descendant of that purchaser, that lineal descendant shall be the first person to inherit from the purchaser, but if he dies without leaving any issue of his own body, that is, any person who has lineally descended from himself, then before any collateral relation, however near, before the brother of the purchaser, the father, or, in default of the father, the grandfather and so on shall inherit. Now, that being the effect of this section, let us see in what manner that effect is carried out by the words used, or rather what are the words used for the purpose of working out that effect, and I think it will be found that the act proceeds on this footing: in order to determine the place in which the father shall be entitled to come into the inheritance as heir to his son, it adverts to the position of persons in the inheritance who, according to the law existing at the time of the passing of this act, would have been entitled to inherit. Now, to explain what I mean I will refer to the very words themselves—"in every case where there shall be no issue of the purchaser his nearest lineal ancestor shall be his heir in preference"—to whom? "In preference to any person who would be entitled to inherit either by tracing his descent through such lineal," &c. Supposing the purchaser, that is, the person dying seised without issue, leaves his father and a brother living. According to the old law the brother would have inherited. This act adverting to the then existing right of that collateral relation puts in the father immediately before the brother; and the way in which the legislature points out in what order the father is to come in, is by adverting to the order in which somebody else, according to the then existing law, would have come in if it had not been for the passing of this act. So that, according to this act, the father is to come in next before the brother, and I am supposing the case simply of the purchaser of the land dying intestate. Now, let me take this case. I am supposing that all the circum-

stances existing in this case exist in the case I am about to put. Supposing D. Don the elder, after his marriage with the mother of D. Don the younger, had had born in Scotland children by that mother, who, according to the view of our law, would have been not *ante natus* but *post natus*, and supposing besides D. Don the younger, who was the *ante natus*, there had been another son who was *post natus*, if I am right in the view I have already stated of the law as it stood before the passing of this act, if D. Don the younger had died seised of land in England, he being the *ante natus*, the *post natus* could not have inherited to him. Very well. Then, supposing that state of things to exist, where does this act say that D. Don's father shall come in? Why, next before and in preference to any person who would have been entitled to inherit. D. Don the younger's *post natus* brother would not have been entitled to inherit. The father, then, is preferred to some other person. Where is the father to come in? Putting it in language, it is next before nobody. But if D. Don the father was entitled to inherit, of course D. Don the father's *post natus* son would (if there was no father) be also entitled to inherit. Clearly, because he would be the legitimate son of D. Don the elder; so would D. Don the younger, as the legitimate son of D. Don the elder; because, according to the old law, there was an immediate descent between brothers. Now, I ask, if the reasoning be good which is applied to the interpretations of this act on behalf of the petitioner, why would not the same reasoning, if the act had never passed at all, have allowed the *post natus* brother of D. Don the younger to have inherited to him? The reasoning is this: D. Don the younger was the legitimate son of his father, and recognized as legitimate in this country. It is true (it is said) that, according to the decision in *Birtwhistle v. Vardill* he cannot inherit; but he is, as it were, the ancestor, the purchaser, the person who dies seised. The *post natus* son of D. Don the elder is also clearly his legitimate child, and so recognized in this country; therefore they are lawful brothers, and, if so, it is a rule of law that one brother may inherit to another, and why should he not? But nobody would dream that in such a case,

independently of this statute, the brother would inherit, and where does this act say that the *post natus* brother shall inherit to a person who is the *ante natus*? There is nothing about it in this act of parliament. If it gives any party a right to inherit, it gives the right to the father, but it nowhere gives to the *post natus* brother the right to inherit.

For these reasons, it appears to me that the interpretation of this act, in the first place looking at it generally, leads me to the conclusion that I ought not to allow any alteration of the law of inheritance to be considered as effected by that act, except so far as that act has clearly and distinctly effected that alteration, and so far as I can find, having a fair regard to all the language used, that the legislature intended to alter the existing law of inheritance. Further, it appears to me that, looking at this particular section, I cannot find that it was the intention of the legislature, except so far as you may put a somewhat limited and straitened construction on particular words used, to affect the question, with regard to the right of an individual in the position of D. Don the younger, either to inherit to another, or to transmit the inheritance to another from himself. Further, when I examine the particular language used, it appears to me that the word "issue," upon which the whole question turns, is used in a sense which must be limited to issue capable of inheriting. I have already pointed out the reasons which, upon the language of this section, lead me to that conclusion; and that, therefore, there is no alteration in the rule of law which existed before this act, which precluded a person born out of wedlock from inheriting land, and precluded any person whatever from inheriting land to the person born out of wedlock.

Now, in the consideration of this case, I need hardly say that I have been very considerably embarrassed by what took place in the case of *Reed v. Keith* (1), commonly called *Black's case*. That case was this:—Samuel Black was the son of a domiciled Scotchman, who, by cohabiting with a woman in Scotland, had had this son,

Samuel Black, born before marriage, and afterwards married the mother—in other words, Samuel Black stood, according to his personal *status* in the situation in which D. Don the younger stands in the present case; but the father of Samuel Black had, after he intermarried, two daughters, who of course were his legitimate daughters, and could have inherited land in England. Samuel Black, I think, was in the employment either of the Hudson's Bay Company, or one of the companies in the far West, being resident in some of the possessions which I believe were part of Upper Canada, and had died, seised of some 1,200 acres or thereabouts of land in a very remote part of Upper Canada, where the law prevailing was the law of England. He had devised, or attempted to devise, this land, and his devise was effective so far as regarded three-fourths, but as to one-fourth it failed, and he died intestate. Then, in the administration of his estate, it became necessary to ascertain who was his heir-at-law, and who were his next-of-kin, and so on. It was referred to the Master, and the Master, upon very ingenious arguments, (very much the same as I have heard in this case), came to the conclusion, that the two *post nate* sisters were his co-heiresses-at-law and entitled to succeed, according to the law of Canada, which is the same as the law of England. Now, although I should always pay great respect to the decision of a Master, yet I never can treat that as a decision standing on the same footing as a decision of one of the superior Courts of this country. Of course, I could not; and I need hardly say, when that Master was myself, I had not the smallest scruple in acknowledging myself to be wrong; and I have no scruple now in saying, that according to my present feeling, I was undoubtedly wrong in coming to the conclusion that I arrived at in that case. The case was not argued before me, nor, indeed, before the Court afterwards, hostilely by the Crown, but it was argued before me by the counsel for the parties claiming to be the heirs, or the trustees under Black's will. I am bound to say, that so far as I can venture to recollect the impression that was made on my mind by these arguments—I do not say, from any fault of course—I certainly

(1) Not reported.

had not these detailed views of the construction of this section, or of the whole matter in general, which, after long and anxious consideration, I have been obliged to entertain. But upon the Master's report, (without exceptions, I think), the matter came on for further directions before the then Vice Chancellor Knight Bruce; and it is represented, and I have no doubt represented with great accuracy, that the matter was, to some extent at least, again argued on behalf of the same parties, and that the Vice Chancellor expressed his opinion that the Master had come to a right conclusion. But he considered that if those ladies were not the co-heiresses, the Crown would be entitled, and that therefore it was right that the Crown should appear. He accordingly directed the Attorney General to be communicated with; and it appears that a case, no doubt drawn up by the Solicitor for the Treasury, was laid before the Attorney General, suggesting whether or not it would be right for the Crown to intervene, representing that the whole 1,200 acres, as to which the question only arose as to one-fourth, had been, in the first place, taken possession of by the Crown for the non-payment of certain rates or assessments of some kind or other, and that there would be no difficulty in the way of recovering it; but it was also represented that the property yielded not one fraction of profit; that it was of no value intrinsically; that it had been encroached upon by squatters; and that, in point of fact, it was probably not worth anybody's while to take possession; and upon those representations the Attorney General declined to intervene, upon what ground, of course, I cannot say, whether upon the ground of the little value of the property, or that the Attorney General thought the Master's construction right. Now, if I could find in any report of that case, or from any short-hand writer's note, that upon full argument and upon a full presentation of all the facts and all the questions which arose upon this very novel and difficult case, the then Vice Chancellor, now Lord Justice Knight Bruce, had arrived at a deliberate conviction that those two ladies, the *post natae*, were, according to the law of this country, the co-heiresses of that Samuel Black, even if I had enter-

tained the view I do entertain, I should have adopted the decision of the learned Judge, and have followed it out by holding that in the case before me the father is entitled to inherit. In the first place, I think that would be escaping from a difficulty, which I cannot say I should have been sorry to have escaped from, of overruling my own opinion; and in the next place, I should be attributing (which is what I have no right to do) to the learned Judge a deliberate opinion upon the question. I am not at all doubting the representation that he did intimate his opinion that I had come to the right conclusion, but I think that I ought not to treat that as a decision upon the question; and although I confess that during the argument the strong inclination of my opinion was in favour of the view contended for by the counsel for the petitioner, yet, after very great deliberation, I have been obliged to come to the conclusion that I was wrong when I made that report, and that the *post natae* could not inherit the lands. It appears to me that that was clearly a wrong decision. Then ought I in this case to hold that the father is entitled? because all that this act says upon the subject is, that the father (that is, the lineal ancestor) shall be capable of being heir to any of his issue, and shall come in in a certain place; but there is not a word which says that the *post natus* brother shall be capable of being heir to his *ante natus* brother; and I confess, therefore, that I have not the least scruple in coming to the conclusion that my former decision was wrong. But it does appear to me that all the arguments that were addressed to me, so far as they turned upon the language of this section, which would go to shew the father could inherit, would apply in a great degree to the case of the *post natus* brother.

I ought to mention, as an additional matter that presses on my mind, what an anomalous state of things you arrive at if you hold that to be the law. If the father in this case were capable of inheriting, I do not well see how to escape from the conclusion, that then the descent may be traced through him—that is, that the *post natus* brother of D. Don might inherit, although there is nothing in the act which

says so. Then you come, among other anomalies, to this:—There are two brothers, and one dies seised of land, the other is his heir, because he is his legitimate brother; but if the one dies seised of land, the other cannot inherit to him, though he is his legitimate brother. That is an extraordinary, anomalous state of things; and I should pause before coming to a conclusion which would give rise to such an anomaly, and to many others of a similar kind. I may add, that if the present Lord Justice Knight Bruce, when Vice Chancellor, did deliberately arrive at the conclusion, which it is wished to be assumed he did arrive at, it is a great satisfaction to me to think that an appeal will lie direct from me to him, and his very learned and able colleague; and if I am wrong in coming to the conclusion I have arrived at, it will be set right by the joint opinion of those learned Judges. It is a great satisfaction to me to know that if I am wrong, my former opinion will be affirmed, and my present decision reversed. But I am of opinion that upon this application I must dismiss the petition.

would have been entitled to have added to his mortgage debt, was held entitled, as against the wife, to the benefit of such purchase, but to the extent only of securing himself in respect of the debt due to him from the husband.

By the settlement made in contemplation of the marriage of Joseph Waterworth and the plaintiff (then Julia Booth), and dated in November 1831, certain real estates, situate at Denby Dale, in Yorkshire, of which the plaintiff was then seised in fee, were conveyed by her to trustees and their heirs, to the use of herself for life, to and for her own sole and separate use and benefit, or to the use of such person or persons as she, Julia Booth, by writing under her hand and seal should at any time during her then intended coverture direct or appoint; and, in default of such direction or appointment, then in trust to pay the rents, issues, and profits of the said hereditaments and premises into the proper hands of the said Julia Booth, or otherwise to permit her to receive the same for and during her natural life, to and for her sole and separate use, wholly and independently of the said Joseph Waterworth, and without the same being subject to his debts or engagements; and the receipt of the said Julia Booth, notwithstanding her coverture, was thereby declared to be a good and sufficient discharge for so much of the said rents and profits as should be therein acknowledged or expressed to be received: and from and after the decease of the said Julia Booth, to the use of the said Joseph Waterworth, for and during the term of his natural life, for his own absolute use and benefit, with remainder to the use of the children of the said intended marriage, in manner therein mentioned.

At the date of the execution of the said indenture of settlement, the hereditaments and premises comprised therein were subject to a term of 1,000 years, created by an indenture dated the 12th of June 1801, and made for the purpose of securing the payment of a sum of 300*l.* and interest to one Francis Crowther. Such sum had, however, long before the date of the said indenture of settlement, been paid off, although no assignment nor mention of

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STUART, V.C. }
1857. } NELSON v. BOOTH AND
June 24, 25. } OTHERS.

Baron and Feme—Separate Estate—Mortgage—Solicitor and Client—Purchase by Solicitor.

S. N. having paid off a debt secured by mortgage upon real estates, in the equity of redemption of which his wife was, at the date of their marriage, entitled to a life interest to her separate use, afterwards, without her privity, assigned the mortgage to the solicitor of himself and wife, as security for a debt due to such solicitor for costs principally incurred in a suit in which he acted, first for the wife before her marriage, and afterwards for both the husband and wife:—Held, that such assignment was a valid security as against the wife's life interest in the hereditaments assigned.

*The solicitor, having subsequently purchased from the original mortgagee, for 40*l.*, a debt, for costs, of 175*l.*, which the latter*

the said term was made by the said indenture of settlement.

The marriage of the plaintiff and Joseph Waterworth was shortly afterwards duly solemnized. By indentures of lease and release, dated the 28th of February and 1st of March 1833, Joseph Waterworth and Julia his wife appointed and conveyed the premises comprised in their marriage settlement unto and to the use of Samuel Marshall, with a proviso for redemption thereof on payment of the sum of 250*l.* and interest; and Francis Crowther Jackson, the executor of the said Francis Crowther, assigned the said term of 1,000 years to Benjamin Dixon, as a trustee for the said Samuel Marshall, the better to secure the payment of the said sum of 250*l.* and interest; and subject thereto, in trust for the person or persons for the time being entitled to the equity of redemption in the said hereditaments and premises; and Joseph Waterworth thereby assigned to the said Samuel Marshall a policy of assurance on his own life for the sum of 250*l.*, as a further security for the said sum of 250*l.* and interest.

Joseph Waterworth died in October 1836 intestate, and letters of administration of his goods and effects were granted to his widow, Julia Waterworth. Julia Waterworth, shortly after the death of Joseph Waterworth, paid off the said sum of 250*l.* and all interest due thereon, secured by the said indenture of the 1st of March 1833, partly out of the proceeds of the said policy of assurance, and partly out of other monies belonging to the estate of the said Joseph Waterworth.

By indentures of lease and release, dated respectively the 9th and 10th of March 1837, Julia Waterworth charged the hereditaments comprised in her above-mentioned marriage settlement with the payment of 400*l.* and interest, to John Tolson, and the said term of 1,000 years therein was assigned by B. Dixon to W. Senior, as trustee for J. Tolson, to secure payment of the said sum of 400*l.* and interest, and subject thereto, in trust for the person or persons for the time being entitled to the equity of redemption in the said hereditaments.

In February 1838 Julia Waterworth married Stephen Nelson, but no settlement

or agreement for a settlement was, on that occasion made or entered into of the hereditaments and premises comprised in the settlement of November 1831.

In October 1838 the said sum of 400*l.*, and all interest thereon, was paid to J. Tolson by S. Nelson, and on payment thereof the said indentures of lease and release of the 9th and 10th of March 1837, and the title-deeds of the said premises were given up to the said S. Nelson. No reconveyance of the said premises or re-assignment of the said term of 1,000 years was on that occasion made, but a memorandum was given by J. Tolson to S. Nelson in the words following:—"1838, October 31.—I promise to sign a release when made in a proper way concerning the mortgage on the estate at Denby Dale belonging to Mrs. Nelson for the sum of 400*l.*, having received the same this 31st day of October 1838.—John Tolson."

It was alleged, by the defendant J. W. Booth, who was a solicitor, that in June 1837, the plaintiff (then a widow) authorized him to defend a certain suit (*Stead v. Nelson*) (1), which had been instituted against the plaintiff and J. Tolson, and that she gave to him a written authority to appear for her and J. Tolson in the said suit, and to take all necessary proceedings therein (at her expense) in the names of both; and that he accepted and acted on such authority; that the object of such suit was to have it declared that Stead was entitled to a prior incumbrance to that of Tolson upon the above-mentioned premises; that in July or August 1839, the said indentures of lease and release of the 28th of February and 1st of March 1833, and of the 9th and 10th of March 1837, were delivered by S. Nelson to J. W. Booth, who thenceforward continued to act for him and his wife and J. Tolson, as their solicitor, in the suit of *Stead v. Tolson* (2); and that on the 18th of November 1837, a decree was made in that suit in favour of Stead (the plaintiff therein), with costs, and in August 1840 Tolson was compelled to pay Stead, the plaintiff, 175*l.*, being the amount of his taxed costs therein.

(1) See 2 Beav. 245.

(2) *Ubi supra*.

The decree in *Stead v. Nelson* directed the execution of a legal mortgage in the said premises to Stead. No such mortgage, however, was ever executed, but Stead entered into possession of the mortgaged premises, and held them until the 1st of July 1842, by which time his mortgage debt was satisfied.

From the time of the delivery of them to him as such solicitor as aforesaid, J. W. Booth had retained possession of the indentures of lease and release of the 28th of February and 1st of March 1833 and the 9th and 10th of March 1837.

J. W. Booth's account of costs for defending the suit of *Stead v. Nelson*, on behalf of Stephen Nelson, Julia his wife, and John Tolson, under the retainer given to him by Julia Nelson, then Julia Waterworth, widow, amounted to 229*l.* 12*s.* 7*d.*, added to which he had other claims against S. Nelson and Julia his wife, amounting to 18*l.* 12*s.*, and a claim against S. Nelson, amounting to 86*l.* 6*s.* 9*d.*, making together 336*l.* 11*s.* 4*d.*, which was admitted by S. Nelson to be due to the said J. W. Booth on an account stated between them in February 1841.

To secure the sum so due S. Nelson executed a deed, dated the 25th of February 1841, expressed to be made between himself of the one part and the said J. W. Booth of the other part, whereby, after reciting that S. Nelson was indebted to J. W. Booth in 330*l.* and upwards, for money advanced and professional business done at his request, for securing which J. W. Booth held certain title-deeds and writings relating to property situate at Denby, otherwise Denby Dale, and also a policy of assurance under the hands and seals of three of the directors of the York and North of England Assurance Company, dated the 6th of January 1837, whereby the life of Julia the wife of S. Nelson was assured in the sum of 400*l.*, S. Nelson agreed that for further effectually securing the same he, together with all necessary parties, would, when thereunto requested by J. W. Booth, well and effectually convey and assure all that estate and interest of him the said S. Nelson and also of the said Julia his wife in the messuages and hereditaments at Denby Dale, and assign to J. W. Booth, his ex-

cutors, administrators and assigns, the said deed or policy and the sum or sums recoverable thereon. In April 1841 S. Nelson was adjudged a bankrupt, and he shortly afterwards applied for and obtained his certificate. J. W. Booth thereupon, in order to secure his interest in the hereditaments at Denby Dale, served a notice upon John Tolson that he was entitled to an equitable charge upon them under the deed of February 1841, and he also served a similar notice upon the trustees of the term of 1,000 years therein, and in October 1841 he negotiated with J. Tolson for a transfer of his remaining claim under the mortgage to him of the said hereditaments made in March 1837, which Tolson then agreed to transfer to Booth, though no such transfer was actually made until the year 1854.

In January 1843 Booth entered into possession of the said premises at Denby Dale so agreed to be assigned to him as aforesaid, and shortly afterwards S. Nelson levied a distress upon one of the tenants for a half-year's rent which had been previously paid to Booth. The tenant then, by directions and under the indemnity of Booth, replevied the distress. The proceedings in replevin were, after Booth had been put to an expense of 18*l.* 19*s.* 9*d.* in respect thereof, abandoned by Nelson, and Booth consequently claimed to add that sum to his mortgage debt.

By indenture, dated in September 1854, J. Tolson, in pursuance of the above-mentioned agreement of October 1841, and in consideration of 40*l.* paid to him by Booth, assigned to Booth the above-mentioned debt of 175*l.* due to him in respect of the sum so recovered from him for costs in the suit of *Stead v. Tolson* as aforesaid, and which he was entitled to add to his mortgage debt upon the said hereditaments at Denby Dale; and he thereby conveyed and assured the said mortgaged hereditaments, and all his rights and remedies in respect of such mortgage, to Booth, his heirs and assigns.

S. Nelson died on the 5th of December 1855.

The bill, which was filed by his widow, Julia Nelson, alleged that the deed or memorandum of the 25th of February 1841 was never executed by her the plain-

tiff, nor had ever been confirmed by her; that she had never agreed that the hereditaments and premises comprised therein should be charged with any debt of the said S. Nelson due to the defendant Booth, and that she was not, in fact, aware of the existence of such deed until after its alleged execution; nor did she ever agree that the title-deeds and documents relating to the said hereditaments and premises should be held by the defendant J. W. Booth as a security for any debt whatever; that she never confirmed the authority alleged to have been given to Booth to act as solicitor for her and for Tolson (if such authority was ever given, of which she had no recollection) after her marriage with S. Nelson, and such authority (if any) was not intended to and did not create any charge on the hereditaments and premises comprised in the said indenture of settlement of November 1831, and that on her marriage with S. Nelson the debt (if any) incurred under such authority became the debt of S. Nelson.

The plaintiff also charged by her bill that J. W. Booth obtained his knowledge of the alleged right of J. Tolson to obtain payment of the sum of 175*l.* out of the hereditaments in mortgage to him, and his knowledge of the nature of the security held by J. Tolson, of the title thereto, and of the value of the property comprised therein, in the character of solicitor of the plaintiff and her deceased husband; and that he could not, therefore, use such knowledge for his own benefit.

The bill prayed that it might be declared that the deed or memorandum of February 1841, executed by Stephen Nelson, was ineffectual to create a charge on the premises comprised therein; that an account might be taken of the rents and profits of the said hereditaments received by the trustees of the settlement of November 1831, and a like account of those received by J. W. Booth, or which, but for his wilful neglect and default, he might have received; and that what should be found due on taking such accounts, together with interest thereon, might be paid to the plaintiff; and, further, that it might be declared that the defendant, J. W. Booth, was not entitled to hold the indentures of the 9th and 10th of March 1837,

as a security for any larger sum than the 40*l.* actually paid by him to J. Tolson; that an account might be taken of what (if anything) was due to J. W. Booth on the security of those indentures, and that, on payment of what (if anything) should be found due on such account, he might be decreed to re-convey and re-assign the said hereditaments and premises as the plaintiff should direct; also, that it might be declared that, in taking such account, the defendant Booth was not entitled to take or receive the said sum of 330*l.*, so alleged to have been secured by the deed of the 25th of February 1841, or any part thereof. The defendant, J. W. Booth, by his answer, insisted that inasmuch as the mortgage for 400*l.* and interest to Tolson had been paid off by Stephen Nelson out of his own money, the mortgage money so paid remained a charge upon the estate for the benefit of Nelson; and he claimed to be entitled to stand in the place of J. Tolson in respect of such rights of his under the said security as the payment of the 400*l.* and interest did not satisfy, and to stand in the place of S. Nelson in respect of the charge upon the estate which he had acquired by paying the 400*l.* and interest. He also stated, that since the year 1840 he had never in any way acted as the solicitor of the plaintiff, or of her deceased husband.

The case was brought on for hearing upon motion for decree.

Mr. Elmsley and Mr. Pemberton, for the plaintiff.—The husband of Mrs. Nelson was bound to pay off the mortgage upon his wife's estate, and must therefore be presumed to have paid off the 400*l.* in discharge of that obligation. That being so, he cannot be held entitled to stand in the place of the mortgagees whom he had paid off; and the circumstance, that the solicitor of a husband and wife has transacted business relating to the separate estate of the wife, does not make that estate liable for the amount of his bill of costs.—

Miles v. Williams, 1 P. Wms. 249.

Campion v. Cotton, 17 Ves. 264.

Callow v. Howle, 1 De Gex & Sm.
531; s. c. 17 Law J. Rep. (N.S.)
Chanc. 71.

The defendant Booth having acquired his knowledge of the mortgage to Tolson, and of the particulars thereof, while acting as solicitor for the plaintiff and her husband, will not be allowed to use such knowledge for his own benefit.—

Carter v. Palmer, 8 Cl. & F. 657.

Ex parte James, 8 Ves. 337.

Mr. Wigram and *Mr. Wickens* appeared for the defendant, J. W. Booth, but were not called upon.

Mr. C. Barber, for the trustees of the settlement of 1831.

STUART, V.C. said, that Mrs. Nelson, at the time of her marriage with S. Nelson, was entitled to an estate for life to her separate use in the equity of redemption of the mortgaged premises, and that it was now clearly settled that if the husband paid off the mortgage debt, he could deal with such mortgage so as to acquire for his own benefit a right to stand in the place of the original mortgagee—*Bagot v. Oughton* (3). Mr. Nelson, therefore, upon payment of the 400*l.* to Tolson, acquired a right to hold and retain the title-deeds, which were delivered up to him by way of equitable security for that amount. That being so, he (the Vice Chancellor) was of opinion that Mr. Nelson had a right to apply his equitable security in the way he had done by the deed of February 1841, in discharge of a debt unquestionably due from him to his solicitor, Mr. Booth; and that there was no ground for setting aside such deed. As to the subsequent purchase for 40*l.* by Booth from Tolson of his further claim upon the mortgaged premises for 175*l.*, it had been argued that Booth, having been the solicitor of the plaintiff and Tolson, was not entitled to make this purchase for his own benefit, but must be held to have purchased the debt for the benefit of Mrs. Nelson. No doubt the well-established doctrine which prohibits a counsel or solicitor, who has acquired professionally a knowledge of his client's property and affairs, from using that knowledge for his own benefit, could not be disregarded; but it was a very different thing to say

that, where a debt is fairly due to a solicitor from his client, his right to that debt is so qualified by the confidential relation in which he stands towards his debtor, that no security which he might obtain for such debt could stand. The benefit of this purchase was claimed, as he understood, by Booth to the extent only of securing himself in respect of the debt due to him from Nelson. To that extent he was clearly entitled to such benefit; but, apart from his right to obtain and enforce such security, he could not be held entitled to sustain the purchase in question.

Mr. Wigram and *Mr. Wickens* submitted that Mr. Booth was entitled to stand in the place of the original mortgagee for the full amount (175*l.*) of the debt purchased from him; citing in support of such claim,

Darcy v. Hall, 1 Vern. 49.

Austin v. Chambers, 6 Cl. & F. 1.

STUART, V.C. said—The 175*l.* could be regarded only as part of the entire claim of Mr. Tolson, the original mortgagee, the whole of which Mr. Tolson was entitled to be paid before the Court would have compelled him to transfer the mortgage. The whole mortgage debt had thus been transferred to Mr. Booth, and was now held by him as security for his own debt; but he was only entitled to reckon as part of that debt the sum of 40*l.*, which he had paid, and the costs which he had properly incurred.

The following was the order made:—Declare the defendant, J. W. Booth, entitled to hold the indentures of lease and release of the 9th and 10th of March 1837, as security for the amount which shall be found due to him for principal, interest and costs under the memorandum or agreement dated the 25th of February 1841, and for the sum of 40*l.* mentioned in the indenture dated the 15th of September 1854, and interest thereon, and his costs incurred in certain proceedings in replevin in the pleadings mentioned. Order that the following accounts be taken: first, an account of what is due to the said J. W. Booth for principal, interest and costs on the sum of 330*l.* 0*s.* 8*d.* in

the said memorandum or agreement dated the 25th of February 1841 mentioned, and on the said sum of 40*l.*, and for costs of this suit and of the said proceedings in replevin; secondly, an account of the rents and profits of the mortgaged premises received by J. W. Booth, or any person for him, or which, but for his wilful default or neglect, might have been so received. Deduct the amount so, lastly, found due from the amount found due for principal, interest and costs as aforesaid, and upon the plaintiff paying the difference to J. W. Booth, let J. W. Booth deliver up to the plaintiff the said indentures of lease and release of the 9th and 10th of March 1837, and all deeds in his possession relating to the mortgaged premises. But in default of the plaintiff making such payment within six months from the date of this order, let the bill stand thenceforth dismissed. Let all just allowances be made; and let the bill be dismissed as against the trustees of the indenture of settlement of the 4th and 5th of November 1831, with costs to be taxed, and then paid by the plaintiff. Liberty to apply.

STUART, V.C. }
June 29. } WEBSTER v. WEBSTER.

Baron and Feme—Deed of Separation—Reconciliation—Parol Contract—Part Performance—Statute of Frauds.

Upon the separation of husband and wife the husband covenanted with a trustee for the wife to pay her an annuity for her life. Shortly before the death of the husband, and at his solicitation, a reconciliation and re-cohabitation took place in consideration of a parol promise by him to the wife and to her trustee to continue the payment of the annuity to her, and to charge it upon his real estate. The husband died without having carried into effect the parol promise:—Held, that such promise was effectual to charge the land with the annuity as against the devise of the real estate under the husband's will.

The material statements in the bill as amended were to the effect following:—

In 1844 differences having arisen be-

tween the, plaintiff, Ann Webster and her husband W. G. Webster, they came to an agreement to live separate and apart from each other.

The terms of this agreement were embodied in an indenture, dated the 4th of September 1844, and duly executed by the parties thereto.

By this deed, after reciting the aforesaid differences, it was witnessed that W. G. Webster thereby, for himself, his heirs, executors and administrators, covenanted with Thomas Summers, a party thereto, his executors, administrators and assigns, that it should be lawful for the plaintiff, from time to time, and at all times from thenceforth for her natural life, to live separate and apart from him, and to reside and be in such place and to follow and carry on such trade and business as she, from time to time, at her will and pleasure, notwithstanding her coverture, and as if she was then sole and unmarried, should think fit; and that the said W. G. Webster would not sue the plaintiff in the ecclesiastical court, or any other court, for living separate and apart from him, or compel her to cohabit with him; and that he would not, without the consent of Thomas Summers, visit her, or knowingly come into any house or place where she should dwell or reside. Then followed other clauses usual in deeds of separation, concluding with a covenant in the following terms:—

“That the said William Granville Webster, his heirs, executors or administrators, or some or one of them, shall and will well and truly pay, or cause to be paid unto the said Ann, his wife, and her assigns, during the term of her natural life, for and towards her better support and maintenance, one annuity or yearly sum of 65*l.*, of lawful money of Great Britain, free and clear of all taxes, charges and deductions whatever, the said annuity or yearly sum of 65*l.* to be paid and payable to her the said Ann and her assigns during her natural life by two half-yearly payments in each and every year, on the days and times hereinafter mentioned, that is to say, on the 25th day of March and the 29th day of September, the first half-yearly payment thereof to begin and be made on the 25th day of March next, and which said sum of

65*l.* per annum so hereby made payable to her the said Ann Webster in manner as aforesaid, she, the said Ann Webster, doth hereby agree to take in full satisfaction for her support and maintenance and all alimony whatsoever during her coverture."

The separation thereupon took place and continued, and the indenture was acted upon until the 14th of January 1846, when the separation was discontinued under the following circumstances:—

At the latter end of the year 1845 the said William Granville Webster was in a very bad state of health, and in the month of December in that year he called upon the plaintiff at her mother's house, where she was then residing, and he then requested her to return and live with him, and stated that if she would do so the annuity which he had secured to her by the before-stated indenture should continue payable; and he also stated that he would make it safe for her by charging it on his freehold property. In reply to such request the plaintiff stated that she could not so live with him, the said William Granville Webster, unless with the sanction of her trustee, the said Thomas Summers. Thereupon, William Granville Webster stated that he would see the said Thomas Summers on the subject.

In consequence of the said W. G. Webster becoming more ill, he was unable to call on the said Thomas Summers until early in the month of January 1846, when he called upon the said Thomas Summers, and asked him to give his consent to the plaintiff returning to live with him; the said W. G. Webster stating that if she would do so, the annuity which was already payable to her should not only be continued, but that he would secure it on his real estate. Thomas Summers then stated that he should not consent to the plaintiff returning to reside with the said W. G. Webster unless he the said T. Summers was assured by the said W. G. Webster that the said annuity would be continued to the plaintiff for her life; whereupon the said W. G. Webster assured the said T. Summers that the said annuity should be continued to be paid to the plaintiff for her life, and that he would further secure it on his real estate; and on the faith of such assurance, and it being understood and

agreed by and between the said T. Summers, acting as the trustee of and for and on behalf of the plaintiff, and the said W. G. Webster, that the said annuity should be so continued, the said T. Summers gave to the said W. G. Webster his consent to the plaintiff's returning to reside with the said W. G. Webster. Shortly afterwards the said W. G. Webster called on the plaintiff at Broome, where she was then staying, and told her what had, as hereinbefore stated, passed at his said interview with the said T. Summers; and that the said T. Summers had consented to the plaintiff returning to live with him, the said W. G. Webster, on condition that the said annuity was continued and made secure; and the said W. G. Webster then promised the plaintiff that such annuity should continue payable to her for life if she would return to live with him, and that he would secure it on his real estate. The plaintiff, relying on the promise made to the said T. Summers, and upon the said promise to herself, and acting upon the consent given by the said T. Summers, consented to return to live with the said W. G. Webster, and she did accordingly do so on the 14th of January 1846, and thenceforth continued to live with the said W. G. Webster up to the day of his death, which happened on the 26th of January 1846, he being very ill when the plaintiff went home to him.

W. G. Webster, prior to his death, made his will, but the same did not contain any provision for the plaintiff, and no deed or document of any kind was ever executed by him charging his real estate with the payment of the said annuity.

The plaintiff sued *in formâ pauperis* as a creditor, on behalf of herself and all other creditors of her deceased husband. In the former stage of the suit it had been held that the subsequent reconciliation and cohabitation had avoided the deed of separation—see 1 *Sm. & G.* 489; 4 *De Gex, M. & G.* 437; s. c. 22 *Law J. Rep. (N.S.)* Chanc. 837; and the question upon the hearing of the amended bill was, whether the parol agreement by the husband to secure payment of the annuity by a charge on his real estate could be enforced as against the devisees of that estate.

Mr. Lee and Mr. Charles Hall, for the

plaintiff, submitted that she was entitled to have the agreement carried into effect, and the annuity charged on the real estate of the testator, her deceased husband.

Mr. Greene, for the devisee of the real estate of *W. G. Webster*.—The old written contract in the deed of separation having been put an end to by the subsequent cohabitation, there is nothing here but a parol contract to charge an annuity on land, which, it is submitted, is void under the Statute of Frauds. There was no payment of the annuity made by the husband after the reconciliation, and, therefore, no part performance, even if any part performance could bring the contract within the statute. He cited *Mechelen v. Wallace* (1).

Mr. T. Smythe and *Mr. F. J. Wood* appeared for the other defendants.

STUART, V.C.—It has always been the practice of this Court, not to permit the Statute of Frauds, which was passed to prevent fraud, from being used as an instrument for the commission of a fraud; and a more gross fraud than that attempted to be committed here cannot well be conceived. The husband having had the benefit of the consideration for which he contracted to charge his land with the annuity, his devisee cannot be allowed to set up the statute as a ground for exonerating the land of his testator from the burthen of that contract. The re-cohabitation of the plaintiff with her deceased husband was a sufficient part performance of the contract to entitle the plaintiff to a decree charging the real estate of her deceased husband with the annuity of 65*l*.

STUART, V.C. }
July 22, 23. } BOOTH v. ALINGTON.

Legacy — Joint Tenancy — Tenancy in Common.

Bequest of a legacy upon trust to pay, assign and divide the same, upon the death of the testator's daughter, unto and equally between all her children if more than one, as joint tenants, and if but one, then to such one

(1) 7 Ad. & E. 49; s. c. 6 Law J. Rep. (N.S.) K.B. 217.

child,—held to create a tenancy in common amongst the legatees.

At the death of *Elizabeth Booth* there was in the hands of the trustees of her father's will a sum of 90,000*l*., the trusts whereof under the will then remaining unperformed were as follows: "upon trust that the said trustees should pay, assign and divide the said sum unto and equally between all the children of the testator's said daughter, *Elizabeth Booth*, if more than one, as joint tenants, and if but one, then to such one child."

The testator, by the will, had given his residuary personal estate unto and equally between his grandchildren, *John Alington* and *Frances Alington*, "as tenants in common."

Elizabeth Booth, who, under the trusts of the will, had received the interest of the 90,000*l*. until her death, had only three children, all of whom survived her.

The question was whether, under the above trust of the said sum of 90,000*l*., the children took as joint tenants, or as tenants in common.

Mr. Elmsley and *Mr. Mackeson*, in support of the latter construction, cited—

Walker v. Shore, 15 Ves. 122.

Marryat v. Townly, 1 Ibid. 102.

Jolliffe v. East, 3 Bro. C.C. 25.

Ettricke v. Ettricke, Amb. 656.

Perkins v. Baynton, 1 Bro. C.C. 118.

Woodgate v. Unwin, 4 Sim. 129.

Mr. Wigram and *Mr. Macnaghten*, for the former construction, contended that the primary meaning of the words "pay, assign and divide," which imported a tenancy in common, was controuled by the expression "as joint tenants" afterwards used. That was a technical term contradicting the sense of the words first used, and as the testator must be taken to know the distinction between the terms "joint tenants" and "tenants in common," both of which he used in the course of the will, it must be held that, by employing the term "as joint tenants," he intended to create a joint tenancy in the children.

Stratton v. Best, 1 Ves. jun. 285.

Sussex v. Temple, 1 Lord Raym. 310.

Oates d. Hatterley v. Jackson, 2 Str. 1172.

Crooke v. De Vandes, 9 Ves. 197, 204.

Mence v. Bagster, 4 De Gex & S. 162.

Kenworthy v. Ward, 11 Hare, 196.

Cookson v. Bingham, 17 Beav. 262 ;
s. c. on appeal, 3 De Gex, M. & G.
668 ; 23 Law J. Rep. (N.S.) Chanc.
127.

Mr. Bacon, Mr. Craig, Mr. Hardy, Mr. Hawkins and Mr. L. Mackeson appeared for other parties.

STUART, V.C. said that, collecting the intention of the testator from the whole context of the will, it did not appear that by using the term "as joint tenants" the testator meant to controul the intention previously clearly expressed by the words "pay, assign and divide," that the children should take as tenants in common. The expression "as joint tenants" was, no doubt, a technical expression ; but he was satisfied that the testator in this case had not used it in its technical sense, but had used it inadvertently, and without meaning thereby to indicate the substance of the gift, or the mode of its enjoyment.

WOOD, V.C. }
Nov. 9, 10. } HANSON v. REECE.

Solicitor—Lien for Costs—Set-off.

A cheque having been deposited by H. in the hands of a solicitor, to be applied by him in payment of any such amount as might be recovered by F, his client, in an action then pending against H, the action proceeded to trial, and F. recovered a sum of money against H, and entered up judgment for the debt and costs. Before the exact amount due on the judgment was ascertained F. became bankrupt, and H, having a cross claim against his estate for a larger amount than was due on the judgment, was admitted to prove for the difference, the rest being set off against the judgment debt under the 171st section of the Bankrupt Law Consolidation Act :—Held, that the solicitor had a lien upon the proceeds of the cheque for his costs, to the extent of the sum found due upon the judgment, and such lien was not displaced by

the set-off under the proceedings in F.'s bankruptcy.

The bill in this cause was filed for the purpose of obtaining payment of 191*l.* 17*s.* 6*d.*, the amount of a cheque deposited in the hands of the defendant, an attorney, together with interest from the time when the cheque was presented and the money received. The circumstances were as follows :—In March 1856 William Foster, for whom the defendant acted as attorney, caused the plaintiff Hanson to be served with a trader debtor summons in bankruptcy for 339*l.* 9*s.* 10*d.* Of this sum Hanson admitted 34*l.* 5*s.* 8*d.* to be due, and as to the residue he was ordered to enter into the usual bond, with sureties for payment of so much as might be recovered by Foster in an action. Foster accordingly commenced an action for the amount, employing Reece as his attorney. At this stage of the proceedings an arrangement was entered into between the parties for discontinuing the proceedings in bankruptcy, and the following memorandum of agreement, dated the 13th of March, was drawn up and signed :—
"Memorandum, that the bankruptcy proceedings instituted by W. Foster against T. Hanson shall be discontinued, and the order for bond be discharged on the following terms :—First, the sum of 116*l.* 5*s.* for rent, less 2*l.* 18*s.* 4*d.*, the property-tax, to be excluded from the claim of the plaintiff, as stated in his particulars of demand under the trader debtor summons, and the plaintiff to be left to his remedies for recovering the same. Secondly, the residue of the debt which the plaintiff claims to be considered 226*l.* 3*s.*, of which 34*l.* 5*s.* 8*d.*, being the amount admitted by the defendant, is to be paid forthwith. Thirdly, Mr. Knight (who acted as Hanson's attorney) to give a cheque for payment of 191*l.* 17*s.* 6*d.*, such cheque to be handed to Mr. Reece, and applied by him in payment of any such amount as may be recovered by the plaintiff, W. Foster, in the action brought by him against the defendant T. Hanson, or any other action to be brought for the same claim, or any part thereof. Fourthly, Mr. Knight to give a further cheque for 26*l.* to be applied, so far as it extends, towards payment of the

sum of 6*l.* for the costs of the trader debtor summons and proceedings, and the residue thereof towards the costs, if any, recovered by the plaintiff in the aforesaid action or actions. Fifthly, Mr. Knight undertaking that there shall be funds to meet the above cheques, and not to stop the payment thereof from the bank under any circumstances. In case of verdict for the defendant, Mr. Reece to return the cheque for 191*l.* 17*s.* 6*d.* and the cheque for 26*l.*, upon receiving 6*l.* for the bankruptcy costs, and also the costs of any issue found for the plaintiff. In order to save the expense of witnesses to prove the delivery of goods and the performance of work and labour mentioned in the wharf account, the defendant (T. Hanson) shall, on the trial of the said action, admit the delivery of such goods and the performance of such work and labour, without prejudice to his liability to pay for the same, or that the same was done upon his account. Dated this 13th day of March 1856. (Signed), W. Foster."

In pursuance of this agreement, cheques for 191*l.* 17*s.* 6*d.* and 26*l.* were deposited with Reece, and the bankruptcy proceedings were discontinued, and shortly afterwards Foster declared in his action.

Upon the trial, a verdict was taken by consent for the plaintiff Foster for the full amount of his claim and 40*s.* costs, subject to a reference, the costs to abide the event of the award. The arbitrator, by his award, dated the 10th of May 1856, directed that the verdict should stand, but that the amount should be reduced to 103*l.* 16*s.* 7*d.*, for which sum and the costs judgment was entered up by Foster on the 24th of May. On the 28th of May Hanson brought an action against Foster for 92*l.* 10*s.*, the amount of an accommodation bill, accepted and paid by him for Foster's accommodation, and Foster pleaded his judgment. On the 17th of December the balance due on this judgment was ascertained to be 108*l.* 19*s.* 1*d.*, which was reduced to 88*l.* 19*s.* 1*d.* by the payment of 20*l.*, part of the proceeds of the 26*l.* cheque, after payment of 6*l.* for the costs of the trader debtor summons. Foster was adjudicated bankrupt on the 14th of November, and after the ascertainment of the amount due on the judgment, Hanson

was admitted to prove for 31*l.* 10*s.* 11*d.*, the balance of the 92*l.* 10*s.*, after deducting 88*l.* 19*s.* 1*d.* Reece, whose bill of costs exceeded 88*l.* 19*s.* 1*d.*, then presented the cheque for 191*l.* 17*s.* 6*d.*, and after retaining thereout 88*l.* 19*s.* 1*d.*, tendered the residue to Knight, who declined to receive it; and this suit was instituted to recover the whole amount of the cheque and interest from the time when the money had been received.

Mr. Rolt and Mr. Chapman Barber, for the plaintiffs, insisted that Reece was a trustee of the cheque, and had committed a breach of trust by receiving the money. The judgment debt having been set off against a portion of the 92*l.* 10*s.*, was satisfied before the presentation of the cheque. The judgment was not complete till the 17th of December, which was after the bankruptcy; and under the 171st section of the Bankrupt Law Consolidation Act, 1849, Hanson was entitled to a right of set-off. Reece's lien for his costs, if any, was subject to the equities between the parties.

Mr. Cairns and Mr. Eddis, for the defendant Reece, contended that the cheque was part of the fruits of the action, and he was entitled, therefore, to a lien for his costs upon the proceeds. The proceedings in bankruptcy had not displaced that lien.

The cases cited were—

- Ex parte Rhodes*, 15 Ves. 539.
- Simpson v. Lamb*, 26 Law J. Rep. (N.S.) Q.B. 121.
- Bawtree v. Watson*, 2 Keen, 718; s. c. 7 Law J. Rep. (N.S.) Chanc. 184.
- Richards v. Platel*, Cr. & Ph. 79; s. c. 10 Law J. Rep. (N.S.) Chanc. 375.
- Davies v. Lowndes*, 3 Com. B. Rep. 823.
- Taylor v. Popham*, 15 Ves. 72.
- Symson v. Prothero*, 26 Law J. Rep. (N.S.) Chanc. 671.
- Wright v. Mudie*, 1 Sim. & S. 266; s. c. 1 Law J. Rep. Chanc. 136.
- Collett v. Preston*, 15 Beav. 458.
- Newton v. the Grand Junction Railway Company*, 16 Mee. & W. 139; s. c. 16 Law J. Rep. (N.S.) Exch. 276.
- Boxon v. Bolland*, 4 Myl. & Cr. 354; s. c. 9 Law J. Rep. (N.S.) Chanc. 123.

Mr. Barber replied.

WOOD, V.C.—If the case were to be looked at with reference to the right of set-off merely, without the memorandum of agreement, the case of the defendant *Reece* would not have been altogether so clear. His case would then have been, that there being a judgment against *Hanson* in favour of *Foster*, he, as *Foster's* attorney, was entitled to satisfy himself out of the fruits of that judgment. I think the argument for the solicitor's lien was put too high. It could hardly be treated as the same thing as an actual mortgage; and I was struck in the course of the argument with the fact, that compromises are frequently allowed in this court without regard to the solicitor's lien. Apart from the memorandum, *Mr. Reece* must have gone to the Commissioner, and required him only to allow a claim of set-off for the difference between the costs and the sum recovered by the judgment, and must have obtained permission to proceed in the name of the assignees or otherwise. The result of such an application might be doubtful, though probably a Court of Bankruptcy would have held, that the set-off applied only as regarded the amount of the debt, and not as regarded the amount of the costs. There would, at any rate, have been a question of some importance to be tried, if there had been no memorandum of agreement or cheque. But the memorandum of agreement puts *Mr. Reece* in a much more favourable position than *Mr. Barber* is willing he should be in. *Mr. Barber* treated him as a mere stakeholder; but it should be remembered that he was also, and was known to be, the attorney in the action, and the person, therefore, to whom the money recovered in the action would in the ordinary course be payable. It is clear upon the agreement that the money was to go into *Reece's* hands, and it would be immediately subject to the lien for costs, which he would be entitled to deduct. From the moment the cheque was given, it was appropriated to the payment of the debt. It was admitted that, as soon as the debt was ascertained, the agreement authorized the appropriation of the money to the payment of the debt;

but it was said, that before that moment arrived the bankruptcy had intervened, and the order in bankruptcy had been made appropriating the debt towards the satisfaction of a cross-debt; but it appears to me that the right to have the money specifically applied towards the payment of the particular debt which is recovered in the action relates back to the date of the memorandum; and from the moment of the debt being ascertained, it belongs, by virtue of the agreement, to the party for whom the benefit is intended by the agreement. If the money had been in the hands of a mere stakeholder, and he had parted with it to *Hanson*, *Reece* might have been deprived of his right; but here it has been always in the hands of *Reece* himself. I do not see how the lien could be affected by the proceedings in Bankruptcy. The Commissioner decided that the amount of the debt due to *Hanson* should be set off against the judgment; but *Reece* was a stranger to that decision. It was therefore no decision against him; and as he had in his own hands the means of paying himself, he was not put to make any application to the assignee. The order of the Commissioner neither did, nor was meant to operate in derogation of his rights. I had some little doubt with respect to the plea of set-off which was set up against *Hanson's* action, but without entering into the question how far *Reece* compromised himself by putting in that plea on behalf of *Foster*, judgment had at that time been recovered for 103*l.* 16*s.* 7*d.* and costs, which were known to be very large; and I cannot say, therefore, that they were not justified in putting in that plea. Independently of the order in Bankruptcy, it would not be competent for the plaintiff to file his bill to recover the amount of the cheque, on the footing of the abandonment of the agreement by setting up this plea. The bill, therefore, must be dismissed. I cannot dismiss the bill with costs while *Reece* has a balance remaining in his hands. He can apply that balance in payment of his costs; and upon his undertaking to pay the residue to the plaintiffs, the bill will be dismissed, without costs.

L.C.
Dec. 17, 18, }
21, 22, 23. }

PERRY-HERRICK
v. ATTWOOD.

Mortgage—Priority—Possession of Title-deeds—Statute of Elizabeth.

If a person seeking a legal mortgage chooses to leave the title-deeds with the mortgagor, not through negligence or through fraud, but intentionally, to enable him to raise a definite sum which should take precedence, the mortgagee cannot complain if, instead of the definite sum, the mortgagor raises a sum of much larger amount, because he puts it in his power to raise any sum he pleases.

Semble—That if the meaning of a transaction between a mortgagor and mortgagee is that the mortgagee should have his security, but that the mortgagor should have the title-deeds, and be enabled therefrom to deal with third persons, that is within the principle of the Statute of Elizabeth.

This was an appeal by the Misses Attwood, two of the defendants, from a decision of the Master of the Rolls, on the 16th of July last, in favour of the plaintiffs. The suit was instituted by William Perry-Herrick and George Barker, for the purpose of having their securities on the Hylands estate, in the county of Essex, declared to be the first charge on the estate, and for a foreclosure. The bill also prayed that an indenture of the 30th of January 1848 might be delivered up, and that, if necessary, a receiver should be appointed, and the defendants claiming under the indenture of the 30th of January 1848 should be restrained from proceeding at law under or by virtue of the same.

James Attwood, by his will, bequeathed to his executors, viz. his son, John Attwood, and two other persons, (who renounced probate), 21,000*l.*, being 7,000*l.* apiece for his three daughters, Frances, Maria, and Catherine, upon trusts for his said daughters during their lives, for their separate use; and after the decease of either of them, upon trust for her husband for life, as she should appoint; and subject thereto, in trust for their issue, with further trusts in default of issue. The testator died in 1821, and J. Attwood afterwards, by agreement with his sisters, added 3,000*l.* to the portion coming to

each of them under their father's will. Catherine Attwood, in the year 1829, married the defendant Thomas Troward, and thereupon a settlement was executed, whereby she appointed part of the income of her legacy of 7,000*l.* to Troward for his life; and the sum of 3,000*l.*, accruing to her under the said agreement, was thereby settled in trust for her for life, for her separate use, without power of anticipation, but with power, with the consent of J. Attwood, to appoint the income during her life to Troward; and after her decease, in trust for the children of the marriage, with further trusts over. The trustees of the said settlement were John Attwood and his brother James Alexander Attwood, the latter of whom died in 1845. John Attwood, both before and after the execution of the settlement, retained in his own hands the whole of the said trust monies, amounting to 30,000*l.*; neither investing nor giving any security for the same, until by an indenture of mortgage dated the 30th of January, (but executed on or about the 7th of February 1848), and made between John Attwood of the first part, Frances Attwood and Maria Attwood of the second part, and Catherine Troward of the third part, after reciting that for the purposes of that security, so far as concerned the defendant Catherine Troward and the amount due to her trust and settlement funds, the said Frances Attwood and Maria Attwood should stand interested on her behalf, and as fully and effectually as she, acting in her sole and separate right, could direct and authorize the same, John Attwood demised the Hylands estate (except the copyhold portion thereof) to Frances Attwood and Maria Attwood, their executors, administrators and assigns, for the term of 200 years, without impeachment of waste, by way of mortgage for securing 30,000*l.*, with interest at 4*l.* per cent. This deed was prepared on behalf of all parties by Roger Williams Gem, of Birmingham, who was at that time the solicitor of the Attwood family. The firm of Gem, Pooley & Beisley (which afterwards became successively Pooley, Beisley & Read, and Beisley & Read) were then the London agents of Roger Williams Gem. In the subsequent mortgage transactions the London firm acted directly as

Attwood's solicitors. In 1850, Messrs. Pooley & Co. applied to Mr. E. T. Whitaker, a solicitor, for a loan to Attwood, upon the security of the Hylands estate, representing it to be unincumbered, and producing the title-deeds for Whitaker's inspection. A loan of 15,000*l.* was accordingly obtained from Messrs. Edward Cardwell and Charles Cardwell, clients of Whitaker; and an indenture was executed, dated the 7th of September 1850, whereby Attwood conveyed the whole of the Hylands estate to E. Cardwell and C. Cardwell, and their heirs, by way of mortgage, for securing 15,000*l.* and interest. On this occasion the title was submitted to counsel and approved of, and regular search was made for judgments and Crown debts, and the whole of the title-deeds were deposited with Whitaker; but there was nothing to lead to any notice or suspicion of the mortgage of the 30th of January 1848; and Whitaker stated in his evidence that it was not in his opinion possible that a mortgage transaction could have been more entirely free from any circumstance calculated to raise suspicion of prior incumbrances than this transaction. Three other sums were afterwards advanced to Attwood, through Whitaker, upon the security of the same estate, viz. a further sum of 5,000*l.* by Messrs. Cardwell, secured by an indenture of further charge dated the 24th of January 1851; 3,000*l.* advanced by Whitaker and William Atchison, and secured by an indenture of mortgage dated the 17th of May 1851; and 2,000*l.* advanced by Herbert Henry Rice, and secured by a mortgage dated the 27th of August 1851. By an indenture dated the 15th of September 1851, John Attwood conveyed the same property, by way of mortgage, to Charles James Bloxam and Robert Alexander Mitchell, and their heirs, to secure monies previously advanced by Raikes Currie and Henry Raikes and others to J. Attwood on other parts of his estate, amounting altogether to 40,000*l.* These parties had no notice of the first mortgage. By an indenture dated the 16th of December 1851, the Hylands estate was mortgaged to Edward Barnard and Edgar Barker (whose name was used as a trustee for the plaintiff George Barker) to secure 6,000*l.* advanced

to J. Attwood. On this occasion the title was investigated by Messrs. Barker, Bowker & Peake, solicitors to the mortgagees, and inquiries as to previous incumbrances were made of the said E. T. Whitaker and the said C. J. Bloxam, solicitor to the mortgagees of the 15th of September 1851, but without leading to the discovery of the mortgage of the 30th of January 1848. At the same time statutory declarations were required from and made by Attwood, and Messrs. Beisley & Read, his solicitors, in respect of the incumbrances upon the estates, on the ground (as stated by Messrs. Barker & Co.) that the security to E. Barnard and E. Barker was merely an equitable one. Attwood, in his declaration, stated that he had created, or agreed to create, several mortgages or charges on the Hylands estate, which (except those mentioned in the schedule) were only equitable, and that releases had been executed, or discharges or receipts given, for the principal monies and interest secured by all of them, except those mentioned in the schedule; and that (except as aforesaid) he had not created, or agreed to create, any incumbrances upon the said estate except those mentioned in the schedule. The declaration of Messrs. Beisley & Read contained the following statement:—"I, the said Sidney Beisley, hereby declare that from the year 1848 up to the month of April 1850, my late partner Harvey Gem and my present partner James Pooley and myself acted as solicitors for J. Attwood; and the said Sidney Beisley and David Read declare that we and our partner, the said J. Pooley, have acted as solicitors of the said J. Attwood from the said month of April 1850, up to the present time." The declaration further stated that during the period aforesaid Beisley & Read and their partners respectively had procured for Attwood various loans upon the estates comprised in the mortgage to E. Barnard and E. Barker, and that all the loans so procured by them had been satisfied or discharged, except those mentioned in the schedule, and that they were not aware that any loans had been procured during the period aforesaid by Attwood upon the said estates, or for him by any other person. Neither declaration

contained any mention of the mortgage of January 1848; but among the charges mentioned in the schedule to Attwood's declaration was the following:—"Mary Attwood (now a minor) 5,000*l*." There were several other mortgages upon the property, the incumbrances amounting in the whole to upwards of 140,000*l*. By three several indentures, dated the 22nd of September 1853, the mortgage and further charge of the 7th of September 1850, and the 24th of January 1851, and the mortgages of the 17th of May 1851, and the 27th of August 1851, were respectively transferred to the plaintiffs without their receiving any notice of the mortgage of 1848. The title-deeds were at the same time delivered over to their solicitors, Messrs. Barker, Bowker & Peake, by Whitaker, in whose possession they had remained up to that time. In the early part of the year 1853 it was arranged that the affairs of Attwood, which had become embarrassed, should be wound up under inspectorship; and inspectors were thereupon appointed, to whom his estates were conveyed. In March and June 1854, attempts were made by them to sell the Hylands estate by public auction, but no purchaser could be found. They accordingly relinquished possession. The plaintiffs afterwards took possession, and put the property up for sale, but without success. During all this period no claim was put forward on the part of the mortgagees of January 1848, and evidence was given by the plaintiffs' solicitors to the effect, that during a long series of communications (commencing immediately after the transfers to the plaintiffs) between them and the solicitor for the inspectors and the Misses Attwood, Mr. John Foster Elmalie, the latter never, until January 1855, alluded to the existence of that deed, and that their communications proceeded on the footing that the plaintiffs were the first incumbrancers. R. W. Gem died on the 31st of March 1855. On the 26th of April 1855, Troward filed a bill against the plaintiffs and the other incumbrancers upon the Hylands estate and J. Attwood, seeking to enforce the priority of the mortgage of 1848 over all other charges. By an indenture dated the 18th of April 1855, the Misses Attwood as-

signed their term of 200 years to F. W. Medley and A. O. Medley, subject to the claims of Mr. and Mrs. Troward and to redemption. The present suit was instituted on the 12th of June 1855, and the bill charged that the title-deeds at the time of the mortgage of January 1848 were in the possession and power of Attwood, and that the defendants, the Misses Attwood and the Trowards, were aware of this, and took no steps to obtain possession of the deeds or to have a notice of the mortgage indorsed on them; and that the mortgage was put away and kept secret, under an arrangement between Attwood and the mortgagees, and that there was the grossest possible neglect with regard to the deeds, and that they were left in the possession and power of Attwood as though the mortgage had never been executed, the effect and object being to enable him to deal with the estate as the absolute owner. The bill was taken *pro confesso* against Attwood. The charges in the bill of negligence and concealment were denied by the defendants. Maria Attwood stated that she had been informed by her brother, and believed, that the deeds were, shortly previous to and on the 30th of January 1848, in the hands of Roger W. Gem, for the purpose of giving effect to a proposed agreement for a mortgage, and that they were shortly afterwards handed over to Gem, Pooley & Beisley for the purpose of that security. The answer of Mr. and Mrs. Troward contained a similar allegation. The circumstances alluded to in these statements were as follows:—John Attwood, John Yeend Bedford, and John Cope, the trustees under an agreement for a settlement entered into on the marriage of J. A. Attwood, having advanced nominally to J. A. Attwood, but in reality to J. Attwood, sums of money out of the trust funds, amounting in the whole to 10,600*l*., and George Braithwaite Lloyd, William Spencer, and the said J. Y. Bedford, trustees of the will of John Hawkins, having advanced to J. Attwood, through J. A. Attwood, a sum of 5,000*l*., part of their trust funds, an indenture dated the 25th of May 1843, was executed, whereby J. A. Attwood and J. Attwood covenanted to pay on the 1st of January 1844 the sums so advanced, and any further sums which

might be necessary to enable the trustees to replace the trust funds; and J. Attwood thereby covenanted, in case of default in payment as aforesaid, immediately on such default being made, to convey a competent part of any hereditaments of which he then was or should become seised or possessed, at law or in equity, to the use of the trustees, upon trusts for securing the repayment of the trust monies. The parties beneficially entitled to the said trust funds were the three children of J. A. Attwood, viz., James Harrington Attwood, Maria Louisa Attwood, and Mary Attwood, their shares being equal and payable at twenty-one. They respectively attained twenty-one in 1847, 1850 and 1852. In the year 1847, the trustees being desirous to pay J. H. Attwood his share of the trust monies, called upon J. Attwood to repay the same, which he promised to do; and in anticipation thereof releases of the covenants were prepared and executed as escrows; but the arrangement was not completed in consequence of J. Attwood failing to keep his promise. On the 11th of January 1848 two actions were commenced in the Queen's Bench against J. Attwood for the recovery of the trust monies, and were vigorously prosecuted until the 3rd of March 1848, when (the actions being then ready for trial) an arrangement was come to for stay of proceedings, the terms of which were afterwards embodied in two agreements, dated the 24th of April 1848, (one for each set of trustees). Under these agreements respectively J. Attwood was to pay the monies due to J. H. Attwood, and to execute mortgages to the trustees, parties thereto respectively, upon his freehold estate at Hylands, for the residue of the trust monies, to make out a title thereto, and forthwith to deposit the title-deeds with Messrs. Gem, Pooley & Beisley, who should hold the same pending the completion of the agreements, and the monies were to remain on the security of such mortgages until Maria Louisa Attwood and Mary Attwood should attain twenty-one. The title-deeds were deposited with Messrs. Gem & Co., but no mortgages were executed. In order to contradict the allegation of the defendants Maria Attwood and Mr. and Mrs.

Troward, that at the time of the execution of the mortgage of 1848 a mortgage to the trustees of Hawkins's will and J. A. Attwood's settlement was in contemplation, and to shew that the deeds were then in the complete controul of J. Attwood, the plaintiffs produced evidence, the most material part of which was the following: In reply to a letter addressed to J. Attwood by the firm of Spencer & Rollings, of Birmingham, solicitors to the trustees, demanding immediate repayment of the monies owing to the trustees, and in default threatening to issue writs, R. W. Gem, about the 9th of January, wrote a letter containing the following passage:—"It is forsooth somewhat strange that Mr. Attwood did not before communicate to me his desire to give a mortgage for these amounts in lieu of payment of the money, alleging that he should lose 1,500*l.* by selling out of the funds. It was to confer with you and myself on this matter that he wished me to write to request your coming up; and I should be obliged to you to come." It was stated by Mr. Spencer that he saw the trustees on the proposal contained in the last-mentioned letter, and they expressed great dissatisfaction at it, and at the vacillating conduct of Attwood, and declined the proposal altogether, and directed writs to issue. It appeared from an entry in the partnership books of Spencer & Rollings that a similar proposal was made in the month of February and again refused by the trustees; and it was stated by Mr. Spencer that no other offer of the kind was made until the 28th of February, when negotiations were commenced which led to the arrangement of the 3rd of March. About the 8th of March S. Beisley wrote the following letter to Mr. Spencer:—"Dear Sir,—I have received the title-deeds of Hylands estate from Mr. Attwood, and also the conveyance of the estate to him." Spencer also made the following statement:—"On the 13th of April 1854, I saw the said R. W. Gem. He stated, that after making this mortgage (of January 1848), he, the said R. W. Gem, tied up the said title-deeds, and returned them to the said J. Attwood, by whom they were retained, and that he, the said R. W. Gem, never saw anything of them again until he saw them at the office

of Mr. Beisley, to whom they had been handed by the said J. Attwood." The circumstances attending the execution of the mortgage of 1848 were stated by Maria Attwood to be as follows, and Frances Attwood alleged that she believed, so far as her recollection extended, the statement by her sister to be correct:—"Some time in the early part of the year 1848, Mr. R. W. Gem, then of King's Heath, near Birmingham, but now deceased, who had been for many years the confidential solicitor and adviser of my late father and his family, spoke to me on the subject of having a security from my brother, the said J. Attwood, for money due to me and my said sister, and he said that it was his intention to prepare one, and get my brother, the said J. Attwood, to execute it. Some short time after this conversation the said Mr. Gem one evening stated to me that he had prepared the security for the money due to me and my said sister, and that the same was ready for signature, and he produced the deed for the purpose of the same being executed; and the said indenture was accordingly executed by the said J. Attwood, Frances Attwood, Catherine Troward and myself, at the residence of my brother, the said J. Attwood, in Park Lane, in the county of Middlesex, about the time it purports to bear date. The circumstances which led to the proposal for and preparation of the said indenture of mortgage were, as I have heard from my brother, the said J. Attwood, and believe, that he was desirous of making his will and arranging his affairs, and had consulted the said R. W. Gem thereon, and that the said R. W. Gem, knowing that the said J. Attwood had engaged to give a security on his landed property, the bulk of which then consisted of Hylands estate, for monies which were due from him to the trustees of Mr. Hawkins's will and of his late brother's marriage settlement, suggested that he, the said J. Attwood, should give a security to me and my said sister Frances Attwood for the monies due to me and my said sister, and also for the money forming the subject of the marriage settlement of my sister, the above-named defendant Catherine Troward; and that he, the said J. Attwood, having acquiesced therein, directed the said R. W. Gem to do

what was necessary for that purpose. The said R. W. Gem spoke to me and my said sister Frances Attwood on the subject, and we expressed ourselves obliged to him for his attention to our interests, and stated that we should leave it to him to do what was necessary to make us secure. The said R. W. Gem had our confidence in the preparation of the said mortgage, and he was left entirely to his own discretion both by myself and my said sister Frances Attwood, and also by my said brother J. Attwood, as I believe, from his having told me so, and no other solicitor was employed by me or by my said sister in reference to the said indenture of mortgage. After the deed had been executed, the said R. W. Gem gave the same to me, saying, 'Here, Miss Attwood, is the security for your and your sister's money.' The said deed was then inclosed in a paper cover, with the indorsement, '1848—Miss Attwood's security from her brother,' in the handwriting of Mr. Gem. Mr. Gem, at the time of handing me the said deed, made some further observations, to the effect that the fortune of myself and sisters was made secure by the said deed, and advised me to take care thereof. From what the said Mr. Gem said to me, and also from the indorsement in the handwriting of the said Mr. Gem on the said paper cover, I believed that the said deed so given to me by the said R. W. Gem did constitute a valid, sufficient and complete security, and that the said deed was the only document which it was necessary for me to have for the purpose of such security."

From the defendant Troward's evidence it appeared that the mortgage was executed without any communication with him, and that he was ignorant of it until April 1853. Mrs. Troward was unable to recollect what occurred at the time of her executing the deed. In Mr. R. W. Gem's bill of costs against J. Attwood were the following passages:—"I went to London on the 7th of January, and remained until the 10th of February, thirty-five days, engaged in various matters for different purposes of yours, as to you and your family affairs, for raising money for discharging amounts due to the Birmingham trustees for your nephew and nieces. During this period I drew out a long will for you, and fair copied it

for execution; also wills for your three sisters, and a mortgage to secure to your sisters 30,000*l*." After referring to the actions being at issue—"In this state of things an immediate arrangement being indispensable, a second journey to town at your request to meet Mr. Rollings thereon, and after some consultation it was agreed that you would give an equitable charge upon your Hylands estate, and deposit the deeds with Gem, Pooley & Beisley, as you objected to the deeds being taken to Birmingham." In a letter written by Mr. R. W. Gem to Mr. Spenceer in 1854 he said, "I do not know of any arrangement that Mr. Attwood ordered his sisters to enter into in respect to the mortgage on Hylands. I believe whatever he did was done without their consent or knowledge at the time. I believe Beisley & Read were the parties borrowing the money at the time, through a professional friend of theirs, which friend was himself concerned in making the mortgage. Beisley & Read were fully (at least Mr. Beisley was) apprised of the Misses Attwood's previous mortgage." It was also in evidence that, on the 23rd of May 1853, a statement was submitted to J. Attwood's creditors, containing a list of the incumbrancers on the Hylands estate, among whom appeared "the Misses Attwood, 30,000*l*. at 4*l*. per cent.," but no date was stated for their incumbrance. Mr. Elmslie, the solicitor for the inspectors and the Misses Attwood, also stated that in interviews with creditors the mortgage was constantly referred to by him; and that interest had been paid to Mrs. Troward under it.

The cause came on to be heard, before the Master of the Rolls, who on the 16th of July decided that the claim of the Misses Attwood must be postponed to the plaintiffs',—his Honour considering that J. Attwood had been allowed to retain the deeds for the express and admitted purpose of raising money upon the property by the creation of a charge upon it. From this decision the Misses Attwood appealed.

Mr. Fooks and *Mr. Druce*, in support of the appeal, contended, that the non-possession of the title-deeds by the appellants was not to be attributed to gross or culpable negligence on their part. As

being mortgagees for a term only they were not entitled to the title-deeds—*Harper v. Faulder* (1), *Wiseman v. Westland* (2). Their claim was in 1848 subject to the then prior claims of Hawkins's and J. A. Attwood's trustees; and if the deeds were left with Attwood, the mortgagor, it was only for the purpose of securing those prior claims, and there was therefore no negligence—*Farrow v. Rees* (3). As Attwood was the trustee of Mrs. Troward's marriage settlement, his was the proper custody of the deeds, and he could not deal with them to the prejudice of his *cestuis que trust*—*Evans v. Bicknell* (4). The deeds also related to other property than that comprised in the mortgage of 1848, and the mortgagees were therefore not entitled to the delivery of them—*Atterbury v. Wallis* (5). The plaintiffs' solicitors might, if they had made the inquiries which facts communicated to them suggested, have arrived at the knowledge of this deed. The deed was not voluntary, as it was to secure an antecedent debt—*Plumb v. Fluitt* (6). The plaintiffs' possession of the title-deeds, on which alone their right to priority rested, depended on the misconduct of others. They cited also—

Hewitt v. Loosemore, 9 Hare, 449; s. c. 21 Law J. Rep. (N.S.) Chanc. 69.

Colyer v. Finch, 5 H.L. Cas. 905; s. c. 26 Law J. Rep. (N.S.) Chanc. 65.

Martinez v. Cooper, 2 Russ. 198.

Barnett v. Weston, 12 Ves. 180.

Ex parte Reed, re Buckland, 17 Law J. Rep. (N.S.) Bankr. 19.

Stevens v. Stevens, 2 Coll. 20; s. c. 14 Law J. Rep. (N.S.) Chanc. 252.

Allen v. Knight, 5 Hare, 272; s. c. 15 Law J. Rep. (N.S.) Chanc. 430;

16 Law J. Rep. (N.S.) Chanc. 370.

Jones v. Smith, 1 Phil. 244; s. c. 12 Law J. Rep. (N.S.) Chanc. 381, and

Wellesley v. Wellesley, 4 Myl. & Cr. 561; s. c. 9 Law J. Rep. (N.S.) Chanc. 21.

(1) 4 Madd. 129.

(2) 1 You. & J. 117.

(3) 4 Beav. 18.

(4) 6 Ves. 174, 183.

(5) 2 Jur. N.S. 343, 1177; s. c. 25 Law J. Rep. (N.S.) Chanc. 792.

(6) 2 Anstr. 432.

Mr. R. Palmer, Mr. Giffard and Mr. H. Cadman Jones, for the plaintiffs, referred to—

Worthington v. Morgan, 16 Sim. 547; s. c. 18 Law J. Rep. (N.S.) Chanc. 233.

27 *Eliz.* c. 4.

Rice v. Rice, 2 Drew, 73; s. c. 23 Law J. Rep. (N.S.) Chanc. 289, and

Waldron v. Sloper, 1 Drew. 193.

Mr. Selwyn, Mr. Morgan, Mr. Hingston and Mr. Amphlett appeared for other parties.

Mr. Fooks was heard in reply.

THE LORD CHANCELLOR. — This case has occupied a long time, and has given rise to questions, some of law and some of fact, which are of very great importance. It has been discussed, how far a mortgagee, taking a mortgage, without taking the title-deeds, does or does not postpone himself to persons who may claim under a subsequent title, without notice of the mortgage, and who had obtained possession of the title-deeds; and the cases on that subject have been alluded to, the last being that in the House of Lords, of *Colyer v. Fisch*. Now, if this case had involved the consideration of the principle involved in these decisions, I should have taken some time further to consider the subject; although I confess I should think it very inexpedient now to consider it as an open question to be discussed, whether the law has or has not been correctly laid down on the subject. I consider it has been established beyond doubt that the law is, that the person having the legal estate without the title-deeds is not to be postponed on account of the absence of title-deeds only, unless he has been guilty of something which the law calls fraud or gross negligence. It is difficult to define what is in such particular case negligence, and still more is it difficult to define what constitutes negligence with the epithet of "gross" connected with it; and I confess I agree with Mr. Giffard, that it may very often lead to great hardship on persons who have taken conveyances on the faith of the person giving the conveyance being

the owner, that ownership, or apparent ownership, being indicated by the possession of the title-deeds. However, that is the law, and I must act upon it until it is otherwise settled. But, in my opinion, in this case no such question arises at all. I do not think there was any fraud or any negligence; and the reason I do not think there was any fraud or any negligence is this: that I do not believe these persons ever meant, when they took the mortgage, that it should be a mortgage that would interfere with any dealing Attwood might have with his estate, having the title-deeds. If that was not so, it was a gross fraud on the part of Attwood and his solicitor, and the ladies also, if they understood it,—on the part of all parties concerned.

The case is this: Mr. Attwood, as I collect, is a single man, advanced in life, but living with his two sisters, who were not young. He managed all their affairs. He was indebted to each of his three sisters, the two living with him and the one married; not, as he represents it, indebted to them in 10,000*l.* each, but what may be fairly represented as being so, when shortly stated. They had only life interests, with remainder to their children; and those who were unmarried were at a period of life when it was probably out of the question that they should have children, and therefore he calls it being indebted to each of them in 10,000*l.* At the end of 1847, and the beginning of 1848, he was pressed very strongly by creditors, who were insisting on payment of large sums of money, amounting altogether to about 15,000*l.* He proposed, first, a mortgage, and they refused it; then they insisted upon having it in a certain way, if they could, but they could not; and then they insisted on having payment of the money. That took place in the early part of January 1848. I do not go into the details of all the evidence; but there were angry discussions going on, and actions brought, and pending the time when all these discussions were going on, and after the writs had been issued, he gives them this security, but expressly does not give them the title-deeds; for we learn from the evidence of Mr. Spencer—it is not necessary to state how he became

acquainted with the matter, but he did in some unexpected way—he never heard of these title-deeds till years after he had got the securities on the faith of there being no such deeds; and what he says is, that on the 13th of April 1854 he saw Mr. Gem and charged him with this; that is, he had just heard there were some other charges. Mr. Gem admitted there was a mortgage when the agreements of 1848 were entered into, and that he had prepared such mortgage. Then Mr. Spencer was the person concerned for the creditors who had issued the writs, and eventually did take an agreement for a mortgage. Then he says, Mr. Gem admitted that when the agreement was entered into, he had prepared the mortgage to the sisters for a large sum of money, and that after making the mortgage, he had tied up the title-deeds, and returned them to Mr. Attwood, by whom they were retained; and that he, Mr. Gem, never saw anything of the title-deeds again until he saw them at the office of Mr. Beisley, to whom they had been handed by Mr. Attwood. What does that all mean? Why, that this security was given; and, either taking it in the bad sense, with the intention of having a pocket security that they could avail themselves of afterwards, when those who were to claim under subsequent conveyances of Mr. Attwood, the apparent owner of the title-deeds, should assert it against them, or taking it *in mitiori sensu*, and, I believe, in the true sense, the deeds were never intended to be set up by any subsequent dealing with the property by Mr. Attwood, but the deeds were returned to him, to be dealt with as he thought fit; and I think that is perfectly clear, from the very argument of Mr. Fooks, that at this time it was contemplated by Mr. Attwood that he should raise money to pay off these creditors, by whom he was then sued. Taking that to be the intention, I concur with the Master of the Rolls. He put it, I believe, in this way—and if he did not, I do—that if a person taking a legal mortgage chooses to leave the deeds with the mortgagor, not through negligence or through fraud, but intentionally to enable him to raise a sum of 15,000*l.*, which should take precedence,

the mortgagee cannot complain if instead of 15,000*l.* he raises 50,000*l.*, because he puts it in his power to raise any sum of money he pleases. That is the true nature of the transaction. It is not a case in which there was any negligence. It is not a case in which, I am willing to believe, there was any fraud; but it is a case in which the mortgagee did deliberately and intentionally leave the deeds in the hands of the mortgagor, in order that the mortgagor might raise the money. To hold that a person who advances money on these deeds left in the hands of the mortgagor is not to have preference, would be to stultify this Court and to shut one's eyes to the plainest equity.

The only doubt which I have upon the case is one which is immaterial; but I very much incline to believe that this is a case within the statute of Elizabeth, as stated by Mr. Palmer. When we speak of its not being voluntary, there is not a word about "voluntary" in the statute of Elizabeth; but secret and not *bond fide*, and which the parties intended to be to their own use. If the meaning of this was, that the persons should have this security, but that, nevertheless, Mr. Attwood should have the title-deeds, and be enabled therefrom to deal with third persons, I believe that is within the statute of Elizabeth. I am sure it is within the principle. The only difference that this would make is, not that this Court might have jurisdiction, because unquestionably this Court would have jurisdiction if it is within the statute of Elizabeth, but if it is within the statute of Elizabeth the consequence would be, that the parties might maintain ejectment, because the prior deed would not stand in their way. But that does not oust the jurisdiction of this Court in such a matter, the jurisdiction having existed long prior to the statute of Elizabeth, and therefore not being defeated by that, which can only be meant to have given a more clear and distinct jurisdiction.

It appears to me that this appeal was totally unnecessary; that it ought not to have been brought; and, therefore, that it must be dismissed, with costs.

N.R.
 April 24, 25 ;
 May 30 ;
 July 23.

BARROW v. WADKIN.

Alien — Real Estate — Trust — The Crown.

If real estates are devised to British-born subjects, upon trust for the benefit of aliens, the trust will, in equity, be executed for the benefit of the Crown.

Thomas Barrow and John Barrow were brothers. They were English-born subjects, and members of the Society of Friends.

In 1783 John Barrow, the brother, then about sixteen years of age, left England for New York, since one of the United States of America, which he reached on the 11th of September in that year, eight days after the treaty of peace, dated the 3rd of September 1783, between Great Britain and the United States, had been entered into and concluded. He wrote several letters to his relatives in England, in one of which, dated the 2nd of July 1788, he mentioned that the Custom dues had been charged to him because he was alien, and that citizens of those States would have been exempt from such dues; and in another, dated the 12th of July 1788, he stated that he had been to Philadelphia to endeavour to have himself made a citizen of the United States in order to save the alien duty, but that he had failed, and was about to make a like experiment in New England, but with no great hope of success.

It was, however, supposed that in 1788 he was made an American citizen, and about 1806 he married the daughter of an American citizen, by whom he had issue the plaintiff Lawrence Barrow, Henry Barrow, and the defendant John Barrow of Skaneateles.

In 1806 the plaintiff Lawrence Barrow married, and his wife Mary was born in the United States, but there was no issue of the marriage.

In 1822 the defendant John Barrow, of Skaneateles, married, and his wife Elizabeth was born in the United States. There was issue of the marriage the plaintiffs John Dodgson Barrow, Edmund

Prior Barrow, William Barrow, Rebecca Haydock Barrow, Elizabeth Barrow, George Barrow, Edward Frederick Barrow, and Mary Lawrence Barrow, who are the only surviving issue, the last three of whom are infants; there was also another son, Charles Henry Barrow: he attained twenty-one, but died in June 1856, intestate, without having ever been married. All the children of this marriage were born in the United States.

Thomas Barrow, late of Elswick Lodge, in the county of Lancaster, by his will, dated the 28th of June 1843, devised certain lands, called the Lime Grove and other lands at Gressingham, unto and to the use of his wife, Sarah Barrow, during her life; and after her decease he devised the same hereditaments unto and to the use of William Barrow, since deceased, and the defendants John Wadkin, Corbyn Barrow, and John King the elder, and John King the younger, hereafter called trustees, their heirs and assigns for ever, upon trust for his nephew Lawrence Barrow, described as of New York, in America, his heirs and assigns for ever. And the testator, after devising certain hereditaments therein described, unto and to the use of his wife Sarah for life, and after her decease unto and to the use of the same five trustees, their heirs and assigns, in trust nevertheless for his nephew Henry Barrow, of New York, aforesaid, oil-merchant, his heirs and assigns for ever, devised all his messuage, &c. called "Storrs," and his farm called Oatlands and a field in Scotforth adjoining his farm, called Mount Vernon, and a field near Langthwaite, and a field adjoining Mount Vernon, unto and to the use of his wife Sarah during her life; and after her decease he devised the same estates unto and to the use of his trustees, their heirs and assigns, upon trust to pay the rents for such purposes as the plaintiff Elizabeth, the wife of the testator's nephew, the defendant John Barrow, of Skaneateles, in Onondago county, and State of New York, in America, should, notwithstanding her coverture, by writing, from time to time, so long as she should live the wife or widow of the said John Barrow, but not so as to deprive herself by sale, mortgage, or otherwise by anticipation, direct or appoint, and for

want thereof into her own hands for her separate use, and her receipt was declared to be an effectual discharge for the same; and after the marriage again, or decease of the said Elizabeth, the trustees were to stand seised of the same hereditaments, upon trust, as to the messuage called "Storrs," in trust for the plaintiffs John Dodgson Barrow, Edmund Prior Barrow, and William Barrow, children of the defendant John Barrow, of Skaneateles, in equal shares, as tenants in common, and their respective heirs and assigns for ever; and as to the farm called Oatlands, and the residue and remainder of the hereditaments thereinbefore lastly devised unto his trustees, in trust for all and every the child and children of the defendant John Barrow of Skaneateles, by the said Elizabeth, his wife, except the plaintiffs J. D. Barrow, E. P. Barrow and W. Barrow, in equal shares as tenants in common, and their respective heirs and assigns for ever, if more than one as tenants in common; and in case any one or more of such children should die under twenty-one without having lawful issue living at his or their decease or respective deceases, then, as to the share or respective shares, as well original as accrued, of such child or children respectively in trust for all and every the surviving and other child or children of the defendant John Barrow, of Skaneateles, by the plaintiff Elizabeth his wife, except the plaintiffs J. D. Barrow, E. P. Barrow and W. Barrow, his, her and their heirs and assigns for ever as tenants in common.

The testator also devised to the defendants C. Barrow and J. King the younger all his customary farm and estate, called "Mewith Head," with all rights of common and other rights, privileges and appurtenances thereto, to hold the same unto and to the use of C. Barrow and J. King the younger, their heirs and assigns for ever, according to the custom of the manor of which the same were part and parcel, subject to all rents and services (if any) to which the same were liable, but in trust for the plaintiff L. Barrow, his heirs and assigns for ever. The testator appointed his trustees executors of his will.

By a codicil, of even date with his will, the testator, after reciting that he had de-

vised his estate called Lime Grove and his estate called Mewith Head to trustees in trust for his nephew, the plaintiff L. Barrow, his heirs and assigns for ever, directed that the trustees should stand seised of the said estates and hereditaments in trust for the plaintiff L. Barrow and his assigns during his life, and after his decease in trust for the then present or any future wife of the plaintiff who might survive him during her life, and after the decease of L. Barrow and his wife, in trust for all and every the child and children of him, L. Barrow, in equal shares as tenants in common, and their respective heirs and assigns for ever; and in case any one or more of such children should die under the age of twenty-one years, and without leaving lawful issue at his, her or their decease or respective deceases, then upon trust for the surviving children of L. Barrow, their heirs and assigns, as tenants in common if more than one; and if there should not be any child of L. Barrow who should attain twenty-one or die under that age leaving lawful issue living at his or her decease, then in trust for all and every the child and children of J. Barrow of Skaneateles, by the plaintiff Elizabeth, his wife, except the plaintiffs J. D. Barrow, E. P. Barrow and W. Barrow, in equal shares as tenants in common, and their respective heirs and assigns for ever, and in case any one or more of such children should die under twenty-one, then the share or respective shares, as well original as accrued, of such child or children respectively, in trust for all and every the surviving and other child or children of J. Barrow of Skaneateles, except J. D. Barrow, E. P. Barrow and W. Barrow, his, her and their heirs and assigns for ever, as tenants in common, if more than one.

The testator died in July 1843, and W. Barrow, the trustee, died in February 1853.

Sarah Barrow, the testator's widow, died in 1848. The trustees then for some time paid to L. Barrow and Mary, his wife, the rents and profits of the estate devised for their benefit, but they ceased to pay the rents to any of the plaintiffs upon its being suggested that they could not take the benefits intended for them by the testator, and that either the Queen on office found

or the testator's heir-at-law had become entitled to such estates absolutely.

The plaintiffs, however, insisted that they were and always had been capable of taking and holding real estates in Great Britain, and that they were entitled to the equitable estates devised by the will of the testator in trust for them respectively, and they therefore asked that the trusts might be carried into execution.

Mr. R. Palmer and Mr. Little, for the plaintiffs.—*J. Barrow*, the brother of the testator, continued a British subject after the Treaty of Peace of 1783, and his children could inherit lands in Great Britain. The wives of two of these children, *L. Barrow* and *J. Barrow*, of Skaneateles, are merely said to have been born in America: it is not said of what parents. They have no nationality attached to them. It was, however, clear that a person born in America since the treaty of 1783 of other than British born subjects could not take land here. The right of inheritance, however, was preserved to the grandchildren of the testator's brother *John* under the 13 Geo. 3. c. 21. and the 4 Geo. 2. c. 21. and the sacramental test required by the 13 Geo. 3. c. 21. s. 3, and the 13 Geo. 3. c. 25. was not applicable to them; it merely excluded certain specified parties from some specified privileges. A foreign lady upon her marriage is not thereby made a participant of all the advantages of naturalization, and the rights of these ladies were not affected by the 7 & 8 Vict. c. 66 (1). The certificate of the marriage of *J. Barrow* of Skaneateles stated that he was the son of *J. Barrow*, who was born in Great Britain.—

Doe d. Thomas v. Acklam, 2 B. & C. 779; s.c. 2 Law J. Rep. K.B. 129.

Fitch v. Weber, 6 Hare, 51; s.c. 17 Law J. Rep. (N.S.) Chanc. 73.

The Count de Wall's case, 6 Moo. P. C.C. 216.

Mr. Turner, for *J. Barrow*, of Lancaster, who claimed to be the testator's heir-at-law.—A trust created for the benefit of aliens was void, and the

estate resulted for the benefit of the heir-at-law. The Crown could not intervene. It had no estate and no interest, and it would never diminish or deprive the heir-at-law of any rights devolving upon him as such. The trust of an inheritance would not escheat to the lord for want of heirs of the *cestui que trust*, or upon his attainder for felony, the trust in each case being absolutely determined. The trust of a copyhold estate purchased in fee in trust for an alien passes for the benefit of the customary heir; it could not be seized for the benefit of the lord. The legal disability of an alien could never be considered as operating the forfeiture of the rights of an heir-at-law. The Crown has no interest in the lands of an outlaw in a personal action: still it is entitled to the rents and profits of the real estate. But upon an outlawry against a *cestui que trust* or *cestui que use*, the Crown is not entitled to the profits of the land: they belong to the trustee; the outlawry does not affect him. If an alien took lands by conveyance, it could not affect the title of the Crown; its claim could only arise on office found or inquisition taken and duly returned into the Chancery or Exchequer finding title in the Crown: without this the Crown could make no grant. But even these would not entitle the Crown to seize if there was a legal title vested in a subject, and equity would not lend its aid to deprive a subject of a legal estate and defeat the claims of the heir-at-law. An heir could sue either by real, personal, or mixed actions, but an alien could not. The Court of Chancery acts *in personam* only; it could not affect the legal estate in the lands. An alien devisee cannot take by act of law, as by descent, so as to enable the Crown to seize on office found. An alien might renounce or repudiate any trust created by will for his benefit. The Crown could not then insist upon the existence of a trust, or claim any benefit; and this Court would not insist upon performing a trust for aliens which did not exist. The Crown's legal remedies of entitling were clear; it had no means of entitling itself to a trust so as to deprive the heir of his descent and the trustees of their legal estate. A *cestui que trust* had a mere right of action: if the trustees died, the Crown would take for want of heirs;

(1) See *The Queen v. Manning*, 19 Law J. Rep. (N.S.) M.C. 1; s.c. 2 Car. & K. 887; 1 Den. C.C. 467.

and if both the trustees and *cestui que trust* died without heirs, the Crown would be entitled. A lord, however, could only take by escheat, but it would be subject to existing trusts, upon the presumption that all that the tenant did had been done with the lord's consent. As a right of action could not be assigned at law, the Crown could not take. An alien wife was also not dowable (2), and a trust created for her benefit was altogether void. The heir-at-law of the testator was absolutely entitled to the estates devised for the benefit of the aliens.

The Attorney General v. Sands, Hard. 488, 495; s. c. 2 Freeman, 129.

Holland's case, Styles, 20, 40; s. c. 1 Roll. Abr. 194; Alleyn, 14.

The Attorney General v. Duplessis, 2 Ves. sen., 286; s. c. 1 Bro. P.C. 415.

Fourdrin v. Gowdey, 3 Myl. & K. 383; s. c. 3 Law J. Rep. (N.S.) Chanc. 171.

Burgess v. Wheate, 1 Eden, 177; s. c. 1 Sir W. Black. 123.

Doe d. Thomas v. Acklam, 2 B. & C. 779; s. c. 4 Dowl. & Ry. 394; 2 Law J. Rep. K.B. 129.

Mitford's Pleadings, 223, 4th edit.; Dyer, 2, b.

Calvin's case, 7 Rep. 1.

Burk v. Brown, 2 Atk. 397.

Ex parte Boussmaker, 13 Ves. 71.

Doe d. Hayne v. Redfern, 12 East, 96.

Gilbert on Uses, 18, n. 10, Sug. edit.

Hughes v. Wells, 9 Hare, 749.

Henchman v. the Attorney General, 3 Myl. & K. 485; s. c. 2 Sim. & S. 498.

Burney v. Macdonald, 15 Sim. 6, 14.

Downe v. Morris, 3 Hare, 394; s. c. 13 Law J. Rep. (N.S.) Chanc. 337.

Ritson v. Stordy, 3 Sm. & G. 231.

Du Hourmelin v. Sheldon, 1 Beav. 79; s. c. 4 Myl. & Cr. 525; 8 Law J. Rep. (N.S.) Chanc. 133 (3).

Dimes v. the Grand Junction Canal Company, 9 Q.B. Rep. 467; s. c. 13 Law J. Rep. (N.S.) Q.B. 314; 16 Ibid. 107.

(2) See 8 Hen. 5. Rot. Parl. vol. 4, 128, 130.

(3) See *Master v. De Croismar*, 11 Beav. 184; s. c. 17 Law J. Rep. (N.S.) Chanc. 466.

Mr. Follett, for the trustees of the testator's will.—The Crown cannot call on trustees to execute this trust; they were always governed by the intent, and no legal intent could be presumed in favour of the Crown. Were there any political reasons why the Crown should take lands which were given to subjects upon trust for foreigners? If an alien was in possession, the Crown might upon office found take the lands; but if he was not in possession the Court would execute trusts at the instance of the trustees for those who could legally take. If money directed to be laid out in land was not definitely marked with the character of real estate—if it remained in doubt whether it was to be considered as land or money, the Crown on failure of heirs could have no equity against the next-of-kin, or require that it should be laid out in land that it might claim by escheat. The Crown, in such cases, came in under no one of the numerous heads of equity.

Collingwood v. Pace, O. Bridg. 410; s. c. 1 Vent. 413.

Burney v. Macdonald, 15 Sim. 6.

Taylor v. Haygarth, 14 Ibid. 8.

Walker v. Denne, 2 Ves. jun. 170.

Mr. Wickens, for the Crown.—The 7 Ann. c. 5, the 4 Geo. 2. c. 21. and the 13 Geo. 3. c. 21, preserved the rights of children and grandchildren of the testator's brother John Barrow; but trusts created for the benefit of Mary and Elizabeth Barrow were void as they were aliens, and though married to natural-born subjects no rights were preserved to them by the 7 & 8 Vict. c. 66. It was clearly laid down by Lord Hale that a trust would enure for the benefit of the Crown; and other Judges had been of the same opinion. The lands held by or for the use of an alien were forfeited, and were taken by the Crown by virtue of its prerogative; but escheats were in consequence of a failure of parties to inherit: they were essentially different, though it was not until office found on inquisition that the Crown seized. It was, however, a common practice to find for the Crown upon an equitable title. The 47 Geo. 3. sess. 2. c. 24. was especially addressed against secret trusts, and when established it empowered the Crown by

warrant to direct the execution of any trusts as in the act mentioned. There appeared, therefore, to be little doubt but that if a trust of real estate was created for the benefit of an alien, it could only be executed through the intervention of the Crown—*Sanders on Uses and Trusts*, 309, *et seq.* 5th edit.

Mr. Amplett, for John Barrow, of Skaneateles, the husband of Elizabeth Barrow.

Mr. Turner, in reply.

May 30.—THE MASTER OF THE ROLLS.—John Barrow was a natural-born British subject; he did not settle in the United States of America until after the independence of that country was recognized. His sons Lawrence Barrow, the plaintiff, and John Barrow, the defendant, must be considered to be natural-born subjects, and entitled to the benefit of the devises made in trust for them; their wives, however, are aliens. The parties claiming the devises made in trust for aliens are nominally three: the four devisees in trust, the heir-at-law of the testator, and the Crown. The first two, if they shall be declared entitled, admit that they intend to give the benefit of the devise to the persons pointed out by the testator's will. The only serious question therefore is, whether the Crown can take the benefit of a devise made in trust for aliens. If it cannot, there can be no question between the trustees and the heir-at-law. The devise being made specifically upon trust, it was not intended that the trustees should take beneficially. If this trust is void, then there is a resulting trust for the heir-at-law of the devisor. This is an ordinary case. It is similar to a devise of land to trustees in trust for charitable uses: when the trust is void, the heir of the devisor is entitled to the beneficial interest absolutely, and he becomes the *cestui que trust* instead of the *cestui que trust* who cannot take, and he can require the trust to be executed for his benefit. The trustees can take only in the event of there being no heir of the devisor: that is, there being no *cestui que trust*, as in *Burgess v. Wheate*, which decided that there was no reversion to the Crown of real estate held in trust by the trustees. Is, then, a trust of

real estate for the benefit of aliens void? If it is, the Crown clearly can take no interest. If it is not void, can the Crown enforce the execution of the trust so as to obtain the benefit of this devise? I can discover no principle upon which this can be held to be a void trust. If void, it must be so either by the enactment of some positive statute, or by operation of law. No enactment has been pointed out, and I am not aware of any statute which affects the question. If it is not void by statute, is it then void by the common law? This also must be answered in the negative. A devise of the legal estate in fee-simple to an alien is good. He takes the land, though he cannot hold it. The devise is not void, but takes effect in him, although not for his benefit. This is laid down by Lord Hardwicke in *Burk v. Brown*. It is said, however, that the trust cannot take effect, and that it enures for the benefit of the heir. But this is only an instance of a doubt created by the use of vague language. The expression "cannot take effect" is ambiguous. A trust may fail of taking effect by reason of its being *ipso facto* void, or, without its being void, by reason of the *cestui que trust* being unable to enforce the execution of it. So far as relates to the former branch of the alternative, I have disposed of it in what I have already said. So far as relates to the latter branch of the alternative, it is involved in the second proposition, namely, whether this is a trust which can be enforced by or for the benefit of the Crown. In considering this question, I shall assume that a trust in favour of an alien is not in itself, or *ipso facto*, void. When a trust exists, the trust must be executed on behalf of the *cestui que trust*, or on behalf of all those who claim by or under him. This proposition requires no authority for its support, but I have stated it in the words employed by Sir Thomas Clarke in his judgment in *Burgess v. Wheate*, and I find no exception stated. The proposition is general and universal. The alien is the *cestui que trust*, and it would follow as a necessary conclusion that the trust must be executed on his behalf. It is argued that the case of an alien constitutes an exception, and that the alien cannot enforce the execution of a

trust, because he cannot derive any benefit from it; for which proposition *Burney v. Macdonald* is cited; but I am unable to understand the value of that argument, either in a technical or practical sense. As a technical rule of law, it is true that the alien derives no benefit from the execution of the trust; but this Court enforces the execution of all legal trusts, using the word "legal" in the popular sense of the term, without regard to the value which the *cestui que trust* may derive from it. I say "legal trust," because if not legal it is *ipso facto* void, which this trust is not. But practically, though not technically, the alien may derive great benefit from the enforcement of the execution of the trust, for if executed, and the land be seized by the Crown, the Crown may, and probably would, allow the land to be sold, and the proceeds of it, or what remained after payment of expenses, to be paid to the alien for his benefit; whereas, if not executed at all, the heir-at-law or the trustees would take beneficially, and the alien would be deprived of all benefit of the devise. It is impossible to take into consideration the fact, that the trustees and the heir-at-law intend to give the alien the benefit of this estate. The case must be decided on the same principles as if they were claiming to hold for their own benefit. The law does not depend on the liberality or sense of justice of the trustees or of the heir. If, then, the case arises of a legal trust, where the alien, who is a *cestui que trust*, desires and insists that the trust shall be executed in his behalf, and who believes that by so doing he shall gain advantages which he cannot otherwise obtain, it seems to be difficult, on principle apart from authority—if I may use and comment upon the expression in *Burney v. Macdonald*—to say that there would not be a violation of justice in refusing to execute in his behalf the trust of the property which he could not hold, but from taking which he alleges and believes that he would derive a benefit; and instead of so doing, in giving the land to persons whom the deviser never intended to have it, and from whom the alien would derive no advantage whatsoever. Even if the alien derived no advantage in a pecuniary point of view, he might

prefer the Crown to the heir-at-law. Nor do I understand, on principle, why this Court should favour one more than the other. But against this view, and in support of the argument urged, a passage is cited from *Gilbert on Uses*, to this effect, namely, that though a use may be raised to an alien, he cannot compel the feoffees to execute the use; and the King cannot seize the land to an alien, unless it be executed in him by a decree in Chancery, for there is no right in the *cestui que use* to seize the land without a decree, and the King has only the rights of the *cestui que use*. The cases, however, which are cited by Gilbert, C.B., do not establish any such proposition as that laid down in the text, if intended in the sense in which it was applied in the arguments in this case: they are *Holland's case* and *The Attorney General v. Sir George Sands*. The proposition, therefore, rests very much, so applied, on Chief Baron Gilbert's sole authority. I do not place much reliance on that, for it is known that the book was a posthumous work, and not presented in the form in which he intended it to be made public, and it is possible he might have made considerable alterations if published in his lifetime; and it bears marks, particularly in the latter part of it, of being incomplete. But while it is not supported by the cases cited, it is in fact contradicted by *Godfrey and Dixon's case* (4), where the plaintiff, a natural-born subject, brought an action of debt against the tenant of land to recover arrears of rent under a lease from his elder brother, who was born an alien, and who claimed to have inherited the land from his father, originally an alien, but who had, after acquiring the land, obtained letters of denization, the counsel used this very argument, which was denied by the Court. The words of the report are these:—"And he" (that is, George Crook, the counsel for the plaintiff) "said, that if a man doth covenant to stand seised to the use of his brother, being an alien, that the same is not good, and the use will not rise. But that was denied by the Court." It is only an *obiter dictum* in the middle of the

(4) Godb. 275. See *Dumoncel v. Dumoncel*, 13 Ir. Eq. Rep. 92.

argument of counsel ; but, as far as it goes, it is an authority. The expression in the text of *Gilbert* also appears, if used without some understood qualification, to extend too far. It cannot mean "that an alien shall not plead or be impleaded touching lands in any court of this kingdom." It cannot mean, that if an alien in this country enters upon and takes possession of lands not belonging to him he cannot be impleaded for the recovery thereof at the suit of the rightful owner ; and yet that would be the effect of giving the words in the text their full effect. If so, he would hold them against all the world, because the Crown could not take them, as they did not belong to the alien. Sir E. Sugden, in his note on this passage, states that *Holland's case* and *The Attorney General v. Sir George Sands* shew that a trust for an alien will be executed for the benefit of the King. I am, therefore, not prepared to go the length of saying, that the alien cannot enforce the execution of this trust ; nor do I find any direct authority, although there are *dicta* to that effect in *Burney v. Macdonald* and *Ritson v. Stordy*, but these are contrary to the *dicta* in the earlier cases. If the alien can enforce the execution of such a trust, there is an end of the question ; but assuming that he cannot, does it necessarily follow that the Crown cannot ? It is important to guard against any misapprehension or ambiguity arising from the use of the word "forfeiture," or "escheat," or the like. This is clearly no case of escheat. It is also equally clearly no case of forfeiture—no case of penalty. That was laid down in *The Attorney General v. Duplessis*, by the House of Lords, after obtaining the unanimous opinion of the Judges. It is, in fact, nothing else than a trust ; and it is a valid trust on behalf of an alien. Can, then, the Crown claim the benefit of that trust, and enforce the execution of it, although the alien *cestui que trust* cannot ? The proposition, as stated in the words of Sir T. Clarke, is, that a trust must be executed on behalf of the *cestui que trust*, and all those claiming by or under him. Does not the Crown claim by the *cestui que trust* ? If so, why is not the trust to be executed on behalf of the Crown ? The answer given is this :

—It is said that the Crown comes under no head of equity, and that it cannot enforce any equitable right whatever. This would appear to be a strange proposition, if it be law laid down in the fullest extent, considering what equity professes to be, and what it really is. If the Crown be neither entitled to obtain equity, nor required to perform it (for the rights and obligations in such a case would be reciprocal), it would seem to be opposed to those principles which obtain in every other part of the law and jurisprudence of this country.

The expression, however, is probably used in argument as applicable only to uses and trusts, and must be so treated in considering this point. *Taylor v. Haygarth* is cited to support this proposition ; but it fails to establish any such doctrine. In that case a testatrix gave her real and personal property to trustees absolutely, in trust to sell, and hold the proceeds in trust for such person as she should by codicil direct, and she died without making any codicil, and without leaving an heir or next-of-kin. *Walker v. Denne*, which was referred to, strictly applies to the real estate ; and therefore it was held that the Crown could not enforce the sale. That being so, *Burgess v. Wheate* clearly applied—that as there were then trustees in possession of the land, and there were not in existence any *cestuis que trust*, they were entitled to hold ; in fact, in that case there was no trust to perform. If the testatrix had left an heir, there would have been a resulting trust for that heir ; and neither Lord Loughborough, in *Walker v. Denne*, nor the Vice Chancellor, meant to lay down, that because the Crown could not enforce the execution of a trust to sell in favour of a non-existing person, therefore the Crown could have no benefit of a trust for an existing person, the beneficial interest in which had, through that person, become vested in the Crown. The words of *Middleton v. Spicer* (5), relied on by the Vice Chancellor of England, shew that the personal estate was held in trust for the Crown ; and I am not aware of any principle which should establish, that a trust for the Crown of personal estate can be enforced, but that a trust of real estate

for the Crown cannot be enforced. I can understand that there shall be no forfeiture of a trust, and there shall be no escheat of trust estate; but this is quite distinct from saying that the Crown shall not be entitled to the benefit of any trust whatever. The case is, in this respect, quite distinct from *Burgess v. Wheate*, which was a case where no *cestui que trust* existed; and the difference may be illustrated by considering the case of a legal rent-charge issuing out of lands. This rent-charge, if granted to an alien in fee, would, I apprehend, after office found, vest in the Crown by prerogative, but not by forfeiture or by escheat. But if this rent-charge were granted to a natural-born subject, and he died without an heir, the Crown would take nothing, but the rent-charge would cease, and fall into the estate for the benefit of the owner—the rent-charge would be simply extinguished. The authorities for these propositions are familiar. In the case before me, the Crown by its prerogative stands in the place of the alien devisee in trust. How can it be said that its rights are less than those of a person who, by purchase from the devisee of his interest, stands in the place of an ordinary natural-born subject, who is an equitable devisee under a devise in trust for his benefit, unless it be that the Crown is unable to enforce a trust at all? It is difficult to understand how this can be law; and it is equally difficult to understand how this latter proposition can be supported on principle; and unless the proposition can be carried to this extent, namely, that the Crown can enforce no trust at all, it appears that the argument must fail altogether. If carried to that extent, it must follow, for instance, that a direct devise to the king of land by an equitable owner in fee would not take effect, but the trustee would keep the estate for his own benefit, or it would go to the heir-at-law, against the expressed intention of the testator and real owner. If this be so, the Courts of equity must have acted through ignorance or inadvertence when they have constantly permitted the Crown to enforce trusts ever since they have existed, without any question having been raised on the subject, as in the cases of forfeiture. Although this be not a case of forfeiture, it is useful to consider what

occurs in cases where the interest of a *cestui que trust* becomes forfeited to the Crown, because, if the benefit of the trust is in the Crown, the right of enforcing it must be the same, whether it comes to the Crown by forfeiture or by prerogative. In cases of attainder and outlawry the Crown takes the equitable interest of the person attainted, and of the outlaw, and obtains possession of them through the instrumentality of this Court; and yet the same argument would apply. It might be said, that neither the person attainted nor the outlaw can enforce the execution of the trust, because he cannot obtain the benefit of it, and the Crown can only enforce it through him: it is also the same with respect to the 47 Geo. 3. sess. 2. c. 24. Therefore, assuming the law to be, that estates held in trust for aliens passed to the Crown, and that the Crown would have the power of taking them, all this must be wrong if the contention now urged be correct. On principle, therefore, it would appear to be clear that the Crown might enforce a trust the beneficial interest of which belonged to the Crown, although the *cestui que trust*, in whose favour the trust was raised, could derive no benefit from it. Next, it is proper to consider how this stands on authority. In *The Attorney General v. Sir George Sands*, Lord Hale expressly says, that a trust for an alien is forfeitable, and will belong to the Crown. The reporter uses the word "forfeitable," which is inaccurate, but it is an inaccuracy of the reporter, as will appear from Chief Baron Parker's note of that judgment. But it is expressed that the trust belongs to the Crown, and yet this is the very case most relied upon in *Burgess v. Wheate* by Sir T. Clarke, M.R., and the Lord Keeper. In Chief Baron Parker's Reports he gives a full note of his judgment in the case of *The Attorney General v. Duplessis*, decided in the Exchequer, and afterwards affirmed in the House of Lords. *Holland's case* is reported in six consecutive places in *Styles's Reports*, once in *Alleyne*, and in a short statement in *Rolle's Abridgment*. It does not, in the report, expressly state this conclusion, which Hale refers to, as being there decided: and in fact the point did not necessarily come before the Court for

decision. The decision, in truth, was this—it was against the Crown; and although it does not decide the question before me, the Judges assumed, as the groundwork of their decision, that the trust could be enforced in favour of the Crown. The case was this—an alien had bought land, and had it conveyed to a natural-born subject in trust for him: the Crown seized the land, and the Court granted an *amoveas manus*, and held that the Crown could not dispossess the trustee, but that it must first get the trust executed in equity, and then take the land. Therefore it is obvious they did not decide the point, but that they assumed it. This observation then occurs. If the Crown cannot enforce the execution of that trust in equity, one of two consequences necessarily follows, both of which appear to lead to monstrous results. Either there is a ready device by which aliens may become the beneficial owners of lands to any extent in this country, which is directly contrary to the whole policy and principle of the law: or if not, then a man whose name is used as a mere trustee for another, and who has not paid a penny of the purchase-money, shall be allowed, in violation of all equity and good conscience, to hold the land to the exclusion of the person who trusted him, and who paid the money, he having received the deed under a solemn assurance that he would act as a trustee under a deed executed. It can scarcely be that either of these two propositions can be now held to be the law of this country; yet one or other would follow if the trust cannot be executed in favour of the Crown. The question did not arise in *Burgess v. Wheate*, but it seems to have been assumed in that case, by even Sir T. Clarke, M.R. and the Lord Keeper, that the Crown would be entitled to the benefit of the trust for an alien. Sir T. Clarke, in his judgment, proceeds upon the assumption that a trust executed in favour of a living existing person, of which the Crown could take the benefit, would be enforced for the benefit of the Crown; but where there is no person living, then there is no trust, and therefore the Court cannot enforce the execution of it. Besides this, he expressly states that he decided the case on

the ground that there was no trust existing. The same view is taken by the Lord Keeper, who says (p. 250)—“My objection to the information is, that it is for the execution of a trust that does not exist.” In fact, the whole of that case proceeds on the ground that the Crown could only claim the equity vested in the person to whom the beneficial interest in the estate was given, and that this equity had ceased in consequence of the death of that person without an heir; which is quite distinct from this case, where the Crown claims an equity through the living person, to whom the beneficial interest in the estate is given. It is not, therefore, necessary to dispute the authority of *Burgess v. Wheate* in this case, which is quite distinct from it, and in fact proceeds on the same principle; but it may perhaps be said that the question there decided may possibly be considered as not finally concluded, if it should ever come again to be considered. In his judgment, Sir T. Clarke, M.R. says (6), that if the trustee came into equity, he (that is, the Master of the Rolls) might be of opinion that he had no right; and if this were so, as there then would in that case be no one having any right to the land, it would be difficult to hold that the Crown would not be entitled to take it as a vacant possession. The argument principally relied upon in that case, that the land must escheat either on the failure of the heirs of the trustee or of the *cestui que trust*, for that otherwise Courts of equity would deprive a lord of his escheat, is not answered by either the Master of the Rolls or the Lord Keeper. In *Middleton v. Spicer*, Lord Thurlow said he did not see how the case before him was to be distinguished from *Burgess v. Wheate*, and yet he decided in favour of the Crown; and he was followed by Sir L. Shadwell, V.C., in the case I have already referred to. In *Barclay v. Russell* (7) the same principle was adopted, and stock standing in the name of trustees, where the *cestui que trust* had ceased to exist was held to belong to the Crown, and not to the trustees. In *Thruvton v. the Attorney General* (8) a man seised in

(6) 1 Eden, 212.

(7) 3 Ves. 424.

(8) 1 Vern. 340.

fee limited a term of years in trustees, in trust for such uses as he should by deed or will appoint; he died without making any appointment, and without heirs: it was held that the Crown took the term as well as the reversion in fee. In *Downe v. Morris* (9) it was held, that where the tenant of a copyhold in fee died without heirs, and where there was a term existing in an unsatisfied mortgagee, the lord to whom the reversion in fee escheated was entitled to redeem the mortgage and obtain an assignment of the term. I refer to these cases not for the purpose of disputing the authority of *Burgess v. Wheate*, which, as I have already stated, is wholly distinct from this case, but for the purpose of shewing within what limits that case must be confined, and for the purpose of pointing out instances where the Crown has obtained the benefit of a trust which could not have been enforced by any *cestui que trust*. It is true that these were trusts of personality; but I am unable to comprehend, on the question of the right of the Crown to enforce the execution of a trust, what distinction there can be between a trust of land, as in the present case, and the trusts of a chattel real, as in the case of *Thrupton v. the Attorney General*; and the trust of stock, as in *Barclay v. Russell*, and the trust of money and personal chattels, as in *Middleton v. Spicer*. Against this great array of authority, nothing has been suggested, nor have I discovered anything, with the exception of the dictum of Sir L. Shadwell, V.C., in *Burney v. Macdonald*, and the case of *Ritson v. Stordy*, before Sir J. Stuart, V.C. The dictum in *Burney v. Macdonald* was not necessary for the decision of that case. With respect to *Ritson v. Stordy*, it certainly decides this point; but notwithstanding the respect I feel for the learning of the Vice Chancellor, I am not satisfied with the reasoning on which he founds this part of his judgment; and when I consider that the decision was clearly right on other grounds, and did not require the decision of this point, which has received no affirmance on appeal before the Lord Justices, I have thought myself bound to consider the

case apart from that decision, and to form my own view of the question on principle and previous authorities. There are still two other cases — *Fourdrin v. Gowdey*, and *Du Hourmelin v. Sheldon*, in which *Fourdrin v. Gowdey* is overruled. The point before me did not arise in those cases, but they are material to the present purpose for this, that they both seem to assume that the execution of a trust in favour of the Crown might be enforced. The latter case also is of importance in another point of view, bearing relation to an earlier part of my judgment, for it lays down not merely that aliens are entitled to the produce of the sale of the real estate devised to be sold, with a direction that the produce shall be applied for their benefit, but, as a necessary consequence, it decided that aliens could in equity compel the execution of that trust, and the sale of the land for their benefit; whereas, if the passage in *Gilbert* is construed as was suggested in argument, and the passage referred to in *Burney v. Macdonald* is correct, aliens could not compel the trustees to execute the trust for sale, which would be a trust relating to real estate, for their benefit. I employ the word "trust" instead of "use," because, unless for this purpose the words have the same effect, the passage relied upon from *Gilbert* does not touch the point before me. I have thought it desirable to go through this detail, that if this case should be carried further, the Court of Appeal might fully understand the ground upon which I have come to the conclusion, that, both on principle and authority, a devise of real estate to trustees for an alien is not a void devise, and that it is a trust of which the Crown may enforce the execution, and of which it may obtain the benefit. I have thought it unnecessary to encumber the case with any discussion as to whether there should be an inquisition and office found of these lands before the Crown could enter upon them. This is wholly beside the point. In point of fact, it would be decided by the passage in Chief Baron Parker's judgment; and I have also thought it better not to dwell on the argument relating to the policy of the law which is the foundation of the rule prohibiting aliens from

(9) 3 Hare, 394; s. c. 13 Law J. Rep. (N.S.) Chanc. 337.

holding lands in this country, which is much noticed and relied on in certain cases. So far, however, as this has any application, it supports the principle of the view I have taken. The Crown, therefore, is entitled to enforce the benefit of the trusts, so far as aliens are interested; and I must declare Mary and Elizabeth Barrow to be aliens, and that the Crown is entitled to enforce the trust, so far as it relates to their interest. The costs of all parties must be raised out of the testator's estate.

It was also suggested that the 13 Geo. 3. sess. 2. c. 24. s. 3. and the 13 Geo. 3. c. 25. imposed a condition upon the grandchildren of the testator's brother, John Barrow, of coming to reside in Great Britain and taking the sacramental test, and subscribing the oath prescribed by the 1 Geo. 1. c. 13. As that question was not fully discussed, I shall refer to the acts and mention it again.

July 23.—THE MASTER OF THE ROLLS.—I have referred to the 13 Geo. 3. sess. 2. c. 24. and also to the record; and it enacts that nothing therein shall "abridge or alter any law, statute, custom, or usage whatsoever now in force concerning aliens, duties, customs, and impositions." The record is without stops; but Mr. Raithby's edition of the Statutes puts an apostrophe over the "s" in aliens, and omits the stop between that word and duties. The other editions contain stops between each of the words "aliens," "duties," "customs" and "impositions." It seems, however, that the object of the act was, that taxes might not be affected by it, and that the rational mode of dealing with the act is to read it as "duties of aliens, customs and impositions," and to consider it as not a separate and disjunctive matter relating to aliens; but as applying only to such matters as relate to the raising of revenue and the imposition of certain charges. The operation of the sacramental test, therefore, will not apply to the interests of the grandchildren.

M.R. } THE SOMERSETSHIRE COAL
Nov. 13, 14, } CANAL COMPANY v. HAR-
16, 23, 25. } COURT.

Company—Lands—Imperfect Contract, Right to enforce—Compulsory Powers unlimited by Act.

An award made by Commissioners under an act of parliament empowering a company to take the lands of an infant for a canal, since converted into a railroad, was informal, and it was repudiated by the infant on attaining twenty-one. No subsequent steps were taken either to fix the price of the land or the amount of rent-charge to be paid; but a rent was paid, which was, however, varied from time to time, and, with the exception of a small part, which was given up to the landlord, the company remained in possession of the greater part of the land. Fifty-seven years after disputes arose, and each party gave the other notice to quit such part of the land taken by the company as each held. The company then filed a bill, asking for a conveyance of the lands comprised in the award, and to restrain the defendants from making a bridge over the railroad:—Held, that the mistakes of the mutual agents of the parties acting under the compulsory clauses of the act of parliament, could not bind the land or give vitality to an informal award on such a contract, and that the company could not ask for a conveyance of the lands on their securing a perpetual rent-charge of 14l. a year to the defendants, as stated in the award.

Held, further, that the landowners had no power to evict the company, or build a bridge over the railroad without the consent of the Commissioners or the directors, as mentioned in the act of parliament.

Held, also, as the powers of the act were not limited, that the company, notwithstanding the lapse of time, could still take the lands; but, if not, that the Court could still make a hostile decree and fix the price to be paid by the company for the land. The Court, however, refused to restrain the defendants from using the bridge which had been completed, upon their undertaking to keep an account of all coal and goods which should pass over it.

This suit was instituted by the plaintiffs to obtain a conveyance of lands, which they claimed to have taken under the 34 Geo. 3. c. lxxxvi., and to restrain the defendants from erecting any bridge over the plaintiffs' railroad, or from fixing the abutments of any bridge thereon, otherwise than in conformity with the said act; the bill also prayed that the defendants might be restrained from taking any proceedings to recover possession of the lands.

The company was incorporated by the 34 Geo. 3. c. lxxxvi., and it was empowered to purchase lands to them, their successors and assigns, for the use of the undertaking. The act then empowered them to make a canal from two places, one of which was subsequently called "The Dunkerton Line" and the other "The Radstock Line," which were to join at a given point, from which it was to be continued until it communicated with the Kennett and Avon Canal. The company was also to make and maintain certain specified rail and carriage ways or stone roads from the canal, and to extend the same to the coal works or stone-quarries then existing or subsequently established within two thousand yards of the canal or the last-mentioned rail or carriage ways or stone roads, or any of them. The company were then authorized to enter upon and set out such lands as should be necessary; after which it was declared lawful for all tenants for life, or for any other particular estate, guardians or trustees, and all other persons who should be seised of or interested in any lands which should be so set out and ascertained, or which should be taken or purchased by the company pursuant to any of the directions of the act, to contract for, sell and convey unto the company such lands either in consideration of a sum of money at once to be paid, or of an annual rent or payment to be charged and secured. Commissioners were then appointed to determine all questions between the company and the several proprietors of any lands taken or affected by the execution of any of the powers granted, and they were to determine from time to time what sum or sums of money ought to be paid by the company, either by an annual rent or payment, or by a sum of money in

gross for the absolute purchase of the lands which should be so set out and ascertained, or intended to be used as aforesaid; and upon payment of such sum or sums of money in gross, or giving security, to be approved of by the Commissioners, for payment of such annual rent or rents to the owner or owners thereof, or other person or persons entitled to receive such money or rent respectively, or upon such legal tender as therein mentioned, then, and not before, unless with the consent of the owners and occupiers, it should be lawful for the company to enter upon and have such lands for their own use and benefit, for the purpose of the canal, ways, &c.; and after such payments, tender or security as aforesaid, and after the determinations of the Commissioners should be transmitted to the clerks of the peace of Somerset and Wilts, the lands were to vest in the company, and they were to be deemed to be in the actual possession and seisin thereof to all intents and purposes whatsoever. It was then provided that the annual rents so to be fixed should be paid to the person or persons who would for the time being have been entitled to the rents and profits of the lands so purchased by the company, and that such annual rents should be deemed a freehold estate of inheritance issuing out of the canal, and should, by the act, be charged on the rates and tolls and paid by the company. The company was also directed to divide the towing-paths from the lands adjoining by posts and fences, and also from time to time, at their own cost, to maintain in good repair such convenient gates and stiles across the towing-paths, and in and through the fences, and also such bridges over the canal at such places, and of such dimensions and in such manner as the Commissioners should from time to time judge necessary and appoint (in case of dispute), for the use of the owners and occupiers of the lands adjoining to such canal and towing-paths, and of all persons who then had, or thereafter might have a right to any way over or through the lands used for making the canal or towing-paths; and in case of omission by the company, the owners or occupiers of such adjacent

lands were empowered to make such fences and bridges, the costs of which, as settled and allowed by the Commissioners, were to be repaid by the company. And if the several bridges made by the company were insufficient in number or situation for the commodious use and occasions of the respective lands on both sides or on either side of the canal, then the owners, whether they did not choose to apply to the Commissioners to have the same removed, or whether they should apply without success, were to be at liberty, with the consent of the committee of proprietors appointed to manage the affairs of the company, or in case of their refusal for ten days after request, then, with the consent of the Commissioners, to make and erect at their own costs such bridges or other conveniences over the canal in such places as should be found and adjudged most convenient for the better use and occupation of the lands, so that the navigation or passage of the canal was not obstructed longer than necessary for the erection of the works, and so as no unnecessary damage was done. The company were then empowered to take tolls for the tonnage and wharfage of all coal, iron, and other goods, &c. carried upon or over the canal and rail and carriage ways or stone roads, but proprietors of coal works in adjoining parishes were to be at liberty to use such ways to convey the coals raised at such works to the canal without paying dues to the company, provided the waggons were constructed as directed by the act. The 36 Geo. 3. c. xlviii. and the 42 Geo. 3. c. xxxv. also related to the company, but they did not affect the question in this suit.

The company required a portion of the lands of John James Earl Waldegrave, who was an infant, for the construction of the Radstock line. The Commissioners who had qualified under the act accordingly met on the 6th of December 1797, and after stating the lands required by the company, they awarded to him a rent of 14*l.* in lieu thereof, or, if he preferred it, a sum of 349*l.* 7*s.* 10*d.* instead. The meeting was attended by John Billingsley, the steward of Earl Waldegrave, and his trustees, and in 1799 the company paid to him the 349*l.* 7*s.* 10*d.* specified in the

award. The earl attained twenty-one in 1806; he then repudiated all that had been done by his steward, and in the year 1808 the 349*l.* 7*s.* 10*d.* was returned to the company by Mr. Billingsley, with eight years' interest; instead of which the company alleged that they agreed to pay to the Earl Waldegrave the perpetual rent of 14*l.* per annum.

From the evidence it appeared that in 1807, a survey of the land occupied by the company was made, which represented the land as belonging to the Earl Waldegrave. On the 8th of June 1807 the company determined to pay a rent of 16*l.* 13*s.* 9*d.* for the same, exclusive of a part of Walker's garden, which was not to be paid for, because the company had built a stable for Earl Waldegrave, for which an abatement was to be made, and this was subsequently fixed at 3*l.* 3*s.* 9*d.*, making the rent to be paid by the company 13*l.*, exclusive of 5*l.*, which was to be paid for two acres of land taken by the company, which were called railway lands. Another document, dated the 7th of July 1813, specified Lord Waldegrave's land used in the canal. It then described it, and put at the bottom, "For these the canal company stand as lessees under Lord Waldegrave," and the rents were affixed to each piece, to take place at the death of the lives therein. Next these, came Lord Waldegrave's lands used as railroads. The document then stated the amount to be paid to the lessees for life, and that on their decease respectively the rents were to be paid to Lord Waldegrave; and afterwards added up the amounts for lands used in the canal and wharf 10*l.* 17*s.* 6*d.*, and in railways, (which latter were now comprised in the Commissioners' award,) 2*l.* 19*s.* 4½*d.*, making a total of 13*l.* 16*s.* 10½*d.* There were many other documents, which varied the statements respecting the lands, and the sums paid and received; but on the 24th of March 1823, Mr. Langford, on behalf of the company, after referring to the award of 1797, as fixing the rent for the lands at 14*l.*, made a proposition to give up certain lands, for which an abatement of 8*l.* 10*s.* was required. Capt. Waldegrave, on behalf of the earl, stated the conditions on which the earl would take the lands and

reduce the rent. Messrs. Langford, Hall & Williams, the company's solicitors, sent an answer, saying 'the company will readily close with the terms you propose, namely, the company to give up to the Earl Waldegrave the 4a. 0r. 17p. of land enumerated in our former statement, and to pay the earl for fencing off all such parts of the lands as may require it, and the company to have the rent of 14*l.* reduced in proportion, which deduction we believe is 8*l.* 10*s.* 6*d.*, so that the future annual rent to be paid by the company to the earl will be 5*l.* 9*s.* 6*d.*' The lands alluded to were apparently given up, but it did not appear that any deduction was then made in respect of the rent, and as the rents were unpaid, it became a subject of further correspondence; and on the 2nd of May 1826 a meeting took place between Mr. Hall, for the company, and Mr. Tucker for the trustees of the earl's estate, a statement was drawn up, without referring to the award of 1797, and on the margin of which there was a note in red ink, stating that the original adjustment of the Commissioners specified twelve pieces of land, estimated at 14*l.* 7*s.* 1½*d.*, and professed to be the settlement between the parties from Lady-day 1824 to Lady-day 1826; and after stating that the perpetual annual rent to be paid by the company, as settled by the Commissioners in 1797, was 14*l.*, it made a deduction of 8*l.* 10*s.* 6*d.* for the 4a. 0r. 17p. given up by the company, leaving only a rent payable by them to the earl of 5*l.* 9*s.* 6*d.*

This abatement was continued till 1846. In the following year disputes arose. The defendants claimed to be the owners of the land, and insisted that the company were only tenants from year to year, and on the 20th of September 1854 they gave the company notice to quit, and threatened an ejectment to obtain possession. Five days afterwards the company served the defendants with notice to give up the lands of which possession was given to the earl in 1824. Pending these disputes, the defendants commenced building a bridge over the plaintiffs' railroad, into which the canal had been converted, that they might carry the coal raised at the Tynning Pit to the Radstock station of the Wilts, Somerset and Weymouth Railway, which could

not otherwise be reached. The plaintiffs had never obtained a conveyance of the lands originally required for their undertaking; they, therefore, instituted this suit to obtain the relief asked.

Mr. R. Palmer, Mr. Osborne, and Mr. Lewis, for the plaintiffs.—The award made in 1797 formed the basis of all the dealings between the company and the earl; and though he disaffirmed what Mr. Billingsley had done, still he never disturbed the company in their possession. The difference in the amounts of rents arose merely from the company not keeping separate accounts of the rent-charge payable for the lands taken, and of those which they held as lessees merely.—

The Duke of Beaufort v. Patrick, 17 Beav. 60; s.c. 22 Law J. Rep. (N.S.) Chanc. 489.

Powell v. Thomas, 6 Hare, 300.

The Duke of Devonshire v. Eglin, 14 Beav. 530; s.c. 20 Law J. Rep. (N.S.) Chanc. 495.

Mr. Selwyn and Mr. Fischer, for the defendants.—No agreement was ever entered into which bound either the company or the earl. The award was not signed; the schedules were never attached; and it was never entered with the clerk of the peace; and no rent-charge had ever been paid, but, on the contrary, the rents for the lands had been fixed from time to time upon actual surveys made by the surveyors of the parties. A void award could not be specifically performed, and the outlay gave the plaintiffs no right to relief. The company said they had the legal estate in these lands; and if that were so, they could want no assistance in this court.—

The Duke of Leeds v. the Earl Amherst, 20 Beav. 239.

Collen v. Gardner, 21 Ibid. 540.

De Montmorency v. Devereux, 7 Cl. & F. 188; 1 Dru. & Walsh, 119.

Dann v. Spurrier, 7 Ves. 231.

Pilling v. Armitage, 12 Ibid. 78.

THE MASTER OF THE ROLLS. — The plaintiffs do not say that there was a conveyance, or any contract; but they say that sixty years ago the Commissioners ap-

pointed under the 34 Geo. 3. c. lxxxvi. made an award fixing the value of this land, and that although the award was not originally binding on the Earl Waldegrave, whose property it was to affect, yet that it has been acted upon from that time to the present, and that it has been especially acted upon and confirmed by an arrangement entered into in May 1826; and that under those circumstances, and the length of time that has elapsed, it is binding on the earl, and on all persons claiming under him, and cannot now be disturbed. The defendants, on the contrary, say that the earl not only never entered into or authorized any arrangement whatsoever, but that instead of requiring the company to take the land and pay any price for it, he allowed them to hold it at a rent which was fixed from time to time, wholly independent of any valuation or any authority contained in the award made by the Commissioners.

In this case, neither a regular agreement for a sale nor a conveyance of the land was necessary. If, therefore, I found a mutual understanding agreed to and acted upon for sixty years by the company and the owner of the land, even though it was not expressed in writing, I should not disturb it; but in the absence of positive evidence, I should assume something necessary to give validity to such a transaction, and time alone would be sufficient; but then the evidence of the actual understanding must be quite clear.

The company took the land under the award made by the Commissioners, and they have retained it from that time to the present, with the exception of a certain portion which has been returned. The earl was then an infant. It was possible to bind him under the 34 Geo. 3. c. lxxxvi, but the necessary formalities were not pursued by the Commissioners, and that is a matter of very great moment. The earl's agent was connected with the company; he acted throughout the transaction, and the purchase-money was paid to him. This, however, is of little importance, because in 1808 the money was repaid by him to the company, with interest; and it was not acted on as the result of the transaction.

The documents produced shewed sub-

sequent mistakes between the agents of the parties. The question then necessarily is, whether the common mistake of Mr. Hall and Mr. Tucker, following the mistake of Mr. Langford and Capt. Waldegrave, bind the lands, and give sanction and other life to an arrangement which never had any existence. It cannot give vitality to the award which never previously had any, neither can it create a contract, where none previously existed. The whole must be negatived, and there is nothing in the words "perpetual rent-charge of 14*l.*," which can bind any of the parties to a rent of 13*l.* 16*s.* 10½*d.* So far, therefore, the bill fails; and so much of it as prays for the conveyance of the lands, upon the company securing a perpetual rent of 14*l.* to the defendants, must be dismissed; and if the defendants ask it, with costs. The defendants, however, are not at liberty to evict the plaintiffs from the lands held by them under the Earl Waldegrave. Those lands must be considered as taken for the use of the company; and they are entitled to hold them, if they desire so to do, as I held in *The Duke of Beaufort v. Patrick*. The 34 Geo. 3. c. lxxxvi. s. 51. still applies to the present case; and though the owners and occupiers of the adjoining lands are at liberty, at their own expense, to erect bridges, yet they must first adopt one of the two courses prescribed by the act. They must either apply to the Commissioners under the act, or they must apply for and obtain the consent and approbation of the committee of proprietors; and unless they do so, they are not at liberty to erect the bridge they require. If, however, the Commissioners and the committee refused with a view of obtaining some undue advantage, or from some unreasonable cause, then this Court, if it had cognizance of the whole matter, would probably assist them, or if not, a Court of law would afford the defendants redress, and give them power to erect the bridges required.

The defendants have not taken these preliminary steps; and so far their case is defective. On the other hand, the canal company have not taken the steps to complete their title, and become the owners of the land by paying the proper price for it.

So far their case is defective. I shall endeavour to remedy these defects, and to do justice between the parties, by making an order to the following effect:—In the first place, there is nothing to prevent the plaintiffs from putting in force the compulsory power of their act for the purpose of ascertaining the value of the land. It is at their option to do so or not; if they state that it is their option not to do so, and not to pay the price, then I shall dismiss the bill; but if they express their intention to take the proper steps for ascertaining the proper price to be paid for the land, then I will, on their undertaking to do so within a reasonable time, grant an injunction against the defendants restraining the erection of the bridge until the further order of the Court; not a perpetual injunction, because the defendants may, by pursuing the proper means pointed out in the 34 Geo. 3. c. lxxxvi. s. 51, obtain the leave to do so, and thereby the injunction would be dissolved. I must, therefore, reserve liberty to apply.

The bridges seem already to have been erected,—I assume, upon an undertaking that they would be pulled down if the Court should think proper to grant a perpetual injunction. That will not affect the principle of my decree, though it may affect the details of the order, which would then simply be, that their undertaking would be continued until it was ascertained what steps the company had taken. If they took no steps for acquiring the land, then the undertaking would fall to the ground altogether; but if they did, then the defendants must obtain the proper sanction for erecting the bridges, as pointed out by the act, or if that is unreasonably withheld, by some competent Court of judicature; and on obtaining that, the undertaking would fall again, but not until it is done. I have stated the purpose of my decree: it will therefore obviously be for the advantage of both parties to settle the proper price to be paid for the land, and to settle whether these bridges can with propriety be allowed to be made, instead of going through the ultimately expensive proceedings for that purpose. My decree, therefore, will be simply to dismiss the bill, so far as it prays the relief sought by the first part of the

prayer of the bill; and with respect to the rest, upon the plaintiffs undertaking to take the proper steps to ascertain the value of the land, continue the undertaking of the defendants, which I do compulsorily, until the further order of this Court, with liberty to apply.

Mr. R. Palmer.—The company will unquestionably exercise their powers, if indeed they continue to exist; and I assume that the judgment has not in the slightest degree prejudiced the case of the plaintiffs, supposing it should appear that the compulsory powers of the act have expired.

[*THE MASTER OF THE ROLLS.*—If the compulsory powers have expired, upon which I express no opinion, I should consider myself entitled to do what I did in *The Duke of Beaufort v. Patrick*, and myself settle the amount to be paid.]

Mr. R. Palmer.—As far as the expiration of the powers is concerned, it is undoubtedly true that there is no limit of time in the act; still it may be a question of construction whether, after all that has been done, they still remain.

[*THE MASTER OF THE ROLLS.*—In that case I should require no consent; I should make a hostile decree, and make a reference to ascertain the proper price to be paid by the plaintiffs to the defendants for the land.]

Mr. R. Palmer afterwards asked for an injunction to restrain the defendants from using the bridges until they had obtained the consent either of the company or of the Commissioners to their construction.

The question was not thoroughly discussed; but after some consideration, upon the defendants undertaking to keep an account of all the coal and goods which have passed or should pass over the bridge, and undertaking to abide by any order the Court might make in the shape of damages,

The MASTER OF THE ROLLS declined to grant any injunction.

[IN THE HOUSE OF LORDS.]

June 25, 26; { THE SOUTH - EASTERN
July 7, 9, 10, 15. { RAILWAY COMPANY v.
JORTIN.

Company — Exchequer Loan — Mortgages—Priority.

A company was formed to establish a harbour, and the proprietors had power by their acts to borrow money and to mortgage their freehold and leasehold property, and the expected tolls, &c. Money was borrowed from private individuals, and mortgages given to secure repayment of the loans with interest. By several statutes the Exchequer Loan Commissioners were authorized to advance money to complete public works and to take mortgages as security for repayment of principal and interest; and by one of these statutes four-fifths of any individual creditors were authorized by writing to consent to give to the Commissioners priority over themselves, and such consent was to be binding on all creditors of a like description. The creditors of this harbour executed a consent of that kind, giving the Commissioners priority over themselves, first, in respect of the interest of the loan, and then (after satisfaction of the interest due to themselves) in respect of the principal. By another statute the Commissioners were empowered to enter and sell, and the purchaser was to hold the property free and discharged from all liability to the harbour proprietors, and all who claimed under them. The produce of the sale was to be applied in discharge of the claims of the Commissioners, but nothing in the statute contained was to prejudice the rights of the other creditors to any surplus. The interest on all the loans fell into arrear. The Commissioners entered and sold:—Held, that the memorandum of consent was valid and binding; and that after the Commissioners had taken from the purchase-money the amount of interest due to them, the other creditors were entitled to come on the surplus for their interest, but that no bill for any account could be sustained against the purchaser.

This was an appeal against two decrees in the Court of Chancery, in a suit instituted against the appellants, under the following circumstances:—

NEW SERIES, XXVII.—CHANC.

Mrs. Jortin, the respondent, was the representative of a gentleman of the same name, who had bought up several mortgages (amounting in the whole to 1,600*l.*) given to different individuals by the Folkestone Harbour Company.

That company had been created under a local act of parliament, 47 Geo. 3. sess. 2. c. ii., for the purpose of constructing a harbour at Folkestone, for which purpose power had been given to the company by that act (afterwards extended by other acts) to borrow money and to mortgage the lands of the company and the tolls, profits, &c. expected to arise from the harbour.

The money borrowed from private individuals did not prove sufficient for the purpose of completing the harbour, and advantage was then taken by the company of the provisions of the 57 Geo. 3. c. 34, to obtain a loan from the Exchequer Loan Commissioners.

By that statute the Commissioners were authorized to grant loans to carry on public works, and to take as security for such loans the "rates and receipts accruing or to accrue from such works." A mortgage to the company was to have priority over all securities, except those of creditors entitled to the repayment of principal as well as interest; and by section 23. four-fifths of the creditors might consent to give priority to the Exchequer Loan Commissioners over all securities, and such consent would be binding on all creditors of a like description.

The 57 Geo. 3. c. 124. extended these provisions to freehold, copyhold and leasehold estates of the borrower.

The Exchequer Loan Commissioners advanced a sum of 10,000*l.* to the Folkestone Harbour Company, and on the 15th of April 1818 took a mortgage on the rates, &c. and on the freehold and leasehold property of the company.

By a "memorandum" executed on the same day the then mortgagees of the company gave the mortgage made to the Commissioners priority over their claims. This memorandum in terms stipulated that the Commissioners should, "out of the rates, duties and receipts," first be paid interest on the 10,000*l.*, at the rate of 5*l.*

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per cent. per annum, that they themselves should next be paid their interest, and that the surplus receipts should then be applied in reduction of the principal of the 10,000*l.* until the whole 10,000*l.* should be repaid in priority to all other claims.

The 1 Geo. 4. c. 60. gave the Commissioners, in case of default in payment of "all or any part of a loan or advance," power to take possession of the property, and by sale to levy the sum due for principal and interest.

Other acts were passed with a like purpose, and by the 1 & 2 Will. 4. c. 24. s. 20. it was enacted that for remedy of doubts which had arisen as to the priority of securities given to the Commissioners for the repayment of advances in bills or money, "in all cases where such securities shall have been or shall be taken by the Commissioners, such securities shall have priority over all other liabilities, claims, and securities whatsoever chargeable on the property included in such securities, and all dividends and divisions of profit or interest upon any sums advanced for carrying on any public works, save and except only such sums as shall have been advanced by way of loan before the advance of such bills or money, and for securing of which previous advances mortgages, &c. shall have been given to persons *bond fide* creditors, and entitled as such to the repayment of the principal advanced by them as well as interest thereon." The 21st section gave the Commissioners power to take possession of the property, and in their absolute discretion to continue in the possession thereof, or to demise or lease the same and also to sell or mortgage the same so as to raise sufficient money to repay the loan with interest. The 5 & 6 Vict. c. 9. s. 19. gave the Commissioners on the sale of the property power to retain the principal money secured by the mortgage, although the payment of the whole of it might not then have actually become due, together with interest thereon. The 20th section enacted that where the property had been sold "the same public works, &c. shall, in respect and to the extent of the estate or interest so sold or otherwise disposed of, be held freed and discharged

from all claim and demand of the persons, parties, bodies politic, corporate or collegiate, or companies, by whom the same were conveyed or transferred to the said Commissioners, and of all persons or bodies claiming under them, and in all respects as if such persons, &c. making such conveyance, and all persons claiming under them, were, in all respects, to such extent as aforesaid, foreclosed from all equity of redemption in respect of the premises so sold or disposed of: Provided, that nothing herein contained shall be taken or construed to prejudice the rights of any persons, parties, bodies corporate, politic or collegiate, or companies, as against the said Commissioners in respect of any surplus of the monies which shall or may arise in consequence of such Commissioners selling or otherwise disposing thereof as aforesaid."

The interest on the loan made by the Commissioners fell into arrear until, in 1843, it amounted to 8,225*l.*, and the Commissioners took possession of and sold the property. The purchasers were Joseph Baxendale and two other persons who acted as trustees for the South-Eastern Railway Company. The property sold consisted of tolls, rates, receipts, &c., and the freeholds and leaseholds, and the sum paid by and on behalf of the company was 18,000*l.* By deeds duly executed on the 21st of April and the 11th of July 1843, the conveyance was fully effected. The present suit was instituted in 1848, and the prayer of the bill was that the plaintiff (the now respondent) might be declared entitled to a charge on the Folkestone Harbour, and the buildings belonging thereto, for the sum of 1,600*l.*, with interest. The appellants, by their answer, insisted that the Exchequer Loan Commissioners had conveyed to them an indefeasible title freed and discharged from all incumbrances; that the plaintiff's remedy, if any, was against the Exchequer Loan Commissioners; and that the claim was barred by the Statute of Limitations. In January 1854, Stuart, V.C. made a decree in favour of the plaintiff (1), which decree was, on appeal, affirmed by the Lords

(1) 2 Sm. & G. 48.

Justices (2). This appeal was then brought.

The Attorney General (Sir R. Bethell), Mr. L. Wigram and Mr. Pole appeared for the appellants.

Mr. R. Palmer and Mr. Baily appeared for the respondent.

Aug. 15. — The LORD CHANCELLOR said that this question entirely depended on the powers given by the different statutes to the Exchequer Loan Commissioners. As a general rule, when a mortgagee sold under a power, that sale defeated the rights of all subsequent incumbrancers, whose only remedy was against the money in the hands of the vendors; but the Court below had thought that the Commissioners here could not, by a sale of the property, affect the rights of the other mortgagees, except so far as they were allowed to do so under the priority "Memorandum" of the 15th of April 1818. It was true that the Commissioners could not, by their sale, defeat what was there stipulated for. But that memorandum of agreement itself gave the Commissioners priority in respect of the interest on their loan, and that interest being in arrear, they had, by the 1 & 2 Will. 4. c. 24. s. 21, power to enter and sell. The sale itself was in conformity with the agreement, and any rights which the individual creditors might have under it could be enforced against the Exchequer Loan Commissioners. The 5 & 6 Vict. c. 9. s. 20. left no doubt upon the subject. The Commissioners were to be treated by purchasers as absolute owners so far as regarded the interests of those whose rights were subsequent to the right in respect of which the sale was made, for those were the persons to whom alone foreclosure could apply. The respondent was one of those persons. Her remedy was against the Commissioners; and her bill against the appellants ought to have been dismissed. The Commissioners, both by the terms of the agreement and of the section of the statute, were bound, after satisfying their own arrears of interest, to pay over the

surplus to satisfy the interest due to the other persons. With that, however, the appellants had nothing to do, for they were purchasers under a sale, which gave them a good title against the harbour trustees, and all claiming under them. He, therefore, moved to reverse the decree of the Court below, and to remit the cause with a declaration that the respondent's bill ought to have been dismissed, with costs.

LORD WENSLEYDALE concurred. — It seemed to him, upon considering the provisions of the various statutes relating to the Exchequer loans, on the construction of which this case depended, that the Commissioners could only exercise the powers thereby given when they had a legal right to enter and sell. If the Commissioners were the first incumbrancers, then the appellants had a good title by virtue of the sale to them, and the remedy of the respondent was against the Commissioners, and against them alone, in respect of the surplus produce of the sale. The act of Victoria expressly provided, that nothing should prejudice the creditors as against the Commissioners in respect of their right to such surplus. Then were the Commissioners entitled to be considered the first incumbrancers? The memorandum of the 15th of April 1818 distinctly gave the Commissioners a right of priority in respect of the interest on the 10,000*l.* recited in that memorandum as being then advanced, and, after satisfaction first of the interest due to the Commissioners and then of the interest due to the creditors, it gave the Commissioners priority in respect of the principal, after which the other creditors would come in for satisfaction of their principal. There was nothing in the statute to invalidate the qualified priority thus conferred by the memorandum of agreement upon the Commissioners' security, nor did it, in express terms, require, in order to give effect to the priority, that it should be an absolute priority for the whole debt, principal and interest. It was obviously the intent of the legislature to facilitate the advance of Exchequer bills upon public works, and particularly on those which, being incomplete, could not be made profitable to any one without such advances. But no such advances would be made, unless the

(2) 24 Law J. Rep. (N.S.) Chanc. 343; s. c. 6 De Gex, M. & G. 270.

Commissioners had the security which the power of entry and of mortgage or sale would give. The provision as to the agreement of four-fifths of the creditors was therefore introduced, and its introduction shewed that the loans by the Commissioners were to be highly favoured; but if the section had required an absolute priority to be given both as to principal and interest, it would have tended to prevent the advance of money, as creditors would have been less likely to consent to give an entire priority than a partial one. The agreement here was valid and binding, and consequently the Commissioners acquired the first security, and had a title to enter into possession and sell, and by such sale to give a complete title to the purchaser free from liability to the other creditors of the mortgagors. The remedy of the respondent and the other creditors was, not against the appellants, the purchasers, but against the Commissioners, if there was a surplus applicable to the payment of the interest due to them.

Decree of the Court below reversed, with costs.

L.C. }
Nov. 2, 3, 20. } DIXON v. GAYFERE.

Vendor and Purchaser—Lien for unpaid Purchase Money—Annuity.

Whether a vendor who sells an estate in consideration of an annuity has or has not a lien on the property for the payment of the annuity, must depend upon the circumstances of each particular case.

Where a vendor sold land in consideration of an annuity for three lives, to be secured by a bond, it was held, that he was not entitled to a lien on the land for the annuity or the arrears.

This was an appeal from a decision of the Master of the Rolls, reported 25 *Law J. Rep.* (N.S.) Chanc. 189, where the facts are fully stated. By an agreement dated the 26th of August 1826, N. Dunbar agreed, in consideration of the assignment and conveyance of certain shares in real estate in the manner therein mentioned, to pay to the vendor, Maria Finucane, a

sum of 25*l.*, and to grant to her a certain annuity of 50*l.* per annum for the joint lives of three persons therein named, and the survivor of them, to be secured by bond, and payable quarterly in each and every year during such lives or life. No conveyance was executed, and N. Dunbar never granted the annuity, or executed any bond or other instrument for securing its payment. The question was, whether a lien existed on the shares sold for the annuity or the arrears. The Master of the Rolls having decided that such lien did not exist, Mr. Bayley, the purchaser of the interest of Maria Finucane, appealed.

Mr. R. Palmer and Mr. Goren appeared in support of the appeal.

Mr. Lloyd and Mr. J. H. Taylor were for the respondent.

Nov. 20. — The LORD CHANCELLOR, after fully stating the circumstances of the case, said that of the general law on the subject there was no doubt. There was no doubt, when a person sold an estate in consideration of a sum of money, whether that money was expressed to be paid or not expressed to be paid then, in point of fact, the seller had a lien upon the property for the purchase-money. Again, there was no doubt that the lien was not lost if the vendor took a note, bond, or even real security for the payment of it. *Primâ facie* the meaning of the parties, as understood in this court, was that whether the principal money was expressed to be paid or not, if it was not paid the vendor had a lien upon the property to secure its payment. That was a principle not disputed. The question was, did this principle apply where there was not strictly purchase-money, but where that which stood in its place was an annuity? It was impossible to state in the abstract that a vendor always had, or never had, a lien on the property for the payment of the annuity. Whether he had or not depended, according to the authorities, on the circumstances of each particular case. The cases referred to were three:—*Tardiffe v. Scrughan* (1), which was this:—A man

(1) Reported, in the course of the argument of another case, in 1 Bro. C.C. 423.

and his wife in the north of England, being far advanced in life, and having two daughters, agreed to convey their real property to their two daughters as tenants in common in fee, in consideration of an annuity of 20*l.*, to be secured to them and the survivor of them, and in consideration of the payment of the father's debts; and the annuity was to be secured by bond. It was so secured. The property was given up; the daughters paid the annuity for some time; one of them died, and the husband then disputed his liability to pay it any longer; and the question was, whether the parents had a lien on the property for the annuity? It was held, that they had. Another case was *Remington v. Deverall* (2). The note of it was extremely short: it was merely stated that there was a contract for the purchase of an estate in consideration of an annuity, and the question arose upon motion, whether the vendor was entitled to have the annuity secured only by personal security or charged on the property; and, *per Curiam*, it was to be charged on the property. There was a case of *Matthew v. Bowler* (3), which was this:—A person having an interest in some ground rents for his life, sold them to a person in consideration of his paying him 15*s.* a week, and a covenant on the part of the purchaser to perform the covenants. There Sir James Wigram held, that the plaintiff was entitled to a lien on the estate for the payment of the 15*s.* a week. These were the cases mainly relied upon. The Master of the Rolls held that all these cases were cases in which the particular circumstances must be looked at; and though there were these cases, there were *Clarke v. Royle* (4) and *Buckland v. Pocknell* (5) supposed to have a contrary aspect; and also it was stated with regard to the case of *Tardiffe v. Scrughan*, before Lord Commissioner Loughborough, that Vice Chancellor Shadwell was of opinion Lord Eldon had overruled it. The subject was also canvassed by Lord St. Leonards in his book. His Lordship confessed the con-

clusion he had arrived at was, that the Master of the Rolls was right in saying you cannot lay down any general rule on the subject, but must be guided by the circumstances of each particular case; and he not only concurred with him that there was no lien of necessity, but also thought the circumstances of this case were such as to exclude the notion that the parties could have believed they had a lien on the property, and he came to that conclusion very much on the ground of the impossibility of a person purchasing an estate, which should be inalienable, as far as he was concerned, for three lives. Where a vendor did not receive the whole of the purchase-money, the purchaser could get the estate free by paying a gross sum of money, but where it was simply an annuity for lives, his Lordship confessed that, though there were different expressions in different cases on the subject, he should always be extremely slow to hold that a vendor could be understood to say an estate was inalienable, so long as any of the annuitants are alive—it was not reduced to option, but was a perpetual charge during three lives. His Lordship thought it was mainly on this ground that the Master of the Rolls decided it could not be intended to be a lien on the estate. There were certain expressions which had been adverted to in the argument itself which would seem to bear this out; and what was intended, as far as it struck his Lordship's mind, was this—there was to be a charge on something for an indefinite period of time during three lives. It was impossible to suppose a purchaser would take an estate subject to a burthen of that sort. One of the cases he had referred to was the case of parents giving up their property in their lifetime to their children, stipulating that they should have a charge during their lives. It was like the case of a settlement, a charge on it during their lives, and afterwards to go to their children. Just the same observation occurred in the case before Sir James Wigram. That was the case of a person who had an interest in ground rents, and he gave them up on a covenant to pay him 15*s.* a week absolutely, that was, to pay him 15*s.* a week out of the ground rents. That was the consideration he expected to receive.

(2) 2 Anstr. 550.

(3) 6 Hare, 110; s. c. 16 Law J. Rep. (n.s.) Chanc. 239.

(4) 3 Sim. 499.

(5) 15 Ibid. 406.

As to the short case in *Anstruther*, the Court took care the estate should be subject to the annuity, and there was nothing to lead to a distinct conclusion as to what were the intentions of the parties. His Lordship concurred, therefore, with the Master of the Rolls in thinking it could not have been the intention of the parties that the annuity should be charged on the estate that was sold. But although his Lordship concurred in that view of the case, the question still remained whether this decree, and what was afterwards done upon it in subsequent proceedings, had been in conformity. The decree excluded the claim of Mrs. Finucane and those who represented her from a right, to which, on general principles, they were clearly entitled. The decree declared the rights of the parties to this estate in fourths, and then declared that the defendant Maria Finucane's interest had passed, &c., and that the defendant Ann Frances Elizabeth Gayfere should execute a proper conveyance of the said undivided fourth shares and moieties of undivided fourth shares to the parties entitled thereto according to the declaration. Now, his Lordship thought that was wrong, because, though he did not think Maria Finucane had, by the terms of this contract, any lien on the estate for the payment of the annuity, he was clearly of opinion this Court had no right to call on Maria Finucane, or those who came after her, or those who were trustees of Maria Finucane, to convey her interest in the property until they gave her that which she undoubtedly stipulated for here as the consideration of a conveyance, namely, a bond to secure the annuity. It was stated that there was a reference to the Master to settle the bond. That was right; the direction was wrong which forced upon the representatives the obligation of conveying the estate until a proper bond was given to secure the annuity. The bond originally was intended, no doubt, to be the bond of Mr. Dunbar, and if this transaction had been under consideration immediately after the matter, his bond might have been all sufficient, and no question then made about its satisfaction. But he had bought the estate, and now what the vendor was entitled to was a bond of some sort or other; and if

a bond, then such a bond as the Master should think was a valid and sufficient bond; and inasmuch as there were considerable arrears of the annuity, no bond would answer the description of the bond to which she was entitled which did not effectually secure the payment of these arrears. It must be a bond to secure the payment of these arrears, and to secure the future. That was what should be done here, and the decree was wrong in not containing a declaration to that effect. His Lordship thought, from what he could see of the report of the case and the terms of the order, that it was extremely doubtful whether this point was brought before the Master of the Rolls.

WOOD, V.C. } WELLESLEY V. THE EARL
Dec. 5, 23. } OF MORNINGTON.

*Incumbered Estates Act, Sale under—
Portions—Tenant for Life.*

*25,000*l.* part of the produce of a sale under the Incumbered Estates Act, having been set aside by the Commissioners, and invested in consols to satisfy portions of that amount, which were payable out of the estate upon the death of the tenant for life,—Held, that the tenant for life was entitled as against the portioners to the dividends in the mean time.*

By the settlement made on the marriage of the late Earl of Mornington, dated the 13th of March 1812, the late Earl and his father, afterwards Lord Maryborough, appointed certain estates in Ireland, called the Forbes Estates, to trustees for a term of 500 years, to take effect from the death of the survivor of them, upon trust to raise 25,000*l.* for the portions of the younger children of the then intended marriage; and other estates, called the Pole Estates, also in Ireland, were appointed to the same trustees for a term of 1,200 years, for better securing the same portions. The estates were afterwards sold by the Commissioners for the Sale of Incumbered Estates, the order for sale being made on a petition presented by the present Earl, who had bought up a small incumbrance

in order to support his petition, and 25,000*l.*, part of the produce of the sale, was set aside by the Commissioners to satisfy the portions, and was invested in the purchase of 27,084*l.* 16*s.* 4*d.* consols, which was transferred into court in pursuance of an order made in the cause. By an order made in the cause on the petition of the present Earl, who, as an incumbrancer on the interests of the late Earl, had obtained an order charging the late Earl's interests in the Bank annuities, it was ordered, that the dividends should be paid to the present Earl until further order. The late Earl died on the 1st of July 1857, and the present Earl received the dividend which accrued due on the 5th of the same month. The administrator of James Wellesley, one of the two younger children of the late Earl, now presented a petition praying, amongst other things, that the rights and interests of all parties in this dividend might be declared, and that the present Earl might be directed to replace so much thereof as should be found to belong to the estate of James Wellesley (1).

Mr. Cairns and Mr. Druce, for the petitioner.—The fund must be taken as having been raised and invested on the 1st of July, the day of the late Earl's death, in which case we should be entitled to the dividends which accrued due on the 5th, or else we are entitled to have the full sum of 25,000*l.* raised now, with interest at 4*l.* per cent. from the 1st of July. We are entitled to all the accretions of the fund to answer any deficiency caused by the fall of stocks.

Mitchell v. Mitchell, 4 Beav. 549.

11 & 12 *Vict.* c. 48.

12 & 13 *Vict.* c. 77.

Mr. Rolt and Mr. Nalder, for the present Lord Mornington, contended that the fund ought to be treated as land during the life of the tenant for life, and the children were only entitled to the income from his death.

(1) It appeared that, on the assumption that the late Earl had a life interest in the fund, the dividend due on the 5th of July was apportionable under an act of the Irish Parliament passed before the Union.

Mr. W. H. G. Bagshawe and Mr. F. G. A. Williams, for other parties.

Mr. Cairns replied.

Dec. 23.—WOOD, V.C.—The point in this case arose upon what took place in Ireland on a sale under the Incumbered Estates Act. The late Earl of Mornington was tenant for life of the estate, out of which 25,000*l.* was to be raised on his death for the portions of his younger children; and the suit was instituted for the purpose of ascertaining the rights of the persons interested in the portions. It was declared that the administrator of James Wellesley was entitled to one half the fund. It appears that a sale of so much of the estate as would raise 25,000*l.* was made under the Incumbered Estates Act, and upon the motion of the solicitors having the carriage of the proceedings in the Incumbered Estates Court, it was ordered by the Commissioners that the money should be invested in consols, and that the amount of consols so purchased should be transferred to the Bank of England, in order that a power of attorney might be executed to the Accountant General of this court, to enable him to make a transfer to the credit of the cause. I find there is a section in the act, which authorizes the Commissioners to lay out the money in English funds; and, therefore, it does not appear that they exceeded their power. The 25th section of the Amendment Act (12 & 13 *Vict.* c. 77.) discharges the purchaser, upon payment into the Bank, from all liability in respect of the application of the purchase-money. Then the 30th section enacts, that the surplus of the purchase-money, after payment of the costs and expenses and satisfaction of the incumbrances, is to be paid to the owner previously to such sale, where such owner was absolutely entitled thereto; or where not so entitled, to be laid out in the purchase of land to be limited to the same uses as the land sold stood limited to; and until such money can be so laid out, it may, under such order as aforesaid, be transferred or paid over to trustees to be appointed or approved by the Commissioners, &c.; and by section 31. any money so paid into the Bank as aforesaid may, by order of the Commissioners, be invested in their name in the purchase of any stocks, funds or

annuities, transferable at the Bank of Ireland; and until the same shall be sold by order of the Commissioners for the purposes of this act, the dividends thereof shall from time to time be applied under the order of the Commissioners in like manner as the rents of the land, or lease, or part thereof, from the sale whereof the money invested in such stocks, funds or annuities has arisen, would have been applicable; and by the 35th section, where any money arising from a sale under this act is not immediately distributable, or the parties entitled thereto cannot be ascertained, or where from any other cause the Commissioners think it expedient for the protection of the rights and interests therein, the Commissioners may order such money, or any stocks, funds or securities in which the same may have been invested under this act, to be transferred to the account of the Accountant General of the High Court of Chancery, or of the Court of Exchequer in Ireland, or, where the case may require, of the High Court of Chancery in England, and the Court may deal with the money as under the Trustees' Relief Act. The Commissioners have exercised these powers, and have, by their order, caused 12,500*l.* to be invested in Government securities, and transferred to this Court. There is no order as to the other sum of 12,500*l.*, but I must take it that the whole 25,000*l.* was set aside for the portions. It seems plain, looking at the substance and spirit of the act, that the money is to be dealt with as if laid out in the purchase of land, and, therefore, I must look on it as representing so much land. It is clear from the 30th section that the legislature did not mean to interfere with the rights of the parties entitled to the land, but merely to provide for the payment of the incumbrances. The Commissioners set apart the 25,000*l.* and freed the rest of the land. It is obvious that the money must be looked upon as land charged with portions, which are not payable until the death of the late Lord Mornington. The Court must regard the property as unconverted until the portions are payable; and I must hold that the late Earl continued in possession of as much land as the 25,000*l.* represents. But it is said that the por-

tioners are entitled to have the dividends kept back in order to indemnify them against loss by a fall in the price of funds after the investment. It would be a monstrous thing to construe the act as depriving the tenant for life of all the income of the fund which is not distributable until his death, in order to guard against a possible deficiency. On the instructions of the Commissioners to invest this exact sum, I hold that it remained land, being only converted for a specific purpose. The tenant for life therefore is entitled to the income up to the day of his death.

STUART, V.C. }
Dec. 2. } SIDEBOTTOM v. ADKINS.

Practice—Attachment for Want of Answer—Evidence—Service of Interrogatories.

Attachment for want of answer ordered upon evidence consisting of a memorandum of service of the interrogatories upon the defendant's solicitor in the handwriting of the clerk by whom the service had been effected, and an affidavit by another clerk of the plaintiff's solicitor of the verbal admission of such service by the defendant's solicitor.

Mr. Bazalgette, on behalf of the plaintiff, moved for an attachment against the defendant for want of an answer; the amended interrogatories, though served on the defendant's solicitor in September last, not having yet been answered. As evidence in support of the application, a memorandum of the service of the interrogatories indorsed on the draft copy of such interrogatories in the handwriting of the clerk (now abroad) by whom the service had been effected, was produced, and an affidavit, by another clerk of the plaintiff's solicitor, of the verbal admission by the defendant's solicitor of such service was read.

STUART, V.C. ordered the attachment to be issued.

L.C.
Nov. 5, 6, 7; } CADDICK v. SKIDMORE.
Dec. 2. }

Statute of Frauds — Partnership in Mines.

*A. B. filed a bill against C. D. alleging an agreement between them in 1846, for working the T. mine, in which C. D. had a term of years, subject to the payment of seven annual instalments of 500*l.* each, and praying an account, &c. The bill stated that the mine was afterwards, in 1847, demised by C. D. to E. F. on a royalty, and that A. B. had paid to C. D. monies on account of their partnership, and on one occasion, in 1849, C. D. had signed a receipt as follows — "Received from A. B. 250*l.*, his share of dividend in instalment due to Messrs. B. [the lessors] for the T. mine." C. D. set up a totally different agreement to that alleged by the plaintiff, and claimed the benefit of the Statute of Frauds:—Held (affirming the decision of one of the Vice Chancellors), that the subject of agreement was within the meaning of the Statute of Frauds, and that the receipt was not sufficient to take the case out of the operation of the statute.*

This was an appeal, by the plaintiff, from a decree of Kindersley, V.C., dismissing the bill with costs.

The bill was filed, by the plaintiff, a solicitor in the county of Stafford, against the defendant Skidmore, who was a miner.

The case stated by the bill was as follows:—The defendant had, under an indenture, dated the 29th of August 1846, in consideration of 2,000*l.* then paid, become entitled for a term of twenty-one years to certain beds of coal, ironstone and iron ore, at Tividale, in Staffordshire, subject to the payment of seven successive annual sums or instalments of 500*l.* each, the first to be paid on the 4th of June 1847.

At the time of the demise of this colliery the defendant was engaged in partnership with Samuel Wagstaff in working an adjoining colliery, called the Sutherland Colliery, and they had nearly exhausted the coal in the Sutherland Colliery, except a rib of coal which was left to keep out the water from the Tividale Colliery.

The Sutherland Colliery was on a lower

level than the great bulk of the Tividale Colliery, but three acres of the Tividale Colliery were on a low level with the Sutherland Colliery. They proceeded to work out the Sutherland Colliery, except the rib of coal, and had been proceeding to work out the three acres of the Tividale Colliery, which were upon the low level.

Shortly after the execution of the lease, the defendant called on the plaintiff and shewed him the lease, and invited him to become a partner with him in working the Tividale Colliery (meaning that colliery, except the three acres), telling the plaintiff that he and his partner Wagstaff had taken the three acres and paid 2,000*l.* as the consideration for them, and representing that the beds of coal comprised in the lease were valuable, and that the working of the same must prove a profitable enterprise.

Upon the faith of these representations, as alleged by the bill, the plaintiff consented to join the defendant in a co-partnership for the working of the same colliery, and the plaintiff and the defendant thereupon agreed to become, and did in fact become partners upon the terms that the Tividale Colliery, exclusive of the three acres, was to be managed and carried on by the defendant in his own name; that the plaintiff should be a dormant partner therein; and that the plaintiff and the defendant should be equally interested in the profits of the concern.

In the spring of the year 1847 the plaintiff and the defendant commenced preparations for opening the Tividale Colliery, and for that purpose purchased some old machinery.

On the 13th of July 1847 the plaintiff paid the defendant on account of his interest 300*l.* towards payment of the first instalment, which was due under the indenture of lease, and the expenses incurred in preparation. The receipt signed by the defendant for this 300*l.* was as follows:—
"Received of Mr. Elisha Caddick the sum of 300*l.* on account of his share in the Tividale Mine."

On the 16th of the same month the defendant concluded an agreement with Caddick (not connected with the plaintiff) and Mason to execute to them a lease for fourteen years, from the 24th of June

1847, at a royalty; and by the agreement it was provided that Caddick and Mason should pay the defendant all monies which had been expended by him in or about the colliery; and this they subsequently did.

The bill then stated that from the time of entering into the co-partnership the defendant had the sole controul over the colliery, and that all payments on account thereof were made through him. Two receipts signed by the defendant were as follows:—

“31st of October, 1848.

“Received of Mr. Elisha Caddick the further sum of 300*l.* on account of his share in the Tivdale Mine.”

“Handsworth, 31st of October, 1848.

“Received from Mr. Caddick 250*l.*, his share of dividend in instalment due to Messrs. Bannister [the lessors] for the Tivdale Mine.”

Various sums of money were from time to time, during the years from 1848 to 1853, received by the defendant from Caddick and Mason, to whom the colliery had been demised, and were received therefore, according to the bill, on the joint account of the plaintiff and the defendant.

The bill then stated that the colliery having become considerably more productive than it had originally been, the defendant, in the month of January 1852, fraudulently misrepresented to the plaintiff what the state of the colliery was, and induced him by fraud and misrepresentation to give up his interest in the colliery upon a representation that it was a valueless property, whereas, in truth, it was valuable, and he sold the colliery for a very large sum of money, between 8,000*l.* and 9,000*l.*, which was only discovered by the plaintiff long afterwards. The object of the bill was to obtain a declaration that the plaintiff was a partner with the defendant in the Tivdale Colliery until the sale thereof in December 1853, and to have an account taken of all the dealings and transactions of the defendant in respect of the colliery, including an account of all monies received by him on account of the sale of the Tivdale Colliery, &c.

The defendant in answer to the bill said, in substance, that it was true an agreement was entered into between him and the plaintiff, but it was a different agree-

ment from that which was alleged by the bill, for it was an agreement which expressly or impliedly stated that the mines should be demised to Caddick and Mason and worked at a royalty, and on certain terms. The defendant stated, that large sums of money were to be paid by the plaintiff on account of the defendant's previous expenditure, and that the defendant was to have an allowance of 50*l.* a quarter for his management of the mine. He then insisted on the Statute of Frauds in bar of the plaintiff's demand, saying that this was an agreement relating to land, and which would not be available at law unless reduced into writing and signed by the defendant or some person authorized by him.

Witnesses were examined, and the cause came on to be heard before Kindersley, V.C., who dismissed the bill, his Honour being of opinion that the agreement set up by the bill was not such an agreement as was in truth substantiated by the evidence, the agreement alleged by the bill being an agreement that they should become partners in the working of the mine, whereas, in fact, in the view of his Honour, it was an agreement for demising it at a royalty, and an agreement different from that alleged by the bill.

Mr. Glasse and *Mr. C. Hall*, for the plaintiff, contended that this was not the case of a suit for specific performance, but of a partnership suit, instituted for the purpose of obtaining an account. The Statute of Frauds did not apply to such a case, as was shewn by—

Dale v. Hamilton, 5 Hare, 369; s. c. 16 Law J. Rep. (N.S.) Chanc. 126, 397.

Phillips v. Phillips, 1 Myl. & K. 649; s. c. 1 Law J. Rep. (N.S.) Chanc. 214.

Const v. Harris, Turn. & R. 496, 522.

In *Mundy v. Jolliffe* (1) Lord Cottenham said, “Courts of equity exercise their jurisdiction in decreeing specific performance of verbal agreements where there has been part performance, for the purpose of

(1) 5 Myl. & Cr. 167; s. c. 9 Law J. Rep. (N.S.) Chanc. 862.

preventing the great injustice which would arise from permitting a party to escape from the engagements he has entered into, upon the ground of the Statute of Frauds, after the other party to the contract has, upon the faith of such engagement, expended his money or otherwise acted in execution of the agreement. Under such circumstances the Court will struggle to prevent such injustice from being effected; and with that object it has at the hearing, when the plaintiff has failed to establish the precise terms of the agreement, endeavoured to collect, if it can, what the terms of it really were."

In the present case, the receipts which had been signed were sufficient to take it out of the operation of the Statute of Frauds.

The Attorney General, Mr. Freeling, and Mr. Pearson, for the defendants, as to the nature of the alleged partnership, referred to—

Crawshay v. Maule, 1 Swanst. 495.

Roberts v. Eberhardt, Kay, 148; s. c.

23 Law J. Rep. (N.S.) Chanc. 201.

As to the objection on the ground of the Statute of Frauds, they contended that there was a great difference between a contract to work a mine and a contract to take a mine; the former might not require a note in writing to satisfy the Statute of Frauds.—

Watson v. Spratley, 10 Exch. Rep. 22;

s. c. 24 Law J. Rep. (N.S.) Exch. 53.

Powell v. Jessopp, 18 Com. B. Rep. 336;

s. c. 25 Law J. Rep. (N.S.) C.P. 199.

Baxter v. Brown, 7 Man. & G. 193.

Boyce v. Greet, Batty's Rep. 608.

The essential points of the alleged agreement were not to be found in the receipts, and there was no part performance to take the case out of the operation of the statute.

Clinan v. Cooke, 1 Sch. & Lef. 22.

Reynolds v. Waring, Younge, 346.

Mr. Glasse, in reply.

Dec. 2.—The LORD CHANCELLOR (after stating the facts as above) said—It is not necessary for me to consider whether the averment in the bill of the contract is

inaccurate, and supposing it to be inaccurate, is nevertheless such an averment as would enable the Court to carry into execution the real agreement, if it could ascertain what that agreement was, and that it was an agreement which ought to be carried into execution. It is not necessary for me to determine this, because I am clearly of opinion,—viewing the agreement upon the strong balance of evidence, to have been an agreement that these persons should become partners in the colliery in this sense, that it was to be demised upon royalties, and the royalties to be divided in some proportions between them,—that that is an agreement not capable of being enforced unless it is a valid agreement within the Statute of Frauds. I am clearly of opinion that there is nothing here to take the case out of the operation of the statute. There certainly was no agreement signed at the time. The only signatures which would take the case out of the statute are the receipts signed by the defendant when the money was paid by the plaintiff, on account of his interest in this mining transaction. The third receipt, dated the 31st of October 1849, is the only one of the documents that created any doubt in my mind as to whether there was a sufficient signature to take the case out of the operation of the statute. I think the fair inference from that receipt is, that upon some terms or other the plaintiff had bound himself to contribute towards this instalment; and if that was sufficient to take the case out of the statute, I think that may fairly be inferred from that third receipt, which could not be from the prior receipts. But that is not sufficient to take the case out of the operation of the statute when that statute requires that an agreement relating to land should be an agreement signed by the party to be charged. Although the Court has struggled to bring within the description of signed agreements any instrument, however informal, which does in truth disclose what the terms of the contract were, the Court has never repealed the Statute of Frauds by holding a writing which does not, by reasonable inference, disclose what the agreement was, to be a signature within the meaning of the statute. Now, although that receipt may, and I think does, shew

that there were certain terms, one of which terms was, that the plaintiff was to pay a portion (say one-half) of the rent, it does not at all shew how they were to be mutually interested in the result of this payment, and this is the point on which the parties are distinctly at issue. The very object of the Statute of Frauds was to prevent parol evidence being gone into to have that elucidated which parties have failed to make distinct by reducing into writing. In my opinion that affords a conclusive answer to the claim of the plaintiff. The ground upon which I proceed is, that the agreement was an agreement for the purchase of land, which was not reduced into writing; that the terms of the contract cannot be ascertained; that there has been no part performance; that the defendant sets up a totally different contract from that insisted on by the plaintiff, and claims the benefit of the Statute of Frauds. I am of opinion, therefore, that the bill was properly dismissed by the Vice Chancellor.

Appeal dismissed, with costs.

WOOD, V.C. }
Jan. 12. } BEESTON v. STUTELY.

Specific Performance.

By an agreement, in writing, A. agreed to demise to B. certain premises which were then in lease to C, and B. undertook to procure a surrender of the existing lease from C, and to accept the new lease. C. having afterwards refused to surrender, A. filed a bill against B. for specific performance, with a modification:—Held, upon demurrer, that the bill could not be sustained.

The bill in this case stated that, in July 1857, the plaintiff purchased the residue of a lease of premises called the North London Depository, subject to an under-lease at a rent of 300*l.*, then vested in the defendant's father, and of which seven years were unexpired; that the defendant had for several years almost exclusively managed and conducted the business of his father upon the premises, and had always assumed to act not merely as a partner therein, but as having the power of making arrangements

respecting the conduct and property thereof, and had always been treated and dealt with as possessing such power; that during the time when the plaintiff was negotiating respecting the purchase of the lease, the defendant applied to her with the view of obtaining a new under-lease of the premises in the event of the purchase being completed, and an agreement was entered into, reduced into writing, and duly executed on the 30th of July 1857, whereby, after stating that the plaintiff had contracted for the premises, and that the defendant had applied to and requested her to accept a surrender of the under-lease, and in lieu thereof to grant to him a lease of the premises upon the terms and conditions thereafter mentioned, the plaintiff agreed on having a surrender of the lease within three months from the completion of the contract for purchase, to demise and lease to the defendant the premises from the 24th of June 1857 for the term of forty-two years, determinable on six months' notice by the defendant at the end of the first and second fourteen years of the term, at the yearly rent of 400*l.*, and the defendant agreed to procure the existing under-lease to be surrendered to the plaintiff, and to accept such new lease, and to pay a premium of 300*l.*

On the 20th of August the plaintiff's solicitor sent to the defendant the draft surrender of the under-lease, and a draft of the new lease, and afterwards repeatedly applied to the defendant to perform the agreement, in order that the plaintiff might be able to complete her purchase. The result of these applications was, that, on the 24th of September, the defendant wrote to the plaintiff's solicitor as follows:—

"I have seen my father in reference to the surrender of the lease, but he still refuses; therefore, I fear I cannot fulfil the condition of the agreement. What is to be done?"

The bill further stated, that the plaintiff entered into the agreement for the purchase upon the faith of the defendant accepting the new lease, and without which she would not have been induced to give such an amount of purchase-money; that the defendant during the negotiations always represented himself to be, and was believed by the plaintiff to be fully competent to pro-

cure a surrender of the original under-lease, and in other respects to enter into and carry into effect the agreement on his part; and the bill prayed that the agreement might be decreed to be specifically performed, the plaintiff being ready and willing to perform the same upon the defendant procuring a surrender of the original under-lease; but if the defendant should be unable to obtain such surrender, then that he might be decreed to accept a lease in conformity with the terms of the agreement, save that the same should commence from the expiration of the under-lease; and that in that case the defendant might be decreed to pay and make good to the plaintiff such loss as she might sustain in consequence of the failure of the defendant fully to complete the agreement on his part.

The defendant demurred.

Mr. Roll and *Mr. Macnaghten*, for the defendant, were stopped by the Court.

Mr. Eddis, in support of the bill, cited *Nelthorpe v. Holgate* (1).

Mr. Roll replied, citing *Thomas v. Dering* (2).

WOOD, V.C.—I do not think, as the averments in this bill are framed with respect to the misrepresentations on the part of the defendant, it can be supported. *Nelthorpe v. Holgate*, where Knight Bruce, V.C. decreed specific performance of a contract for sale with a compensation in respect of an outstanding life interest, was a case in which the vendor was aware, and the purchaser ignorant, of the outstanding estate at the time the contract was entered into. That was a very different case from the one now before me, in which both parties were equally aware of the difficulty. It appears from the agreement that the plaintiff was perfectly acquainted with the fact that the old lease was in the defendant's father. It is averred in the bill that both parties knew the old lease to be in the father, and the defendant undertakes that his father shall surrender it. It amounts to nothing more than the expression of great confidence that he can obtain the surrender, and an agreement to

take a new lease when that is obtained. *Nelthorpe v. Holgate* was very different. The vendor was dealing on a footing which he did not make clear to the purchaser. This defendant never represented that he had any legal power to procure the surrender which he undertook to have made, and it turns out now that he is unable to obtain it. Indeed it does not appear that he ever had, or has now, that power. There is an obvious distinction between this case and *Nelthorpe v. Holgate*. The whole difficulty is expressed on the face of the agreement, but the defendant undertakes to remove it. This cannot be done. It is clearly no case for specific performance, and the plaintiff must be left to her remedy at law. The case cannot be put higher than this, that both parties, being aware of the difficulty that exists, are content to act on the assumption that the defendant is able to procure the surrender of the lease. It is impossible to say that this is a case for new modelling the contract; and another objection is, that there is no averment of the performance of the plaintiff's part of the contract. The demurrer will be allowed, without costs if the plaintiff waives the agreement; otherwise, with costs. I do not think it is a case in which I ought to give leave to amend.

M.R. }
1857. } DEVAYNES v. ROBINSON.
April 21, 22. }

Trustees—Real Estate—Conversion—Liabilities.

Trustees who are directed to sell an estate are not justified in raising money by mortgage, notwithstanding a discretion is given to them to postpone the sale.

The bill in this suit was filed by Elizabeth, Arthur, and John Devaynes, the three younger children of William Devaynes of Liverpool, deceased, to obtain an account of the estate of William Devaynes of Jersey, and praying that such estate, so far as it remained in specie, might be secured for the plaintiffs. The bill also asked for a decree against the assets of James Anderton Forshaw and James Girvin, the trustees of his will, for what should

(1) 1 Coll. 203.

(2) 1 Keen, 729; s. c. 6 Law J. Rep. (N.S.) Chanc. 267.

be found due from them in respect of the estate of William Devaynes of Jersey, and of any breach of trust committed by them, and of any loss sustained by their delay in selling the real estate; and it was further prayed, that a mortgage made by them of two warehouses on the west side of Argyle Street, Liverpool, might be set aside, and that the mortgagee might be restrained from proceeding with an action of ejectment; and that a receiver might be appointed.

William Devaynes, by his will, dated the 31st of March 1795, directed that so much of his estate should be placed on good security as would produce an annual sum of 100*l.*, which was to be paid to his wife during her life, and that, subject thereto, his son, William Devaynes of Liverpool, should on attaining twenty-one become entitled to the said annuity, and to the sum to be set apart for securing the same.

The whole estate of the testator applicable to produce the 100*l.* a year did not amount to 600*l.*; but W. Devaynes of Liverpool, out of his own monies, made up the sum coming from the estate to 600*l.*, which by arrangement was placed in the hands of Benjamin Devaynes, who by an agreement, dated the 31st of October 1809, admitted that he held the 600*l.*, and agreed to pay the interest thereof at the rate of 5*l.* per cent. per annum to W. Devaynes of Liverpool, and his wife and the survivor of them, and after the death of the survivor (an event which had since happened), to pay the principal sum equally among the children of W. Devaynes of Liverpool.

Benjamin Devaynes died on the 16th of December 1809, indebted to the trust in respect of the 600*l.*, and by his will, dated the 26th of December 1807, he directed his just debts to be paid, and he charged his real and personal estate and effects therewith, and he devised certain freehold premises in Argyle Street, Liverpool, to Philip Hitchen and John Jackson, in trust for his son, W. Devaynes of Jersey, for his life, with remainder for the children of W. Devaynes of Jersey, and in default of such children (an event which happened), then in trust for such persons and in such manner as W. Devaynes of Jersey should by will appoint.

By an indenture, dated the 26th of Au-

gust 1825, W. Devaynes of Jersey released John Jackson, the surviving trustee of the will of B. Devaynes, and by the same deed he expressed a desire that the 600*l.* should not then be raised, but that the interest thereof should be paid out of the rents of the premises devised in trust for W. Devaynes of Jersey, and remain chargeable on the other hereditaments of B. Devaynes remaining unsold. W. Devaynes of Jersey, in 1837, appointed Messrs. J. A. Forshaw and J. Girvin trustees of the will of B. Devaynes, and by his will, dated the 21st of April 1837, he, by virtue of the power given to him by the will of B. Devaynes, and of every other power, devised, appointed and bequeathed all his real and personal estate to J. A. Forshaw and J. Girvin, upon trust, as soon as might be after his decease, absolutely to sell every part thereof as therein mentioned, and to stand possessed of the proceeds, upon trust to pay his debts and certain legacies, among which were the following:—To W. Devaynes of Liverpool, 2,000*l.*, to J. A. Forshaw and J. Girvin 250*l.* each, to Henry Forshaw, his solicitor, 500*l.*, and the residue of his estate he bequeathed for the absolute benefit of W. Devaynes of Liverpool.

On the 3rd of March 1841 the testator, by a codicil to his will, directed that if W. Devaynes of Liverpool should die in his lifetime, his trustees should hold the legacy of 2,000*l.*, and all other the residuary estate, in trust for the widow of W. Devaynes for life, and after her decease to divide the same among the children of W. Devaynes of Liverpool, who should be living at the time of his death.

W. Devaynes of Jersey died on the 8th of March 1841, W. Devaynes of Liverpool having died on the 6th of March 1841. At the death of W. Devaynes of Jersey there were living Elizabeth Devaynes, the widow of W. Devaynes of Liverpool, and nine children, namely, the three plaintiffs, and the six defendants, Eliza, Mary, Harriet, Benjamin, William, and Jane, now the wife of James Hilton.

The will of W. Devaynes of Jersey was proved on the 15th of May 1841, by Messrs. Forshaw and Girvin, who as trustees took possession of the real and personal estate of the testator.

By a deed, dated the 18th of May 1841 Messrs. Forshaw and Girvin conveyed to the defendant Thomas Robinson the whole or the greater part of the hereditaments, which by the will of B. Devaynes had been devised for the benefit of W. Devaynes of Jersey. This deed, after reciting the facts hereinbefore stated, recited that J. A. Forshaw and J. Girvin were trustees of the will of B. Devaynes, and that they had occasion to borrow 2,500*l.* for the purposes of the estate of W. Devaynes of Jersey, and they conveyed the two warehouses on the west side of Argyle Street, Liverpool, to T. Robinson, by way of mortgage, to secure the sum of 2,500*l.* and interest.

Messrs. J. A. Forshaw and J. Girvin paid their own legacies of 250*l.* each, and the legacy of 500*l.* to H. Forshaw, but they never accounted for the residue, and H. Forshaw acted as the solicitor both for the mortgagors and the mortgagee.

J. A. Forshaw died intestate, leaving J. Girvin surviving, and letters of administration, limited to this suit, were granted to Mary Devaynes. J. Girvin died on the 20th of March 1846 intestate, and letters of administration to his estate were afterwards granted to his widow Jemima, afterwards the wife of James Hosack. The defendants B. Devaynes and Mary Devaynes obtained letters of administration, with the wills annexed, to W. Devaynes of Jersey and B. Devaynes.

In May 1850 the defendant B. Devaynes entered into possession of the premises comprised in the mortgage, they being vacant; but on the 8th of June 1854 T. Robinson brought an action of ejectment to recover possession of the premises, and served the plaintiffs and the defendants, children of W. Devaynes of Liverpool, with the writ.

The plaintiffs then instituted this suit, insisting that the mortgage to T. Robinson of the 18th of May 1841 was invalid; that it was a breach of trust of which he had notice, and that the mortgage ought to be cancelled, and the premises comprised therein so disposed of as to satisfy the sum of 600*l.* and interest charged thereon, and that they might be held subject thereto, upon the trusts of the will of W. Devaynes of Jersey.

From the answer of T. Robinson it

appeared, that on the 17th of June 1841 Messrs. J. A. Forshaw and J. Girvin obtained from Elizabeth Devaynes of Liverpool, and her six elder children, who had attained twenty-one, a deed indemnifying them from the non-payment of the debt of 2,500*l.* and interest which might become due thereon, or any other debts or liabilities still due of W. Devaynes of Jersey, or against his estate, and also a covenant that they would procure from the plaintiffs, the three younger children then under age, a deed ratifying the arrangement proposed for retaining the premises unsold, contrary to the trusts of the will of W. Devaynes of Jersey, and indemnifying them from the consequences; and it was declared, that until that was done, and all costs, &c., were paid, there should be no division of the premises; and the defendant insisted that if the mortgage was invalid against the plaintiffs, still that it was good so far as the trustees of W. Devaynes of Jersey duly applied the sum raised, and that it was valid altogether against the defendants who executed the deed of the 17th of June 1841, and that as between himself and the other defendants he was entitled to have the plaintiffs' claim satisfied out of the other property of W. Devaynes of Jersey. The defendant also said, that he never had any notice of the claim to 600*l.* owing by B. Devaynes, and that as against him the mortgaged premises were not liable to that debt; but that if they were, then that the other estates of B. Devaynes were the proper estates to pay that and his other debts.

It was in evidence that in 1841, and for some years afterwards, the warehouses were let for 340*l.* per annum, and that they were valued at from 5,100*l.* to 6,000*l.*, but that at the present time they were worth only 3,100*l.*

Mr. Follett and *Mr. Amphlett*, for the plaintiffs.—The mortgage made by the trustees cannot affect the plaintiffs. It was their duty to convert the estate out and out, and not to raise money by incumbering the property they were appointed to realize.—

Stroughill v. Anstey, 1 De Gex, M. & G. 635; s.c. 22 Law J. Rep. (N.S.) Chanc. 130.

Haldenby v. Spofforth, 1 Beav. 390; s. c. 8 Law J. Rep. (N.S.) Chanc. 238.

Page v. Cooper, 16 Beav. 396.

Robinson v. Lowater, 17 Beav. 592; s. c. 5 De Gex, M. & G. 272; 23 Law J. Rep. (N.S.) Chanc. 641.

Mr. Wiglesworth, for Mary Devaynes.

Mr. R. Palmer and Mr. C. Hall, for T. Robinson.—The mortgage made by the trustees was valid; the plaintiffs, since attaining twenty-one, had received the rents of the unsold estate of the testator, and by so doing had acquiesced in the acts of the trustees; but assuming this not to be so, still it was valid so far as the mortgage money was duly applied by the trustees, and so far as it was confirmed by the children, who having attained twenty-one were parties to the deed of indemnity. As to the 600*l.* which was placed in the hands of B. Devaynes, Mr. Robinson was a purchaser, without notice that any such debt existed.—

Colyer v. Finch, 19 Beav. 510; s. c. 5 H.L. Cas. 905; 26 Law J. Rep. (N.S.) Chanc. 65.

Eidsforth v. Armstead, 2 Kay & J. 333; s. c. 25 Law J. Rep. (N.S.) Chanc. 237.

Mr. Lloyd and Mr. Little, for Mr. Hosack.—J. Girvin executed the mortgage to T. Robinson for conformity only. Attempts had been made to sell the estate, but they had failed. The affairs of the widow and children of W. Devaynes of Liverpool were managed by Messrs. Blundell & Forshaw, the latter of whom received the money; and as the parties interested were kept informed of the state of the property, they must be considered to have acquiesced, and had no claim against the estate of J. Girvin, which had been fully administered.—

Buxton v. Buxton, 1 Myl. & Cr. 80.

Dryden v. Frost, 3 Ibid. 670; s. c. 8 Law J. Rep. (N.S.) Chanc. 235.

Raby v. Ridehalgh, 7 De Gex, M. & G. 104; s. c. 24 Law J. Rep. (N.S.) Chanc. 528.

Ball v. Harris, 4 Myl. & Cr. 264; s. c. 8 Law J. Rep. (N.S.) Chanc. 114.

THE MASTER OF THE ROLLS.—Were the executors under the will of William Devaynes, of Jersey, justified in mortgaging the property? and if not, can the mortgage they made be supported under the provisions contained in the will of B. Devaynes? In *Stroughill v. Anstey* it is observed, that, "as a general rule, there can be no difficulty in saying that a mortgage under a mere trust for conversion out and out is not a due execution of that trust." In this case there was a trust for conversion out and out, and consequently, as a general rule, a mortgage is not a good execution of that trust; can the executors, then, support the mortgage under any peculiar circumstances which made it necessary and imperative upon them to obtain money forthwith for the exigencies of the estate without proceeding to sell property that could not be disposed of advantageously? It is the duty of the executors to establish those facts; and that they have not done. I have before me only an account which gives no satisfactory items or details. From that it appears that the estate of the testator consisted of these warehouses, and also of what is called "cash, purchase-money from Mr. Waring." The meaning of that is not clear, but I presume it to be part of his estate. There is much in the accounts that requires explanation. There are sums on account of legacies which clearly are not justifiable, and there is nothing to shew that the estate for which the sums might have been raised independent of this mortgage would not have satisfied all the exigencies that then existed. It has been argued that this can be supported on a proceeding under the will of B. Devaynes. It was, however, not a proceeding under that will, and the parties did not so consider it. B. Devaynes died on the 16th of December 1809, and the mortgage was made on the 19th of May 1841, thirty-one years afterwards; and after such a lapse of time it would be a singular proceeding to sell the property under a general charge to pay debts: the fact of itself would require explanation. A person would be disposed to ask an executor or trustee why he did not sell it before, and how it came that debts, which required the sale, existed after such a lapse of time. But, after reciting the whole

title, the explanatory recital of the mortgage-deed which precedes the operative part, is the key to the intention and object of the deed, which was to have 2,500*l.* advanced for the purpose of the estate of W. Devaynes of Jersey. Suppose, under the estate of B. Devaynes there had been a direction requiring the purchaser to see to the application of the purchase-money. Could T. Robinson have been paid when the money he had lent on his mortgage had not been properly raised or applied under or for the purposes of a trust created thirty years before? The statement in the mortgage that the executors of W. Devaynes of Jersey, were trustees of the property, was merely inserted to avoid any difficulty about the legal estate. It was for the purpose of avoiding expense that when William Devaynes of Jersey, made his will, he, within a fortnight or three weeks afterwards, got the very gentlemen whom he appointed his executors to be new trustees under the will of his father; they, however, on his death, which took place four years afterwards, acting under his will, proceeded to raise money, not for the purpose of B. Devaynes's estate, but, as they themselves expressly state, for the benefit of W. Devaynes's estate. Have they, then, duly raised the money for the purpose of W. Devaynes's estate as they stated? It certainly cannot be supported as a proceeding under the estate of B. Devaynes or justified as a proceeding under the trusts reposed in them by the testator W. Devaynes of Jersey. I must, therefore, declare that it is not binding as against the plaintiffs. The other children bound themselves by the deed of indemnity, that gave validity to the transaction, so far as they are concerned and as long as it stands; I shall not, either by the decree or by any observation, intentionally touch that question. Have the executors, then, exercised a proper discretion in not selling this property? The trust was to sell immediately, but it is said that a discretion was given to them not to sell at what they might consider a loss, with a discretion to buy it in and put it up again to auction from time to time for that purpose. A discretion was certainly reposed in them to suspend for a reasonable time the sale of this estate, but to what period of time

is that to extend? It is incumbent upon them to shew that they have taken steps and endeavoured to carry into effect that trust. Upon that the evidence is wholly silent, and there is no evidence to explain the purpose they desired to carry into effect. On the contrary, the mere fact of making this mortgage shews an opposite intention, since nothing could be so improvident as to incur the expense of a mortgage as if they were about to sell the property and pay off the mortgage immediately afterwards, the expense would be considerable, and the whole of it would fall on the *cestuis que trust*. It necessarily follows, and the evidence establishes, not only that they did not endeavour to execute the trust, and that they did not suspend it by reason of their thinking that further time would be desirable for that purpose, but that it was not their intention to execute it at that time, and that is confirmed by the fact that it goes on for a period of five years, or something exceeding five years in one case, and a little less than five years in the other case, taking no steps whatever to sell this property.

It has been argued that it incidentally appears the value of the property at the death of Mr. Girvin was as large as it would have been if it had been sold in 1841, as even in 1846 it was worth 5,400*l.*; but that is unfavourable to the trustees: why did they not sell during that period? It is impossible to agree with the argument that if a trustee does not act, which in itself is a breach of trust,—the committal, in fact, of a breach of trust, the consequences of which do not occur until after his death—his estate is not to be made liable, because, if redress had been sought in respect of that breach of trust, it was repairable during his life. It would be so in respect of an active breach of trust, and a trustee who placed money in an improper investment, even although the loss might not have been sustained during his lifetime, if the consequences of that act were a total loss after his death, his estate would be liable. When I say the commission of a breach of trust, there is an ambiguity of expression in the words, involving activity; the breach of trust really arises from the want of doing some act; but if the breach of trust arises from

the trustee doing no act at all, it would, in many cases, amount to a breach of trust for which his estate would be liable, as in case of there being a simple contract debt due to the testator, which the executor or trustee had not realized or got in for a period of five years after the death of the testator, during the whole of which time the debtor was solvent, and might have paid. If, immediately on, or shortly after, the death of the trustee, the debtor had become insolvent, the estate of the trustee would still be liable in respect of his wilful default, for not having got in that sum of money which it was his duty to get in. I do not rest it on any doctrine particularly applicable to wilful default; it is part of the duty which the trustee or executor has undertaken, and he must perform all the parts of the trust he has undertaken. In this case there is nothing done towards the performance of this—the first duty—the sale of the estate. No steps were taken, except that it was put up for sale on one occasion in 1849; the highest bidding then being 3,100*l.*: but that was done after the death of all the trustees. And so far as the trustees themselves are concerned, down to the year 1845 and 1846, no steps whatever were taken by them for the purpose of realizing this trust which they have to perform. I certainly cannot hold that any duty devolves upon the heir of the surviving trustee—a person who is called in this court a trustee—by reason of the estate devolving upon him. Undoubtedly this Court would not hold him liable to do anything whatever; it would only hold him bound to afford every facility and assistance for getting rid of the trust, and putting it upon those persons who are personally to engage in it. I cannot but say that there was a trust reposed in them, and that assuming there was a discretion reposed in them, they have neither performed the trust nor exercised the discretion; but they have repudiated both, and have done something which they were not authorized to do under the trust reposed in them. I must, therefore, direct an inquiry to ascertain whether any loss has been sustained by their not executing the trust for the sale of the property during their lives. I shall, then, on further directions, be able to deal with the case. I

cannot now direct any inquiry as between co-defendants. I admit the proposition that this Court frequently does direct inquiries which enable the defendants to be at issue between each other upon the Master making his report, or the chief clerk making his certificate, but these are special cases, and it is not necessary to detail the principles on which they rest; that, however, would not entitle the defendants, the executors, to an inquiry to enable them to fix certain co-defendants with respect to any sums received by them, that did not at the same time leave it open to the defendants sought to be charged, to make any defence which they should think fit to bring forward. Without, therefore, saying anything with respect to the lapse of time or the questions that have occurred between the parties, I cannot direct any such inquiry; but at the same time I express no opinion whether it may not be in the power of the parties, after the chief clerk's certificate, to bring forward these questions, either by petition or otherwise.

M.R.
1857.
April 17;
May 23.

— } MEREDITH v. VICK.

Will—Real Estate—Conversion—Reconversion—Implication.

Real estate converted by will into personality continues as such in the absence of specific acts restoring the character of realty; and acts affecting part of a residuary estate which was in possession will not extend, by implication, to other part of such residuary estate which was in reversion.

*Residuary real estate directed by will to be sold comprised freehold in possession and copyhold in reversion. The legatees entitled to the surplus purchase-money to arise from the estates when sold, paid a sum of 1,000*l.* directed to be set apart, and took possession of the estate and enjoyed the freehold as realty, and finally devised them as such. The copyhold reversion did not fall into possession until after the death of the legatee:—Held, that the acts which amounted to a reconversion of the freehold in possession did not extend to the copyhold in reversion;*

that it remained personalty, and passed to the personal representatives, and not to the heir of the legatee.

John Sueter, by his will, dated the 10th of January 1817, devised all that his copyhold estate called "The Mill Field," held of the manor of Emsworth, in the county of Southampton, which he had surrendered to the use of his will, to Sally, then the wife of Henry Thresher (afterwards the wife and then the widow of William Mower, since deceased), for life, charged with an annuity of 25*l.*, which has since determined; and after the decease of his niece Sally, the testator devised the same copyhold hereditaments unto and equally between all and every the children of his said niece, share and share alike; but if his said niece should happen to depart this life *in the lifetime of her husband without leaving any children or child* (an event which did not happen), then the testator gave and devised all and singular his said copyhold hereditaments unto his nephew John Sueter, his heirs and assigns, charged with an annuity of 50*l.* And the testator devised all and every his other copyhold hereditaments unto his niece Ann, her heirs and assigns, charged as therein mentioned. And the testator thereby devised and bequeathed all and every other his real estates *not thereinbefore otherwise disposed of*, and the residue of his personal estate unto Thomas Sueter, since deceased, and the defendant John Vick, their heirs, executors, administrators and assigns, upon trust that they should as soon as conveniently might be after his decease, *sell and dispose of such real and personal estate and convert the same into money*, and thereout invest the sum of 1,000*l.* on government or on good real security, at interest, in their or his own names or name, with power to vary the same as often as they might think necessary, and upon further trust to pay and apply out of the interest and proceeds thereof, as and when the same should be received, one annuity or clear yearly sum of 10*l.* unto the plaintiff Maria Meredith, then the wife and now the widow of Alexander Meredith, for life for her own use and benefit, and upon further trust to pay and apply the residue and remainder of the said interest and proceeds of the

1,000*l.* unto his, the testator's, brother Thomas for life, and after his decease upon trust to pay and apply the whole of the said interest and proceeds of the 1,000*l.* unto the plaintiff for her life, for her separate use, as therein mentioned, and after the decease of the plaintiff, upon further trust to pay, apply and divide the whole of the stocks, funds and securities unto and equally between all and every the children and child of the plaintiff, share and share alike, to be paid unto them respectively when and as they should respectively attain their ages of twenty-one years, together with interest for the same in the mean time for their support, maintenance and education, and upon further trust that they, the said trustees, should pay and apply the residue and remainder of the monies arising from the sale and conversion of his, the testator's, said real and personal estate, after deducting thereout the before-mentioned sum of 1,000*l.* unto Thomas Sueter, his executors and administrators; and the testator appointed the said Thomas Sueter and John Vick the defendant, executors of his will.

The testator died on the 1st of May 1822.

On the 20th of January 1823, Sally, then Sally Thresher, was admitted to the copyhold estate, called "The Mill Field," as devisee for life under the will.

Henry Thresher died in the lifetime of his wife Sally without her having had any issue by him.

Sally afterwards married William Mower; and there was issue of the marriage one child only, William, who died an infant. She survived her second husband, and died on the 14th of February 1851, when the reversion in the Mill Field fell into possession.

The sum of 1,000*l.* directed to be set apart by the will of John Sueter, was raised out of some part of his real and personal estate.

Thomas Sueter entered into possession of the remainder of the real estate of the testator, which was freehold, and received the rents and enjoyed it *in specie*, and he went to reside with his daughter, Sally Mower, in one of the cottages built upon the Mill Field.

By his will, dated the 29th of September 1826, Thomas Sueter devised the freehold estate he had so retained as realty without in any manner alluding to the copyhold estates to which he was entitled in reversion, but he gave his personal estate to certain persons, through whom the plaintiff claimed an interest.

Thomas Sueter died on the 16th of February 1827, before the reversion in the Mill Field fell into possession, leaving John Vick surviving.

On the 26th of March 1851, after the death of Sally Mower, proclamations were made at the Court Baron for persons claiming the Mill Field; but none came to be admitted.

An action of ejectment was afterwards brought by the plaintiff, in the name of John Vick, against the tenant, to recover possession of the Mill Field, when judgment was given in favour of the defendant, John Vick, on the ground that the legal estate was vested in him under the will of the testator, John Sueter (1).

The bill in this suit was then filed by Maria Meredith, alleging that the Mill Field was comprised in the devise of the residue of John Sueter's real estates, and insisting that it ought to be sold, and the money arising therefrom, with all arrears of rent thereon, distributed, as part of the personal estate of Thomas Sueter, between the plaintiff and the other persons entitled.

Mr. Lloyd and *Mr. Nalder*, for the plaintiff.

Mr. Selwyn and *Mr. Simpson*, for the defendants.—In the events which happened, the devise made by John Sueter of the Mill Field to his nephew failed altogether; it therefore fell into the residue. This residue consisted of real estate in possession, as well as of the copyhold in reversion. They formed one estate; and the dealing with a part must be considered as controuling the whole. The acts of Thomas Sueter with regard to the estates admitted of no doubt; he raised the 1,000*l.* charged thereon, and retained the estates as real property, and dealt with them as such; he therefore

must be considered to have elected to take the estates as land, and this intention must also be considered to extend to the copyhold estate.

Mr. R. Palmer and *Mr. H. Stevens*, for the trustee.

Mr. Lloyd, in reply.

The following cases were referred to:—

Crabtree v. Bramble, 3 Atk. 680.

Triquet v. Thornton, 13 Ves. 345.

Griesbach v. Freemantle, 17 Beav. 314.

Dixon v. Gayfere, 17 Beav. 421, 433;
s. c. 23 Law J. Rep. (n.s.) Chanc. 60.

Pulleney v. Darlington, 1 Bro. C.C. 224, 238.

Wheldale v. Partridge, 8 Ves. 227;
s. c. 5 Ibid. 388.

Walker v. Denne, 2 Ves. jun. 170.

Lechmere v. the Earl of Carlisle, 3 P. Wms. 211.

Davies v. Ashford, 15 Sim. 42; s. c. 14 Law J. Rep. (n.s.) Chanc. 473.

Taylor v. Taylor, 3 De Gex, M. & G. 190; s. c. 22 Law J. Rep. (n.s.) Chanc. 742.

Fletcher v. Ashburner, 1 Bro. C.C. 497.

Deeth v. Hale, 2 Moll. 317.

Harcourt v. Seymour, 2 Sim. N.S. 12;
s. c. 20 Law J. Rep. (n.s.) Chanc. 606.

May 23.—THE MASTER OF THE ROLLS.

—It has already been decided that the reversion of the Mill Field, given to Sally Mower for life, passed under the residuary devise contained in the will of John Sueter; but that will having converted the real estate into personalty, it remains to consider whether Thomas Sueter did by his acts re-convert such personalty again into realty. The reversion in the copyholds did not fall into possession during his life. It has, however, been argued that the 1,000*l.* directed to be set apart out of the money to arise by the sale was raised out of the pure personalty of the testator and by sale of a part of his real estate; that the real estate remaining unsold continued to be enjoyed *in specie* by Thomas Sueter during his life; and that he devised these freeholds as real estate, though at the same time he made no mention of these copyholds. Were, then, the acts of

(1) *Vick v. Sueter*, 3 El. & B. 219; s. c. 23 Law J. Rep. (n.s.) Q.B. 212.

Thomas Sueter sufficient to shew an intention to keep the copyhold estate as land? It has been argued that if real estate, consisting of several parcels of land, is devised upon trust to sell, and it remains unsold, and the party entitled to the purchase-money by his acts shews an intention to keep some portion as land, these acts affect the whole estate, and it must be considered as re-converted. The respondents, however, admit that the acts of a party entitled to the purchase-money to arise on the sale of real estate may re-convert it to its original state; but that this applies only when the property is at home: in other words, the equity, once impressed by the original conversion, continues until the estate becomes vested in some person, who can deal with it as he pleases. This applies to the present case. If the direction for sale and investment had preceded Sally Mower's life estate in the copyholds, the observations would have strictly applied. Here the trust for conversion is not impressed on the property in the first instance; but the property subject to the life interest passes under the general trust for conversion. What acts can be relied on to shew a re-conversion of the copyholds? It cannot be the receipt of the rents, for Thomas Sueter never was entitled to receive, and never did receive any. The argument reduces itself to this: that the copyholds must be treated as re-converted, because they form part of the estate, the freehold portion of which was so re-converted; but they cannot be treated as part of the same estate, for Thomas Sueter had no power in possession over the copyholds, as he had over the freeholds; and the only circumstance is, that they were given to him by one residuary devise. The authorities for applying acts of re-conversion as to part, to the whole of the estate, do not apply to a case of this description; and I cannot treat acts shewing an intention to re-convert freeholds in possession as evidence of a re-conversion of copyholds not in possession. It is impossible to attribute to a reversioner an intention with reference to the reversion from acts which applied only to other property in possession. The copyholds passed, therefore, as personal estate.

WOOD, V.C. } MEALOR v. EARL TALBOT
Dec. 2. } AND OTHERS.

Interpleader Suit—Unnecessary Averment—Plea.

A bill of interpleader stated a demise by a former Earl of S. to the plaintiff of certain lands forming part of an estate settled by act of parliament in perpetuity upon the Earldom of S, that Earl T. claimed the rent due from the plaintiff as heir to the Earldom of S, and other defendants claimed the same rent under a disentailing deed executed by the last Earl of S. and his will.

Plea, by the defendants alleged to claim as devisees, that the premises in question were not portion of the estate settled by the act:—Held, sufficient.

This was an interpleader suit. The bill stated that by an act of parliament (6 Geo. 1.) "for annexing the then late Duke of Shrewsbury's estate to the Earldom of Shrewsbury and confirming Gilbert Earl of Shrewsbury's settlement in order thereto, and for other purposes therein mentioned," it was enacted that the estate therein referred to should "be and remain to the use and behoof of all and every the person and persons being issue male of the body of John, first Earl of Shrewsbury, to whom the title, honour and dignity of Earl of Shrewsbury should, after the decease of Gilbert, Earl of Shrewsbury, George Talbot, and John Talbot therein named without issue male of their respective bodies, by virtue of the letters patent of the creation of the said earldom, descend and come severally and successively one after another, as they and every of them should succeed to and inherit the said earldom, and of the several and respective heirs male of the body and bodies of all and every such person and persons issuing to attend and wait upon the said earldom, and to be annexed to and descend with the same." That (paragraph 2) on the 2nd of February 1844 John, late Earl of Shrewsbury, being then tenant in tail of the said estate under the act, demised a farm at Little Neston, in Cheshire, being a portion of the said estate, to the plaintiff, as tenant from year to year at the rent of 150*l.*; that on the death of the Earl the estates descended to Bertram Arthur Talbot, Earl

of Shrewsbury, who died on the 10th of August 1856; that the defendant, the present Earl Talbot, claimed the earldom and estates as issue male of the first Earl of Shrewsbury, alleging that the issue male of Earl Gilbert, George Talbot and John Talbot had failed, and the plaintiff had received notice from his solicitors not to pay to the representatives of the late Lord Shrewsbury any rent beyond that due up to the 11th of August 1856. The 8th paragraph of the bill set forth the following passage in a letter from Lord Talbot's solicitors to the plaintiffs:—"Lord Talbot's claim will, therefore, come under early consideration, and in the mean time we beg to repeat that Lord Talbot will hold every tenant on the estates responsible to him for all rent accruing due from the 10th of August last, and that any payment on this account to the devisees of the late Earl of Shrewsbury will not in any way exonerate any parties who may have made such payments from their liability to pay the amount again to his lordship."

The 9th paragraph averred that the defendants, James Robert Hope Scott and Edward Bellasis, alleged that Bertram Arthur Talbot, Earl of Shrewsbury, executed a deed by which he disentailed the estate and obtained the fee simple therein, and by his will devised the said estates to those defendants.

The bill further averred that it was alleged by Lord Talbot that Bertram Arthur Talbot, Earl of Shrewsbury, had no power to disentail the estates, and that the devise was invalid.

The bill further stated that the defendants Scott and Bellasis had made many applications to the plaintiff to pay the rent to them, and in July 1857 had levied a distress in respect of the rent due in February; the plaintiff had thereupon brought an action of replevin, which was still pending, and the defendants Scott and Bellasis threatened to proceed in the action or enforce payment of the bond of replevin; they had also served him with notice to quit the premises at the end of the current year of his tenancy. The bill then prayed that the defendants Lord Talbot and Scott and Bellasis might interplead and settle their demands between themselves; that the plaintiff might be at liberty to pay the

rent due, and the future rent as it should accrue due, into court, and that the defendants might be restrained from any proceedings for the recovery of the rent or for ejecting the plaintiff.

To this bill Scott and Bellasis pleaded that the premises in question were not, nor was any part thereof, portion of the estate referred to in the act of parliament in the bill mentioned, and which estate was by such act of parliament limited to the uses set forth in the bill.

The plea being set down for argument,

Mr. W. M. James, Mr. Fleming and Mr. C. Hall, in support of the plea, cited *Jew v. Wood* (1).

Mr. Cairns and Mr. Swanston, jun., for the plaintiff, contended that he was not bound to set out in his bill the title under which each of the defendants claimed; if he was subjected to double vexation in respect of the same subject-matter, he was entitled to protection—*East and West India Dock Company v. Littledale* (2).

Mr. James replied.

WOOD, V.C.—This case appears to me to turn upon the merest point of form conceivable; because if the averments had been somewhat stronger or somewhat more pointed, (and there is no fault to be attributed to the pleader that they are not so, because this question which has arisen could not well have been anticipated by him,) there could be no question that an interpleader would lie, and that a plea of this description would not meet the case. The 8th paragraph of the bill seems to put the claim of Lord Talbot as being rested definitely on the letter. The rent is claimed in the letter as belonging to Lord Talbot, and it is stated that if payment is made to the devisees of Lord Shrewsbury, there will be a liability to pay the amount again to Lord Talbot, and the paragraph states that several other applications have been made by Lord Talbot requiring the plaintiff to pay the rent of the property to him. The 9th paragraph avers that the defendants allege that Lord

(1) Cr. & Ph. 185; s. c. 10 Law J. Rep. (N.S.) Chanc. 262.

(2) 7 Hare, 57.

Shrewsbury executed a deed by which he disentailed the estate and obtained the fee simple therein, and by will, dated in the month of April 1856, and duly made and executed, he devised the estates to the defendants Scott and Bellasis, and it goes on to allege that they have claimed the rent. Now, if it had merely put in issue that this particular farm and lands had been claimed by the defendants, Lord Talbot and the devisees, of course it would be quite immaterial then to know whether or not the lands did form part of that estate, which was settled by the act, or whether or not the devisees had claimed it by virtue of the disentailing deed and the devise in the will. At present the case stands in a somewhat peculiar position. The devisees admit all the facts; they admit that they are suing the plaintiff; they do not aver any title now as the case stands, because they aver according to the 9th paragraph (and perhaps I am obliged to hold, in strict pleading, they aver no more), the existence of the disentailing deed, and they aver the existence of the will affecting the general estates mentioned in the 1st paragraph, called the Shrewsbury estates, but that averment would be extremely immaterial if it were not to be connected with the act, and one might have a doubt whether in strict pleading it sufficiently raises an averment that this particular farm and estate had been claimed by the defendants under the disentailing deed and the will. Therefore, the case is brought to this position: if the plaintiff had sufficiently averred the claim of the devisees to be under the will, and in the subsequent part averred that the particular estate which he holds is held under the Shrewsbury act: if he had clearly and distinctly averred the claim of the two parties as being founded upon that act in the subsequent part of his bill, then, conceding to Mr. James that you may traverse every material fact upon an interpleading bill as well as upon any other, I apprehend the only question would be whether traversing an immaterial fact would be an answer to the whole bill.

Then, the bill averring that this is part of this particular land, and the plea being put in that it is not part of that land, the case would be brought to this point,

that I must look at it as if the contrary had been distinctly averred of that which is contained in paragraph 2, and as if it had been stated that this land was no part of this settled estate, but that these two claims had been raised in consequence of Lord Talbot insisting that it was part of the settled estate. I do not think it can get quite as high as that, for the reasons which I have already assigned, that it is not averred with sufficient distinctness in the subsequent part that it is so; but if it had been averred in that form some difficulty would have arisen, inasmuch as the answer then would be, why do you bring two persons here who are pleading upon wholly immaterial titles, one of which you say cannot exist? What reason is there upon so shadowy a case as that for producing either the one party or the other as defendants to an interpleader suit? Because I quite concur with what was expressed by Lord Cottenham in *Jew v. Wood*, that you must have something upon the face of the bill to shew that there is really a substantial question between the two parties. Then the case, as it appears to me, is even weaker than the one which I have supposed in this respect, because, looking at the issue which has been raised, and which was naturally unexpected by the pleader, I do not think it is with sufficient precision or accuracy averred that the claims are made by these several parties in respect of this particular estate being part of the property which is included in the Shrewsbury Act, and which is, therefore, to be governed by whatever may be the consequences of that act, either as to one party or the other in the suit; and feeling, as I do very strongly, that this is the merest matter of form, assuming—of course I only assume that for the moment, but I found my assumption on the letter of Lord Talbot's solicitors—assuming that Lord Talbot has made the claim in respect of its being a part of the Shrewsbury estate, then, by giving leave to amend and by striking out this clause, which avers that they are part of the Shrewsbury estate, it will be reduced to this position. The plaintiff will say, I took as a tenant from Lord Shrewsbury; I cannot know my landlord's title; but after his decease two persons claiming title under him, that is to say, claiming title in one

sense under him, claiming the reversion in respect of which the rent is reserved, though not strictly under him, are attacking me; the one claims under this particular title, and the other parties claim in some other capacity. They, by their own plea, have not alleged yet in what capacity they claim at all, but in their plea they say they do not claim in the capacity alleged, but under some title or other. It is sufficiently stated on the face of the bill to shew that there is something of a substantial question which, as it appears to me, would be raised if the plaintiff stated that act of parliament and stated the claim of Lord Talbot as founded upon it, and stated on the other hand the claim of the devisees as being a claim of a different description, whether founded on that title or not. The plaintiff cannot be put to try whether it is parcel or no parcel. That is no question of his. He knows, as I said before, nothing of the title under which his landlord holds. All that he has to see to is that he has not to pay his rent twice over upon the death of his landlord, to two persons, who claim the reversion of that rent against him, and either of whom he is willing to satisfy in respect of his being the tenant of the person under whose deed they claim the title, I do not say to the estate, but under whose instrument they claim title to that rent. The last Earl granted the lease; Lord Talbot says, I ratify the lease of that Earl, and I claim under the lease which he granted, the rent: that is the case he asserts. Somebody else says, I claim it in a different capacity from that same landlord. It is clear that that would be as simple a case for interpleader as possible. The right course, I think, to take is to allow the plea, because I do not think there is sufficient accuracy in the averment in reference to this; there is an unfortunate slip, apparently not the fault of the pleader, but which arose, probably, from his instructions as to the fact of this being a portion of the settled estates. If such is the case, the proper course will be to allow the plea and to give leave to amend. The costs must stand over till I see what case is raised upon the amendment, because this is a most idle plea.

L.C. }
Feb. 1. } *In re BISHTON AND CROCKETT.*

Dividends Unclaimed—Statute 56 Geo. 3. c. 60.

Where stock, which had been standing in the names of two persons, had been transferred to the Commissioners for the Reduction of the National Debt, in consequence of the dividends not having been claimed for ten years, the Court, upon the petition of the administrator of the survivor of the two persons to have the stock transferred to him, directed a reference to inquire who was entitled to the stock.

This was a petition, by Richard Crockett, as administrator of Henry Crockett, deceased, praying the transfer to him of a sum of stock which, under the 56 Geo. 3. c. 60, had been transferred to the Commissioners for the Reduction of the National Debt. It appeared that in 1807 the stock was standing in the names of John Bishton and Henry Crockett; and in that year J. Bishton died, leaving H. Crockett surviving. H. Crockett received the dividends through his bankers from 1807 to 1831, when the bankers ceased to carry on business. In April 1833 Henry Crockett died, and some years afterwards the stock was transferred to the Commissioners, as before stated. Upon the death of H. Crockett, George Crockett, one of his brothers, took possession of the greater part of his property; but died in June 1856, without having taken out administration. In 1855, William Crockett, another brother of H. Crockett, being a creditor, took out administration, and subsequently died. The present petitioner, another brother of H. Crockett, then procured letters of administration to be granted to him, and claimed this fund. Stuart, V.C. having declined to make an order on the petition, the case was brought before his Lordship.

Mr. W. W. Cooper, for the petitioner, asked that if it were doubted whether H. Crockett was entitled to the stock beneficially, an order might be made, similar to that made by Lord Cottenham in the case of *Ex parte Ram* (1), where his Lordship

referred it to the Master to inquire who was entitled to the stock, with liberty to state special circumstances.

Mr. Wickens, for the Commissioners, did not object to this; and accordingly

The LORD CHANCELLOR made the order in this form.

LORDS JUSTICES.

Nov. 24, 25;

Dec. 17.

DAWSON v. PRINCE.

Baron and Feme—Bill of Exchange—Separate Estate—Notice.

A bill of exchange was drawn in favour of a married woman, and sent by her trustees in a letter to her. Her husband surreptitiously obtained possession of the bill, and signed her name to it without her knowledge or concurrence, and having indorsed and discounted it through one P, who also indorsed it, he absconded. The wife, before the bill became due, discovered the fraud, and gave notice to the acceptors, who refused to pay at maturity. The discounters recovered at law against P, who sued the acceptors. The wife, by her next friend, filed her bill to restrain this action, and prayed that the acceptors might be ordered to pay the money to her on her separate receipt. The Master of the Rolls decided that no rights could be gained under the forged signature; that the payee being a married woman affected the party taking the bill with notice that it was the separate property of the wife; that the holder had a right to retain it, though he must not sue upon it, and that the acceptors must pay the money to the married woman. Upon appeal, the Lords Justices held, that P. was a bond fide holder for value, and as such legally entitled to the bill; that the Court would not interfere to defeat his title; and that no blame was attributable to him for not making inquiries other than of the husband, as to the wife's signature; and they dismissed the bill, with costs.

Whether the fact of the payee being a married woman being known was constructive notice that the money formed part of her separate estate—quære.

NEW SERIES XXVII.—CHANC.

This was an appeal from a decision of the Master of the Rolls, reported 26 *Law J. Rep.* (N.S.) *Chanc.* 849, where the facts are so fully stated that the following narrative will suffice. The plaintiff, Mrs. Charlotte Dawson, (who sued by her next friend) was entitled under her marriage settlement to the interest of 2,000*l.* part of her own property for her separate use for life. One of her trustees in Australia sent a bill of exchange, payable to her, drawn on the Bank of Australasia, on account of her separate estate. Her husband, Mr. Joseph Dawson, obtained possession of the letter in which the bill was enclosed, without the knowledge or concurrence of his wife, (the same being addressed to her to the care of Mr. Daniel Prince), and he left it at the Bank of Australasia for acceptance. It was accordingly accepted and made payable thirty days after the date of acceptance, at the bank of Smith, Payne & Smith. Mr. Dawson indorsed his wife's name, and applied to Mr. Prince to obtain discount, and, at his request, indorsed the bill with his own name. Thereupon Mr. Prince himself indorsed the bill, and got it discounted by Overend, Gurney & Co., and handed the money to Mr. Dawson, who absconded with it. On discovering the fraud which had been practised upon her by Mr. Dawson, Mrs. Dawson gave notice to the acceptors not to pay the bill at maturity; and upon the bank refusing to pay, the bill was returned to Mr. Prince. Overend, Gurney & Co. brought an action against Prince on his indorsement, and obtained a verdict, whereupon Prince paid the amount, and brought an action against the Bank of Australasia. The bill in this case was then filed to restrain the action, and praying that the bank might be ordered to pay the amount of the bill to Mrs. Dawson. The Master of the Rolls ordered the bank to pay the money to Mrs. Dawson, and granted a perpetual injunction against Mr. Prince to restrain his suing on the bill. In addition to the facts stated in the former report, it may be useful to mention, that the defence made by Mr. Prince in his answer was, that when he indorsed the bill he had no notice or reason to surmise that it was drawn in respect of the separate estate of the plaintiff, and that he had no reason to doubt, and did

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not in fact doubt, at the time when he indorsed the bill, that the indorsement of the plaintiff's name was in the plaintiff's own handwriting; and moreover, that the defendant Dawson acted with the knowledge and concurrence of the plaintiff in procuring the bill to be discounted. In the cross-examination of Mr. Prince by the plaintiff, he said, that at the time when Dawson brought the bill to him to be discounted, he had never seen the plaintiff, and that he did not know her handwriting; he admitted that he had made no inquiries whether it was or not really her handwriting, for he never entertained any doubt upon the point, as the bill was brought to him by her husband, who stated that the indorsement of her signature was in her handwriting; but that if he had known that such signature was not in her handwriting, he should not have procured the bill to be discounted; and that he should not have done so if her signature had not been indorsed, as to have done so without that signature would have been irregular.

Mr. Prince now appealed from the decision of the Master of the Rolls. On the opening of the appeal, counsel for the defendant Prince applied for leave to produce evidence to shew that the signature "Charlotte Dawson" was in the handwriting of that lady, and also asked leave to examine her upon that point.

Their Lordships, after conferring, consented to allow the fresh evidence to be put in, but only *de bene esse*, and it was to be wholly without prejudice to the question, whether, when taken, it was admissible, and if the plaintiff was willing to submit to be examined, their Lordships, under the same limitations, would allow it.

Three witnesses, who denominated themselves "experts in handwriting," deposed that they had examined the indorsement "Charlotte Dawson," on the bill, and they were each strongly of opinion that it was written by the same hand as was the signature to the marriage settlement of Mr. and Mrs. Dawson shewn to them.

Mrs. Dawson, having stated her willingness to be examined, deposed, in answer to questions put by Mr. Follett, that the indorsement was not in her handwriting, nor had she ever authorized her husband

to sign her name, nor was she aware that he had done so: that she never received any money for the bill: that her husband told her the bill was left at the Bank of Australasia, and could not be got away for some time: that her husband had never signed her name to this or any other document by her consent: that she did not interfere at once when she was told that the bill must remain at the bank because she believed that her husband could not obtain money for it without her signature made with her own hand, and that as he had dissipated all her property, except the money included in the settlement, she never would have consented to his receiving a shilling arising from the bill if she could have prevented it.

Mr. Speed and *Mr. J. P. Villiers*, for the plaintiff.—Even assuming that the indorsement by Mr. Dawson was sufficient to pass the legal interest in the bill, and admitting that, therefore, Prince was the holder with a legal title, there is an equity for the Court to interfere in favour of a married woman to protect her right from invasion on the ground that Prince well knew that she was a married woman, in whose favour the document was drawn. Having so much notice, it was the duty of Prince to make further inquiries, as he must be fairly assumed to be aware that the money formed part of her separate estate. At all events, he was bound to make further inquiries, and not to trust to the representations of Mr. Dawson that the signature was that of his wife. Beyond this, the situation held by Prince in the transaction was no more than that of agent for Dawson, and in that capacity he had voluntarily incurred a liability by reason of his own indorsement, and could never be treated by the Court as a purchaser for value—*Esdaille v. La Nauze* (1).

Mr. Follett and *Mr. C. T. Simpson*, for the appellant.—The title of Mr. Prince is good at law, and in such a case this Court does not interfere with it; moreover he holds this security as a purchaser for valuable consideration without notice of any equities affecting it, and as such he is the

(1) 1 You. & C. 394; s. c. nom. *Esdaille v. Lanoge*, 4 Law J. Rep. (n.s.) Exch. Eq. 46.

more entitled to the forbearance of the Court. That is the plain and undeniable principle of the Court in such matters. The observations of the Master of the Rolls, that the mere fact of a bill being made payable to a married woman, was notice to all that it was payable in respect of her separate estate, were wholly subversive of the cases of *Mason v. Morgan* (2) and *Barlow v. Bishop* (3). To revert, however, to the legal title and its prevalence over all equitable demands, the cases of *Jones v. Powles* (4) and *Jones v. Smith* (5) are conclusive, and the principle of the former case is distinctly approved by Lord St. Leonards in that of *Bowen v. Evans* (6). The following authorities were also referred to:—

West v. Reid, 2 Hare, 249, 257; s. c. 12 Law J. Rep. (N.S.) Chanc. 245.

Ware v. Lord Egmont, 4 De Gex, M. & G. 460; s. c. 24 Law J. Rep. (N.S.) Chanc. 361.

3 *Sug. Vend. and Pur.* 10 ed. 471, 472.

As to the amount of inquiry necessary to be made by a mortgagee or an assignee in order to save him from a charge of negligence, they cited *Hewitt v. Loosemore* (7).

Mr. Cotton, for the Royal Bank of Australasia, submitted to act as the Court should direct.

Mr. Speed, in reply, observed that although great stress had been laid on the cases of *Jones v. Smith*, *Jones v. Powles* and *Hewitt v. Loosemore*, they presented no serious difficulty, seeing that they referred not to mercantile instruments or mercantile matters, as was the case in the matter before the Court, but to questions relating to real estate. *Mr. Prince* did not take the bill in the ordinary course of business, but as a mere matter of personal accommodation to a friend he indorsed it

and obtained discount, and then, without making any charges, handed the proceeds over to *Mr. Dawson*. The latter, when he obtained possession of the bill, became a mere trustee for his wife, and *Mr. Prince*, who well knew that it was made payable to her, could not be permitted to stand in a better position.

[*LORD JUSTICE TURNER*.—Would that have been so if Dawson had become bankrupt?]

In that case the assignees would have stood in the same position as Dawson. To shew that Prince ought to have made further inquiry, it was sufficient to state that the bill came in a letter addressed to the wife, that Dawson told him when he asked him to get the bill discounted that he was about to leave England, and that although the wife's name appeared on the back of the bill, there was nothing but *Mr. Dawson's* assertion to shew that the signature "*Charlotte Dawson*" was that of the wife. Such a course indicated gross negligence, and *Mr. Prince* must take the consequence.

Their LORDSHIPS signified their approval of the manner in which the case had been argued on each side.

Dec. 17.—*LORD JUSTICE KNIGHT BRUCE* said, that in this case *Mrs. Charlotte Dawson*, a married lady, suing by her next friend, claimed for her separate use a bill of exchange for 196*l.*, of which she was the payee, which bill came into, and now was in, the hands of the defendant Prince, as indorsee and legal holder. The bill was overdue, and the Bank of Australasia, who were the acceptors, were willing to pay the money to him, unless prevented by the Court. The title of the plaintiff was equitable only, the title of the defendant Prince being undoubtedly good at law; and the only dispute in the present suit was between the plaintiff and *Mr. Prince*. The bill bore the indorsement of the plaintiff; but that signature was said by her to be forged; but, whether forged or not, it undoubtedly bore the genuine signature of the husband, and the defendant insisted that it came into his hands as purchaser for a valuable consideration, and that he was entitled to recover at law upon it, and to retain the amount for his own benefit. The

(2) 2 Ad. & E. 30; s. c. 4 N. & M. 46; 4 Law J. Rep. (N.S.) K.B. 12.

(3) 1 East, 432.

(4) 3 Myl. & K. 581; s. c. 3 Law J. Rep. (N.S.) Chanc. 210.

(5) 1 Phill. 244; s. c. 12 Law J. Rep. (N.S.) Chanc. 381; 1 Hare, 43; 11 Law J. Rep. (N.S.) Chanc. 83.

(6) 1 J. & L. 178, 264.

(7) 9 Hare, 449; s. c. 21 Law J. Rep. (N.S.) Chanc. 69.

Master of the Rolls, on the materials before him, declared the signature of the plaintiff to be not genuine, and to have been written without her consent, knowledge or authority; that she was entitled to the amount for her separate use; that as between herself and her husband, he had no right to deal with it, and that her title was paramount in a court of equity to that of a legal holder. Further evidence had been tendered in this court in proof of the genuineness of the signature of Mrs. Dawson, and that evidence was admitted *de bene esse*. His Lordship had doubted at the time, and he doubted still, whether it could, in the circumstances of the case, be right to admit it absolutely; but that evidence was unimportant upon the question whether relief could be given to the plaintiff; and she was also cross-examined *vidé voce* before this Court, with her own consent, by the counsel for Prince. Both parties were entitled to have that evidence used in the suit. Whether, upon the whole of the materials, either including the evidence *de bene esse* or not, it was right to conclude that the indorsement had been made by the husband without the authority of the wife, he (the Lord Justice) did not intend to say; but, at all events, no injustice could be done to the plaintiff by assuming for the present question (namely, whether the plaintiff was entitled to relief in this suit), that the bill was remitted to the plaintiff in this country in respect of her separate estate; that it was not indorsed by her, but by Mr. Joseph Dawson, her husband, and dealt with by him without her consent; that, as against her, he had no equitable power to deal with it, and that the sole question was whether, under these circumstances, her equitable claim could prevail against the legal title, which was clearly vested in Prince, and for valuable consideration. "For valuable consideration," because Prince indorsed the bill for the purpose of getting it discounted, and by that step became liable to pay it to the discounters at maturity, and he had handed to Dawson the sum which he had received from the discounters. However good the equitable title might have been if Prince had not indorsed it and paid the money, that equitable title must, under the actual circumstances, give way to the

legal title, inasmuch as neither before nor at the time when he indorsed and paid it, had Prince any knowledge, information or notice of any facts rendering it incumbent upon him, as between himself and the plaintiff, to apply to her personally, or to make any further inquiries than those he did make. Whether the fact that he was aware that the plaintiff was the wife of J. Dawson, and that she was so at the time when the bill was drawn, amounted to notice, actual or constructive, to him, that it was drawn in respect of her separate estate, or formed part of her separate property, it was unnecessary to give, and accordingly he did not give, any opinion; but he was entirely satisfied that the defendant Prince did not know in fact, believe in fact, or suspect in fact, that the plaintiff had any interest in the bill for her separate estate, or that any irregularity existed. Prince certainly knew that the bill of exchange required her indorsement, but in reply to his inquiries he was informed by the husband that the indorsement was of her handwriting, and he had no grounds for doubting the assertion that it was so; he believed, therefore, in the genuineness of the signature, and no negligence was to be imputed to him for doing so. There was no suspicious appearance about the signature to a person who was not familiar, or even to one who was familiar, with the plaintiff's handwriting; and any reasonable man might have believed that her husband was acting not without her consent, not without her authority. The defendant must for all the purposes of the suit be held to rely on Dawson's assertion that it was his wife's signature, and that he was not without equitable as well as legal title. That Prince had meant to act honestly throughout he (the Lord Justice) felt satisfied, and although he thought that, if the plaintiff had not been Dawson's wife, the defendant would have lost his money by reason of the forgery, yet in the present circumstances he ought to be dismissed, and as his conduct had been blameless, the plaintiff's next friend must pay his costs of the suit, though, of course, he would be entitled to no costs of the appeal.

LORD JUSTICE TURNER added, that the case was peculiar in its circumstances, but

he considered it was governed by principle and authorities to which this Court was bound to give effect. Both on principle and authority the Court would give no relief against a purchaser for valuable consideration, clothed with the legal title, and who had no notice of any equities affecting the instrument. Now, it was not denied in the present case that the defendant Prince had a good legal title, and the questions were, whether he had actual or constructive notice of the plaintiff's equity, and whether he was a purchaser for valuable consideration. First, as to the notice. It had been contended that the mere fact of a bill of exchange being drawn in favour of a woman was in itself notice that it was in respect of her separate estate. But assuming this to be true, without at all deciding that it was, he was of opinion that it was immaterial to the present case. The bill purported to bear the indorsement of the plaintiff; and in answer to Prince's inquiries, he was told by her husband that that indorsement was in her own handwriting. He (the Lord Justice) thought that he was entitled to rely upon this statement, and could not hold that he was bound to make any further inquiries. He decided this case on the authority of *Jones v. Smith* and *Ware v. Lord Egmont*, and although the plaintiff's counsel had urged that those cases had reference only to real estate, he (Lord Justice Turner) thought that they were decided upon the broad principle, and he could not see why it would not be as dangerous to extend the doctrine of constructive notice in a commercial transaction as in a case affecting real estate. Then, again, it had been argued that this was not an ordinary commercial transaction. But the bill was an instrument of commerce in the hands of a person engaged in commercial transactions, and it could not be said that it was incumbent on such a person to treat such an instrument otherwise than according to commercial usage. He had come to the conclusion, that Prince could not be held to be affected with notice that the signature of the plaintiff was a forgery, as to which point he should express no opinion. The question of valuable consideration paid by the defendant remained; and he thought Prince was a purchaser for valuable consideration. If Prince had himself discounted the bill, there could

have been no doubt; and the fact, that he did not actually advance the money, but procured it to be done, and rendered himself liable to those who made the advance, could not make any difference. It was said, however, that Prince was merely the agent of Dawson; but even if so, he was under liability to account to his principal. The present bill ought to be dismissed, and with costs; but inasmuch as the plaintiff had the authority of the Master of the Rolls in her favour, there would be no costs of appeal to Prince; nor would there be any costs of appeal at all, excepting those of the Bank of Australasia, which must be borne throughout by the next friend of the plaintiff.

LORDS JUSTICES. } *In re BLOOMAR, a lunatic.*
 Dec. 22.

Lunacy — Jurisdiction — Partition — Trustee Act, 1850—Lunacy Regulation Act, 1853.

Several persons were joint tenants in tail in possession of an undivided share of lands. One of them was a lunatic. A suit was instituted for partition, in which the lunatic, by the committee of her estate, was a defendant and appeared. The chief clerk, by his certificate, allotted the lands in severalty, and one of the Vice Chancellors, at the hearing upon further consideration, decreed partition and made an order in the suit, and also under the Trustee Act, 1850, (13 & 14 Vict. c. 60), for the purpose of effectuating the decree, by which he declared the lunatic a trustee of certain hereditaments. Application by petition was made to the Lords Justices to enable the order of the Vice Chancellor to be carried into effect, and their Lordships, on the committee stating his opinion that the partition would be for the benefit of the lunatic, made an order, entitled in the suit, in the lunacy, in the matter of the Trustee Act, 1850, and of the Lunacy Regulation Act (16 & 17 Vict. c. 70), directing the decree to be carried into effect, and that the committee should execute a conveyance of the land vested in the lunatic.

This was a petition presented in the matter of the lunacy, in the matter of the Trustee Act, 1850, and in the cause of

Singleton v. Hopkins, the object of which was to carry into effect an order made by Vice Chancellor Stuart.

The facts of the case were as follows :—Charlotte Bloomar, a lunatic, was seised as tenant in tail in possession of one undivided fourth part of lands in the county of Leicester. One of the joint tenants filed a bill praying a partition of the same lands, to which bill the lunatic was made a defendant by her committee, and a decree for a partition was made by his Honour. In pursuance of this decree the chief clerk allotted the lands in severalty, and his certificate was approved, and by order of the Vice Chancellor, on further consideration, on the 7th of December, he ordered the estates to be conveyed in severalty, and declared the lunatic to be a trustee for that purpose, under the Trustee Act, 1850, of the hereditaments mentioned therein ; and he further directed that the costs of the parties entitled should be a charge upon their respective shares of the estates, and that the amounts of such costs should, if necessary, be raised by mortgages or a mortgage of the same.

Mr. A. Boyd Purcell appeared in support of the petition, and said the only difficulty which appeared to present itself arose from the fact of the lunacy. That the order was right so far as the Trustee Act, 1850, was concerned appeared clear from the 3rd and 30th sections of that statute, whereby, in effect, it was enacted that when a lunatic should be seised of land upon trust, the Lord Chancellor might make an order vesting the same in such persons as he should think fit, and that under a decree for partition the Court might declare any parties to the suit trustees of lands within the meaning of the act. It was true that the order being in this case made by one of the Vice Chancellors, it was doubtful how far his Honour had jurisdiction, seeing that this particular defendant was a lunatic, yet it was clear of doubt that the Lords Justices had such jurisdiction as would enable them to order the decree and order of his Honour to be carried into effect, inasmuch as they could have made the order under those sections of the Trustee Act, 1850. In addition to this, the Lunacy Regulation Act (16 & 17 Vict. c. 70), came in aid, by the 124th section

of which it was enacted that where a lunatic is seised of an undivided part of land, and it appears to be for his benefit that a partition should be made, the Lord Chancellor (and consequently now the Lords Justices) may order the committee of the estate to do such acts as may be necessary to effect the same (1).

(1) The sections of the Trustee Act, 1850, referred to in the argument above, viz., the 3rd and the 30th, were as follows :—Section 3. enacts, "That when any lunatic or person of unsound mind shall be seised or possessed of any lands upon any trust, or by way of mortgage, it shall be lawful for the Lord Chancellor, intrusted by virtue of the Queen's sign manual with the care of the persons and estates of lunatics, to make an order that such lands be vested in such person or persons, in such manner and for such estate as he shall direct." And by the latter it is provided, "That where any decree shall be made by any court of equity for the specific performance of a contract concerning any lands, or for the partition or exchange of any lands, or generally when any decree shall be made for the conveyance or assignment of any lands, either in cases arising out of the doctrine of election or otherwise, it shall be lawful for the said Court to declare that any of the parties to the said suit, wherein such decree is made, are trustees of such land, or any part thereof within the meaning of this act."

The clauses of the Lunacy Regulation Act, 1853, were the 124th and 137th. By section 124. it is enacted as follows :—"Where a lunatic is seised of or entitled to an undivided share of land, and it appears to the Lord Chancellor, intrusted as aforesaid, to be for his benefit, and to be expedient, that a sale of the land, or part thereof, or a partition of the land should be made ; and where a lunatic is seised of or entitled to land, and it appears to the Lord Chancellor, intrusted as aforesaid, to be for his benefit, and to be expedient, that an exchange thereof, or of part thereof, for other land should be made, the Committee of the estate, in the name and on behalf of the lunatic, under an order of the Lord Chancellor, intrusted as aforesaid, may concur with such other person in making such sale or partition, or may make such exchange and receive such monies payable on the sale, and give or receive such monies for equality of partition or exchange, or otherwise in relation thereto, as the order may direct."

Section 137. is this :—"Where a power is vested in a lunatic in the character of trustee or guardian, or the consent of a lunatic to the exercise of a power is necessary in the like character, or as a check upon the undue exercise of the power, and it appears to the Lord Chancellor, intrusted as aforesaid, to be fit and expedient that the power should be exercised or the consent given (as the case may be), the Committee of the estate, in the name and on behalf of the lunatic, under an order of the Lord Chancellor, intrusted as aforesaid, made upon the application of any person interested in the exercise of the power, may exercise the power or give the consent, as the case may be, in such manner as the order shall direct."

LORD JUSTICE KNIGHT BRUCE. — Of course there must be some mode of carrying such an order into effect.

LORD JUSTICE TURNER. — It is my impression that the case can be sufficiently dealt with under the Trustee Act, 1850.

LORD JUSTICE KNIGHT BRUCE. — That seems to be so; but Mr. Purcell must take the hazard of the title being hereafter objected to by conveyancers. Those gentlemen, it is well to remember, are proverbially hard to please.

Mr. Purcell observed, that perhaps some aid might be afforded, if their Lordships thought any were needed, by the 137th section of the Lunacy Regulation Act, by which the Lord Chancellor is empowered to make an order directing in what manner powers may be exercised or consents given to the exercise of powers when such powers or consents are vested in lunatic trustees.

LORD JUSTICE TURNER. — The order may be this, which must recite that the committee consenting to convey, and by his counsel stating his opinion to be, that the partition mentioned in the certificate of the chief clerk is for the benefit of the lunatic, declare that, as it appears to be for the benefit of the lunatic that the partition should be completed, according to the order of Stuart, V.C., made on further consideration, let the partition be completed accordingly, and let the committee of the lunatic's estate convey the estate and interest of the lunatic in such manner as to give effect to the partition by such order directed to be made. The order must be entitled, as well in the matter of the lunacy as in the partition suit, as well as in the matters of the Trustee Act 1850, and the Lunacy Regulation Act 1853.

KINDERSLEY, V.C. } *In re* HEADINGTON'S
Nov. 6. } TRUST.

Trustees' Relief Act—Liability to Costs.

A trustee will be allowed his costs of paying money into court under the Trustees' Relief Act where there is a case of bona fide responsibility. He is not bound to take upon

himself the responsibility of deciding between adverse claimants.

This petition stated that, in 1840, Henry Holloway assigned all his property to trustees, Messrs. Taylor and Poplis, upon trust for the benefit of his creditors; and that in 1848 the said Henry Holloway took the benefit of the Insolvent Debtors Act, and Mr. Sturgis was appointed the official assignee under the insolvency. At the time of executing the deed of assignment H. Holloway was entitled to a sum of 500*l.*, under the will of W. C. Headington, subject to the life estate of Mrs. C. Holloway, his mother. Mrs. Holloway died in the year 1857, and thereupon H. Holloway gave notice in writing to Hugh Parnell, the surviving trustee of the will of W. C. Headington, not to pay over the said sum of 500*l.* to any one but himself. At the same time a claim was made to the money by the creditors of H. Holloway, and after a lengthened negotiation between the parties, Mr. H. Parnell paid the 500*l.* into court under the Trustees' Relief Act.

A petition was now presented by Mr. Taylor, the surviving trustee of the deed of assignment, for payment of the fund to him.

The right of the petitioner was not disputed, but it was submitted, on behalf of Mr. Taylor, that H. Parnell was not justified in paying the money into court, and that he ought to be ordered to pay the costs of the petition.

Mr. Glasse, in support of the petition, contended that the right of the trustees under the deed of assignment, to the fund in question, was so clear that Mr. Parnell ought to be made to pay the costs incurred by the course he had taken. Even supposing the trustees of the deed of assignment were not entitled, still, as Mr. Holloway had subsequently become insolvent, he never could, under any circumstances, be entitled to the money. He cited—

In re Woodburn's Trusts, 26 Law J. Rep. (N.S.) Chanc. 522.

In re Fagg's Trust, 19 Ibid. 175.

Mr. Speed, on behalf of Mr. Parnell, submitted that he was perfectly justified

in paying the money into court. The deed of assignment was executed seventeen years before the legacy became due, and a claim was made by Mr. Holloway, who insisted upon his right to the money. It was impossible for Mr. Parnell to know what had taken place since that deed, nor ought he to be called upon to exercise his own discretion as to the rights of the parties. It was evident that there were conflicting claims to the fund, and that alone was sufficient to justify the trustee in taking advantage of the Trustees' Relief Act, and throwing off the responsibility to which he might have been subject.—

In re Croyden's Trust, 19 Law J. Rep. (N.S.) Chanc. 172.

In re Cawthorne, 12 Beav. 56; s. c. 18 Law J. Rep. (N.S.) Chanc. 116.

In re Bendyshe, 26 Law J. Rep. (N.S.) Chanc. 814.

KINDERSLEY, V.C.—It is evident that the Trustees' Relief Act was framed to enable trustees, with funds in their hands, to relieve themselves from any responsibility which might arise or be incurred, and it justified them, under such circumstances, in the payment of a fund into court. On the other hand, a trustee is not so justified, where he is not acting *bond fide*, but from capricious or worse motives, and from a desire to vex, annoy, oppress or injure the parties with whom he is dealing. The case of *Woodburn's Trusts* is the leading case in this sense, that it established the jurisdiction which the Court has to make trustees pay costs, and the Master of the Rolls proceeded on the ground that a trustee might, in the first instance, decline to run any risk; but that he was not entitled, after leading the parties on to incur expense in proving their title, suddenly to pay the money into court, where he evidently was acting from caprice, without any assignable reason. When that case came before the Lords Justices they thought it a case of oppression, and Lord Justice Knight Bruce characterized it as scandalous; that the length of the correspondence was unexampled; that there had been exhibitions of temper and threats; and that the objection was flimsy and frivolous. Lord Justice Turner concurred in that view; and then came the question of

jurisdiction. In any case at all similar to that I should consider it a case of oppression, and not of a trustee seeking to be relieved from responsibility, but acting from an improper motive. In this case Parnell received an actual notice in writing from a person who, *primâ facie*, was entitled to the fund, calling upon him, at his peril, not to pay it to any one but himself without his concurrence. There was no ground to suppose any connivance, and the fund was then claimed by the trustees of the deed of assignment executed sixteen or seventeen years previously, but embracing this interest, which was reversionary. Parnell replied, that he had received a notice from Holloway not to pay over the fund, and there was nothing unreasonable in his speaking of responsibility under such circumstances. He might be strongly of opinion that the trustees were entitled, assuming he had evidence of the execution of the deed; but how could he take upon himself to say that? Holloway might treat the deed as inoperative by reason of subsequent events, and why was the trustee to take the responsibility of finding that out? The very suggestion of such a chance shewed that there was a responsibility, whether greater or less was not the question. It was in fact just the case which the act was intended to meet; the trustee was not bound to take upon himself any risk, and here there was a risk. It was justly said that, irrespective of the deed, Holloway had no right because of his insolvency, and *quâcunque viâ* he was not entitled; but was Parnell to decide the question as to the right of the official assignee in insolvency, in respect to what might have subsequently occurred? This case does not appear to me to come within the principle of *Woodburn's Trusts*; it is not a case of flagrant oppression. Parnell did not act from an improper motive, neither did he miscarry in point of judgment. He received positive notice, and it was a case of *bond fide* responsibility from which he had a right to relieve himself. He is therefore entitled to have his costs.

STUART, V.C. }
 Nov. 5. } WILLIAMS v. ROBERTS.

Will — Gift to Executors — Resulting Trust.

Testator gave and bequeathed all his residuary estate to his wife, "upon trust" to pay thereout an annuity, and "upon further trust" to pay certain legacies, which did not exhaust the personal estate. He referred to his wife as his executrix in the will; but the will did not contain any express appointment of her as executrix:—Held, upon the construction of the will, that she was entitled beneficially to the surplus estate.

John Johnston made his will, dated the 20th of March 1850, in the following terms:—"This is the last will and testament of me, John Johnston, of the city of Chester, hotel-keeper. Firstly, I direct that all my just debts and funeral expenses be duly paid and satisfied by my executrix hereinafter named, as soon as conveniently may be after my decease; and secondly, I give, devise and bequeath all and every my household furniture, linen and wearing apparel, books, plate, china, pictures, horses, carts and carriages, and also all and every sum and sums of money which may be in my house, at my bankers, or may be about my person, or due to me, at the time of my decease; and also all and every other my stocks, funds and securities for money, money on bonds, bills, notes, railway shares or other securities, and all and every other my estate and effects whatsoever and wheresoever, both real and personal, whether in possession, reversion, remainder or expectancy, unto Elizabeth Johnston, my lawful wife, her executors and administrators, upon trust to pay unto my daughter Ellen Margaret Johnston, wife of William Maysmore Williams, of the city of Chester, tobacconist, yearly, and every year during the lifetime of my said executrix, the sum of 50*l.* of lawful money of Great Britain; and upon further trust that she, my said executrix, at the time of her decease shall cause her executors, administrators or assigns to pay, or cause to be paid, unto John Johnston, the son of James Johnston, now of Holyhead, in the island of Anglesea, engineer,

the sum of 50*l.* of lawful money of Great Britain; and upon further trust to pay unto my sister Janet Brown, widow of the late Michael Brown, of Kilmarnock, in the county of Ayr, Scotland, and also unto my sister Agnes Sowdon, of Kilmarnock aforesaid, should they survive my said executrix, the sum of 30*l.*, of lawful money of Great Britain, each." The will contained no express appointment of an executrix.

The testator died on the 19th of July 1850; and on the 22nd of August following, probate of his will was granted by the Consistory Court of Chester to his widow, the said Elizabeth Johnston, as the executrix according to the tenour of his said will.

Elizabeth Johnston, the widow and executrix of the testator, died on the 4th of November 1856, having by her will, dated the 28th of October 1856, given certain legacies therein mentioned to the said W. M. Williams and to Robert Roberts and William Francis Ayrton respectively, certain specific articles to the said Ellen Margaret Williams absolutely, and finally all the residue of her personal property, including a leasehold estate in Curzon Park, to the said R. Roberts and W. F. Ayrton, their executors and administrators, upon certain trusts therein mentioned for the benefit of her daughter, the said Ellen Margaret Williams, during her life, and after her death of her children.

The bill was filed, by the said Ellen Margaret Williams, who was the only child of the said testator and testatrix, and by the three infant children of the said E. M. Williams (by their next friend) alleging that, since the death of the testatrix Elizabeth Johnston, her executors, the defendants R. Roberts and W. F. Ayrton, had possessed themselves of her personal estate, including the estate and property of the testator J. Johnston, which had been in the possession and enjoyment of the testatrix during her lifetime.

The plaintiffs, by their bill, claimed the personal estate of the testator J. Johnston, as having passed to the testatrix Elizabeth Johnston absolutely, and as being therefore subject to the trusts of the will of the testatrix. The defendant W. M. Williams,

the husband of the plaintiff E. M. Williams, was alleged by the bill to claim, in right of his wife (the plaintiff), two-thirds of the residuary estate of the testator J. Johnston, and to found such claim on the ground that, upon the true construction of the testator's will, Elizabeth Johnston, his widow, did not become entitled absolutely to his residuary estate, but that such residuary estate was held by her as a trustee for herself and the plaintiff, Ellen Margaret Williams, as his widow and next-of-kin.

Mr. Malins and Mr. F. H. Colt, for the plaintiffs. — The testator's residuary personal property is given, by his will, to his executrix "upon trust;" and this, without qualification by the context, would no doubt be sufficient to exclude any beneficial interest in her. It is, however, submitted that in this case, (as the trusts created by the testator do not exhaust the estate) an implication arises that the executrix was intended to take the residue for her own benefit. The plaintiffs contend moreover that the statute, 1 Will. 4. c. 40, does not apply to the present case.

Cook v. Hutchinson, 1 Keen, 42.

Hughes v. Evans, 13 Sim. 496.

Love v. Gaze, 8 Beav. 472.

Dawson v. Clark, 15 Ves. 409; s. c. 18 Ibid. 247.

Mr. Bacon and Mr. Freeling, for the defendant Williams. — We contend that the words "in trust" are sufficient to affect the whole property in the hands of the executrix with a trust, and as the trusts imposed by the testator extend only to the legacies given to others than the executrix, the widow and the next-of-kin, as the persons entitled under the Statute of Distributions, are the *cestuis que trust* of the residue in accordance with the provisions of the statute 1 Will. 4. c. 40. — *Mapp v. Ellcock* (1). The testator through-out the will treats his widow as his executrix — *Mullen v. Bowman* (2).

Mr. Jolliffe, for the other defendant.

(1) 2 Phill. 793; s. c. 18 Law J. Rep. (N.S.) Chanc. 217; on appeal, nom. *Ellcock v. Mapp*, 3 H.L. Cas. 492.

(2) 1 Coll. 197; s. c. 13 Law J. Rep. (N.S.) Chanc. 342.

STUART, V.C. — The question is, whether the testator has, by his will, made his widow a trustee of the whole or of part only of his personal estate. The language of the will cannot, I think, be construed in any other way than as making her a trustee of that portion of the property only which is given to the legatees other than herself. The statute 1 Will. 4. c. 40. does not, I think, apply to this case in any way.

STUART, V.C.
Nov. 6.

{ *Ex parte* THE PRESIDENT
AND FELLOWS OF QUEEN'S
COLLEGE, CAMBRIDGE, *in*
re THE COPYHOLD COM-
MISSIONERS AND THE COPY-
HOLD ACT, 1852.

Practice—Copyhold Act, 1852—Petition for Investment of Compensation—Costs of Appearance of Copyhold Commissioners.

A fund payable for the enfranchisement of copyholds having been paid, pursuant to the provisions of the Copyhold Act, 1852, into the Bank, in the name of the Accountant General, to an account "Ex parte the Copyhold Commissioners," the petition of the lord of the manor for the investment of the fund, pursuant to the act, was served upon the Commissioners, who appeared thereupon, but only to ask for their costs:—Held, that they were entitled to the costs of their appearance.

Certain lands, parcel of a manor of which the petitioners were the lords, having been enfranchised under the provisions of the Copyhold Act, 1852, the money payable for such enfranchisement had, pursuant to the said act, been paid into the Bank, and placed there, with other funds, in the name of the Accountant General, to the account "Ex parte the Copyhold Commissioners." The present petition was for the investment of the fund so paid in, and for payment of the dividends to arise from such investment when made to the petitioners.

The Copyhold Commissioners, having been served with the petition, appeared upon the hearing thereof, but only to ask for their costs.

Mr. Goren, for the petitioners, submitted that as the Commissioners had, pursuant to the provisions of the act of parliament, consented to the enfranchisement, and been made parties to the deed of enfranchisement, they must be presumed to have satisfied themselves as to the title of the petitioners; and that, therefore, their appearance was unnecessary, and such that, under the circumstances, the costs thereof ought not to be allowed to them. He cited—

In re the Justices of Coventry, 19 Beav. 158; s. c. 24 Law J. Rep. (N.S.) Chanc. 586.

Day v. Croft, Ibid. 518.

STUART, V.C. said, that the Commissioners, on being served with the petition, would of course have to refer it to their solicitor to advise whether the proposed mode of dealing with the fund was a proper one. For obtaining the costs so incurred the only course open to them seemed to be that of appearing to ask for them as they had done. The case could not be considered analogous to that of an appearance upon a petition in a cause, where each party having a solicitor in the cause, there was no necessity for their appearing specially upon a petition, in order to obtain the costs of their being advised as to the necessity of such appearance. The Commissioners must therefore have their costs.

STUART, V.C. }
Nov. 11. } LUNHAM v. BLUNDELL.

Trustee—Negligence—Payment by Order of Court.

A trustee was removed by decree of the Court and ordered to pay the balance of the trust fund in his hands to the new trustees appointed by such decree; but no time was fixed by the decree for the payment. The retiring trustee, having omitted for some weeks to make the payment ordered, a correspondence took place between his solicitor and the solicitors of the new trustees, who in their last letter fixed a day by which they said the payment must be made. Shortly before the day so fixed, the bank in which

the trust balance had been deposited by the retiring trustee failed:—Held, that the retiring trustee was personally liable to make good the fund to the trust estate.

This suit was for the administration of the estate of a deceased testator. By the decree in the cause, dated in July 1857, the defendant, Joseph Blundell, the survivor of the trustees of the testator's will, was discharged from being such trustee, and two other trustees were appointed in his place; his costs, charges and expenses were ordered to be taxed and to be retained by him out of the testator's estate then in his hands as trustee of the will, and he was ordered to pay the balance to the new trustees.

The costs of Blundell were taxed on or about the 11th of August 1857, and the balance of the testator's estate received by him was left by him in the bank of Messrs. Harrison & Co. at Hull, where he had placed it before the date of the decree to his own separate account. Blundell made no payment in respect of such balance to the new trustees; and a correspondence arose between his solicitor and the solicitors of the new trustees, in which the latter claimed payment of the balance on behalf of their clients, and complained of the delay: and the former attributed the delay to the absence of their client from home on account of ill health. The last of the letters composing such correspondence was dated the 22nd of September 1857, and written by the solicitors of the new trustees to the solicitor of Blundell, saying that their clients would wait until the 28th of September, on which day the matter must be settled.

On the 24th of September 1857, the bank of the Messrs. Harrison failed, and the balance which still remained deposited there was lost.

The present motion was for an order upon Blundell to pay to the new trustees the balance of the testator's estate received by him, after deducting therefrom his taxed costs.

Mr. Malins and *Mr. Amphlett*, in support of the motion, contended that Blundell should be held personally liable for the balance, which could only be considered

as lost by his neglect to pay it to the trustees at an earlier date.

Mr. Bacon and Mr. E. C. Karlake, for the defendant *Blundell*, argued that as no time was fixed for payment of the money by the decree, the delay which, as shewn by the correspondence, had been acquiesced in by the new trustees, was not so unreasonably long as to render their client personally liable for neglect.

STUART, V.C.—Upon the pronouncing of the decree, the defendant's character of trustee was determined; and, after the taxation of his costs, there could be no fair pretence for delaying to pay over the money to the new trustees appointed by the Court. The letters were written for an indulgence which was granted, but the defendant cannot, on that ground, be held entitled to be exonerated from his personal liability to make good the loss which has taken place. The motion must be granted, with costs to be paid by the defendant.

KINDERSLEY, V.C. } POOLEY v. QUILTER.
Jan. 15.

Bankruptcy — Purchase of Claim by Assignee.

The creditor of a bankrupt sold his claim under the bankrupt's estate to A. B., who was introduced to him by the bankrupt's assignee. The creditor afterwards ascertained that A. B. had purchased the claim as to one moiety as trustee for the assignee, who purchased for the benefit of the general creditors. A bill was filed to set aside the transaction:—Held, that the bill must be dismissed as against A. B. so far as he purchased on his own account, but an issue was directed to ascertain whether the creditor was aware that the purchase was effected partly on behalf of the assignee. If the purchase had been by the assignee himself, the transaction would not have been set aside, unless there had been fraud or concealment on the part of the assignee.

This bill was filed, by *Alexander Pooley*, against the defendants, *William Quilter*, an accountant, and *John Whidborne*, a solicitor, for the purpose of setting aside

certain transactions entered into by the plaintiff, under the bankruptcy of *George Hennet*. It appeared from the statements in the bill and the evidence produced on both sides, that *George Hennet*, a railway contractor and shipowner, became a bankrupt, on the 25th of March 1853, and the defendant *W. Quilter* and Messrs. *H. A. Burge* and *J. Pryor* were chosen creditors' assignees. The plaintiff was a creditor in respect of various bills held by him, for which he claimed to prove, to the amount of 33,433*l.* On the 11th of November 1853 the plaintiff proved under the bankruptcy for 23,433*l.*, but the rest of his claim was disputed. A negotiation was then entered into between the plaintiff and *W. Quilter* respecting the sale of the plaintiff's claim; and the following letter, which constituted the principal feature in the negotiation, was written by the plaintiff to *W. Quilter* upon the subject:—

"Sir,—I hold of *Mr. Hennet's* bills 33,433*l.* 11*s.* 2*d.* I am willing to abandon my proof against the estate for 10,000*l.* provided you allow me to return to *D. L. Lewis* 10,000*l.* bills, and render me such aid as you are able to recover from him such sum as I should be entitled to. The remaining bills, that is to say, 23,433*l.* 11*s.* 2*d.*, I will sell for 7,000*l.* cash, on condition that I receive 2,500*l.* on Friday next, on deposit of the bills and signing contract; the remainder to be paid on the 11th of November next, after proving the same, and any dividend the estate may pay above 8*s.* in the pound to be secured to me. This letter is, of course, to be without prejudice to my claim against *Hennet's* estate."

The above letter was communicated by *W. Quilter* to the defendant *J. Whidborne*, who had been solicitor to *G. Hennet* previous to his bankruptcy, and the result was, that an agreement was entered into between the plaintiff and *Whidborne*, and an indenture was executed by which *Pooley* assigned his claims under *Hennet's* bankruptcy to *Whidborne*, upon the terms mentioned in the letter. In November 1853 a dividend of 2*s.* 6*d.* in the pound upon *Hennet's* estate was received by *Whidborne*, on account of the plaintiff's claim, which amounted to 2,930*l.*, and in March 1854 a further dividend of 5*s.*

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24 Ch 466

in the pound was declared, and was received by Whidborne, amounting to about 5,860*l*. Shortly afterwards Whidborne purchased the plaintiff's interest in all dividends which should be paid above 8*s*. in the pound, for the sum of 812*l*; and the plaintiff having subsequently become entitled to a further proof upon his claim against Henet's estate to the amount of 750*l*., Whidborne purchased from the plaintiff the dividends thereon for 300*l*. The plaintiff then discovered that Whidborne had entered into an agreement with Quilter, by which he was to act as trustee for Quilter to the amount of one-half of the plaintiff's interest in Henet's estate; and that the share so taken by Quilter was for the benefit of the creditors of the bankrupt. It appeared also that one-sixth was purchased for a creditor named Brunskill, who had since died, and his representatives had been brought before the Court. The bill alleged that Whidborne had received 2,400*l*. more than he had paid to the plaintiff; that the plaintiff was not aware, when he sold his claim to Whidborne, than Whidborne had any better means of knowing the state of the bankrupt's affairs than he himself had, whereas he was all the time acting in conjunction with Quilter, the assignee, who had concealed the fact from the plaintiff. The bill charged that Whidborne pretended that the plaintiff had offered to sell his interests to Quilter himself, which was contrary to the truth; and it prayed a declaration that the purchases so made might be declared void, and that the defendants might be held to be trustees for the plaintiff, in respect of the balance over and above the monies paid to him.

Mr. Glasse and *Mr. De Gex* appeared for the plaintiff, and contended that these transactions could not be supported, as the purchasers had superior knowledge to the plaintiff, which he was unaware of. As regards Quilter, his position as assignee gave him means of knowing the full state of the bankrupt's affairs. It was not like a mere trustee who might have no further actual information than the vendor, but Quilter must have been fully aware when the dividend would be paid and the amount of it. As to Whidborne, he, of course, in purchasing on behalf of Quilter, as well as

himself, must necessarily have received from Quilter all the information that he was capable of giving, and these facts were concealed from the plaintiff. They cited—

Barton v. Hassard, 3 Dru. & W. 461.

Ex parte Lacey, 6 Ves. 625.

Ex parte James, 8 Ibid. 337.

Ex parte Bennett, 10 Ibid. 381.

Mr. Swanston and *Mr. Giffard*, for the defendant Quilter, submitted that the plaintiff's own letter proved that he was aware whom he was dealing with, and that he was willing to sell to Quilter himself, or to any one introduced by him. The negotiation was to go through Quilter's hands, and any purchaser introduced by him must have had the same amount of knowledge as Whidborne had. There was no case in which such a transaction had been set aside. They distinguished this case from *Davidson v. Gardner*, cited in *Lord St. Leonards' Vend. and Pur.* last edit. p. 568, where the authorities were collected.

Mr. Baily and *Mr. Wickens* appeared for Whidborne; and

Mr. Shapter, for Brunskill's representatives.

KINDERSLEY, V.C.—From the facts and evidence in this case it appears that the defendant Quilter was, in the first instance, made aware that the plaintiff, being in want of ready money, was desirous of selling his claim under the bankruptcy of Henet, and that he wrote to Quilter saying that he was ready to sell,—not to Quilter himself, it is true,—but that he was ready to sell generally. The defendant Whidborne had been Henet's solicitor before his bankruptcy, and was, therefore, in some measure connected with his affairs, but he was not engaged in transacting the business connected with the bankruptcy. Whidborne then became the purchaser from the plaintiff, and it afterwards became known to the plaintiff that Whidborne was purchasing, as to a moiety, on behalf of Quilter, one of the assignees. The first question for consideration then is, what are the grounds upon which the plaintiff seeks to impeach the transaction? And these obviously are, that a person in the situation of an assignee must have much greater means of knowing the matters

relating to the bankruptcy than any mere creditor can have. He must know the nature and amount of the assets, what they will realize, and what is likely to be the amount of the dividend, and when it will be paid; and upon all these facts the value of the claim depends. In dealing with Quilter, then, it is evident that he must have had a superior knowledge as to the state of affairs. On the other hand, it is obvious that Pooley was not a person ignorant of business, and must have known that Quilter was in possession of such superior information. It has been argued, and with truth, that there is no fixed rule, that a trustee may not, in some cases, purchase from his *cestui que trust*. There must be some additional ingredient introduced besides the mere fact of a person being a trustee. It has been held, that a trustee for sale cannot purchase from his *cestui que trust* so long as that relation continues, and if a trustee should have superior knowledge of the value of property by means of his office, he cannot deal with his *cestui que trust*, who has not such means, and who does not know that the trustee has. But it is obvious that the trustees may be placed in various positions with regard to their *cestuis que trust*, when there can be no objection to their mutual dealing. For instance, take the common case of a trustee to preserve contingent remainders, or where there is an estate vested in A. in fee in trust for B. in fee, who is adult and *sui juris*. In such cases there could be no reason why the trustee should not purchase from his *cestui que trust*. You may go further than this, and take the case of a solicitor, who is not precluded merely because he is a solicitor from purchasing of his client, although the Court no doubt looks with jealousy at such transactions, because a solicitor holds a fiduciary character. Perhaps the strongest case that can be put is that of an assignee, since there is scarcely any position in which a trustee—for he is in fact a trustee—has greater means of availing himself of his knowledge in dealing with creditors; but even here, there is no rule which says that, where there is no misrepresentation and no concealment of any kind, and where the party dealing is an adult, a person in the character of assignee

of a bankrupt may not deal with a creditor so far as relates to any rights and obligations between the assignee and the creditor. There would, consequently, be no reason why the plaintiff in this case should be entitled to set aside these transactions, after having deliberately entered into the contract, merely because he sustained the character of a creditor, and the person he was dealing with was the assignee, unless he could shew some concealment or misrepresentation. It is suggested that Quilter knew there would be an early dividend, but it is not alleged that there was any concealment, on his part, of facts which he ought to have communicated to the plaintiff, or that, in truth, he knew anything which the plaintiff could not have known. It does not appear that there was any undue exercise of the power of the assignee or inadequacy of purchase-money. It is not alleged that any frivolous objection was taken to the proof in order to make better terms, nor that a larger sum could have been obtained on a sale by auction. The fact that the dividend might exceed 8s. in the pound was known to both parties, and the money was paid upon the chance of that being the case. There are no extrinsic circumstances here which would induce the Court to say that the transaction ought to be set aside. If, therefore, the assignment had been direct from the plaintiff to Quilter, I should be under the necessity of saying, much as I disapprove of such a transaction on the part of an assignee, that the plaintiff being adult, and there being no circumstances of fraud or concealment, had no right to impeach it. I have hitherto been supposing the transaction direct between Pooley and Quilter; but I now come to what is most important. Suppose Pooley really conceived that he was dealing with Whidborne, and not with Quilter, but that he afterwards discovered that the transaction had been entered into by Whidborne, as to a portion of the business, as agent and trustee for Quilter, the assignee. That would make the case a very different one, and if I should come to the conclusion that Pooley was not aware till after the transaction was completed, that Quilter was beneficially interested in the purchase made by Whidborne, at least to the extent

of one-half, I should have no hesitation in saying that, to that extent, Quilter could not maintain the purchase against Pooley, nor could the assignees, on behalf of the general body of creditors. How does the question stand on that point? There is nothing on the face of the transaction to shew that any one but Whidborne was interested. Quilter says that in the course of the interviews which took place with the plaintiff, the plaintiff offered to sell to him. It is remarkable that the circumstance of Quilter's interest was never mentioned to the plaintiff. There is, however, no evidence distinctly to prove the fact, and I cannot, upon the case as it now stands, come to a satisfactory conclusion in my own mind. All the witnesses who have given evidence are still living, and the fact may be proved in three different ways. There might be an inquiry in chambers, or there might be an examination of the witnesses in court *videlicet*, or I might send the matter to be tried before a jury. Upon the whole, I think that the latter course will be the most likely one to elicit the truth, and, therefore, I shall decide upon sending the matter to an issue so far as relates to Quilter's moiety. With respect to the case of Whidborne, there is no doubt that the plaintiff knew the fact of his having been Hennet's solicitor prior to the bankruptcy, and that he might have had information respecting the affairs from Quilter; therefore, as between Pooley and Whidborne, the plaintiff can have no right to set aside the transaction, to the extent of Whidborne's own interest. To whatever extent, therefore, the plaintiff may succeed in the issue, it will only be against Quilter's share. The same observation will apply to the case of Brunskill; and the bill must be dismissed so far as it seeks relief against Whidborne and against the representatives of Brunskill, and they must have their costs from the plaintiff in the first instance, reserving the question whether, if the plaintiff should succeed ultimately against Quilter, he will not be entitled to recover the costs back from him as to the moiety in which he is interested.

STUART, V.C. }
Nov. 12. } BARNES v. THRUPP.

Joint-Stock Companies Winding-up Act, 1857, sect. 7.—Construction of—Demurrer.

*After a joint-stock company had been adjudicated bankrupt, and an order in Chancery had been pronounced for winding up its affairs, a creditor of the company obtained a judgment against the official manager, and then, having first obtained leave by a Judge's order, sued out a writ of *elegit* against the property and effects of a shareholder of the company, under which the lands of the shareholder were delivered to him by the sheriff. He then filed his bill as tenant by *elegit* to redeem a mortgage upon the lands prior in point of date to the execution:—Held, upon demurrer, that the bill was not within the prohibition of the 7th section of the Joint-Stock Companies Winding-up Act, 1857, which act had passed since the filing of the bill.*

The plaintiff, a creditor of the Royal British Bank, after an adjudication in bankruptcy and an order to wind up its affairs had been pronounced against the bank, brought his action in the Court of Common Pleas at Westminster, for the amount of his debt against the official manager, and on the 30th of January 1857 recovered judgment in such action for 102*l.* 13*s.* 6*d.* On the 19th of February following the plaintiff obtained a Judge's order, giving him leave to issue execution against the defendant Mayhew, one of the shareholders of the bank, for the amount of such judgment and costs, and on the 23rd of February he sued out a writ of *elegit*, under which and in obedience to a rule made on the 8th of May 1857, certain estates of the defendant Mayhew, situate in Suffolk, were, on the 19th of May 1857, delivered to the plaintiff by the sheriff.

The bill, after setting forth the facts above mentioned, alleged that no part of the monies due to the plaintiff had been levied under the writ of *elegit*, and that the amount thereof still remained due; that the defendant John Thrupp claimed that by a deed of mortgage made between the defendant Mayhew and himself, and dated prior to the 8th of May 1857, the

estates which had been delivered to the plaintiff by the sheriff were mortgaged to him, John Thrupp, to secure a large sum of money and interest; and, lastly, that Thrupp refused to give to the plaintiff any particulars of the said mortgage, or to negotiate with the plaintiff for paying it off. The bill prayed that the plaintiff might be declared entitled to redeem the defendant's mortgage, and to have the amount paid for such redemption, together with his own judgment debt, repaid by Mayhew, or in default that Mayhew might be foreclosed. Mayhew was stated to be out of the jurisdiction of the Court.

To this bill the defendant John Thrupp demurred.

Mr. Wigram and Mr. Hardy, in support of the demurrer.—On the 25th of August 1857, since the filing of this bill, the "Joint-Stock Companies Winding-up Act, 1857" (20 & 21 Vict. c. 78.) has been passed. The material part of the enactment of the 7th section of that act is as follows:—"When any such company heretofore has been, or hereafter shall be, adjudicated bankrupt, then, if or so soon as creditors' assignees shall have been appointed, or when any such company shall not have been or be adjudicated bankrupt, then after the Judge or Master shall by advertisement have called on the creditors to appoint a representative or representatives as hereinbefore mentioned, no such action as is mentioned in the 73rd section of the said 'Joint-Stock Companies Winding-up Act, 1848,' shall be commenced or proceeded with, otherwise than for the purpose of making the company bankrupt, nor shall any execution or *scire facias* be issued or proceeded with against the person, property or effects of any member or members for the time being of such company, or any former member or members thereof, except by leave of the Court of Bankruptcy where such company has been made bankrupt before an order shall have been made for winding up the company, or of the said Judge or Master where such company has not been made bankrupt before such order shall have been made." The defendant submits that this bill is demurrable on the ground that it is a proceeding with an execution against the person, property or effects

of a member of the company, without the leave of the Court of Bankruptcy, or of the Judge or Master by whom the order to wind up the company was pronounced, and is therefore obnoxious to the prohibition of the 7th section of the act.

Mr. Malins and Mr. W. D. Evans, in support of the bill.—The writ of *elegit* in this case having been actually issued out before the act of parliament was passed, and not only issued out but executed—fully and finally executed so far as the sheriff was concerned, and so far as execution could be levied,—it is submitted that the filing of this bill is not a "proceeding with an execution against the person, property or effects" of the shareholder, within the meaning of the 7th section of the act. It is rather a consequential remedy or consequential proceeding accruing to the creditor by virtue of his tenancy under the *elegit*, but entirely distinct and separate from a proceeding by way of executing the writ. It is provided by the 11th section of the act, that "nothing in this act contained shall apply to or affect the rights of any creditor (unless with his own consent) under or in respect of any judgment obtained against any shareholder in Ireland, which judgment has been, prior to the passing of this act, duly registered in manner required by the act 13 & 14 Vict. c. 29, intituled 'An act to amend the laws relating to judgments in Ireland,' or who shall have actually levied execution, or taken proceedings to obtain an attachment; but no such creditor claiming to retain the benefit of such registered judgment, execution or attachment, and not to be affected by any compromise under this act, shall be entitled to receive any further dividend, or to have recourse to any other remedy or proceeding, other than such rights and remedies as he may have in respect of such judgment, execution or attachment against the lands which are affected by the same, until all the other creditors shall have been paid in full." The act, therefore, judging from the language of the 11th section, draws a distinction between a proceeding with an execution which is prohibited by the 7th section, and a proceeding "in respect of an execution," reserved by the 11th section. We submit

that this bill is a proceeding of the latter kind, as distinguished from the former, and therefore not within the prohibition of the 7th section. As to the right of a tenant by *elegit* to redeem, there can be no doubt.—

Jones v. Meredith, Bunb. 346; s. c. Com. 661.

Stonehewer v. Thompson, 2 Atk. 440.

Rhodes v. Buckland, 16 Beav. 212.

Mr. Wigram replied.

STUART, V.C. said, that the 7th section of the act pointed to the issuing of an execution, and the proceeding therewith by executing the writ. In the present case, however, the writ had been fully and finally executed on the delivery of the land to the sheriff; and the relief now asked could not be considered as a proceeding with the execution, but a remedy in respect of the plaintiff's judgment, distinct from the execution of the writ. This distinction between working out the writ of execution and other remedies in respect of the judgment, was recognized by the 11th section of the act. The demurrer must be overruled, with costs.

STUART, V.C. { *VORLEY v. COOKE.*
Nov. 13. { *COOKE v. VORLEY.*

Mortgage procured by Fraud, Assignment of—Evidence of Party Interested.

A solicitor having by misrepresentation procured his client to sign a deed of mortgage of certain estates, which the latter had purchased by auction, afterwards assigned the mortgage so obtained to another client to secure a sum of money advanced, the assignee taking the assignment without notice of the fraud, but without the concurrence of or communication with the mortgagor. The solicitor subsequently absconded, and was declared bankrupt.

The Court, on bill filed by the mortgagor, and supported by his own personal evidence only of the particulars of the fraud by which his signature to the deed had been obtained, directed the deed to be delivered up to be cancelled, the defendant, the assignee of the

mortgage, having declined to cross-examine the plaintiff, and the collateral facts bearing on the case tending to corroborate rather than impeach the plaintiff's evidence.

In December 1846, Cooke, the defendant in the first and the plaintiff in the second of the above-mentioned suits, became the purchaser by auction, at the price of 7,700*l.*, of a portion of certain estates in Lincolnshire, which were put up for sale in a great number of lots, and he paid a deposit of 770*l.* at the time of the sale. His solicitors in the matter of this purchase were Thomas Sturton, Edward Key and John Algernon King, then in partnership as solicitors. By certain deeds, dated respectively the 3rd and 6th of May 1851, Cooke granted two mortgages of the said purchased premises, together with others to which he was entitled in fee, the first of such mortgages being to Alfred Bell and Oliver William Farrer, to secure repayment to them of 5,500*l.* and interest, and the second to Thomas Allen, to secure repayment to him of the sum of 2,000*l.* and interest. Messrs. Sturton, Key & King still acted as Mr. Cooke's solicitors in transacting those mortgages. The balance of the purchase-money for the said purchased estates having been thus raised by mortgage, was paid by Cooke in 1851, when the title-deeds of the whole of the estate sold were delivered to Messrs. Sturton, Key & King, as the solicitors of Cooke, who was the largest purchaser at the sale. On the 27th of December 1851, Cooke, upon the application of Key, executed a deed, which Key represented to him, and which he accordingly believed to be a deed of conveyance to one of the purchasers at the sale of the portion of the hereditaments purchased by him, containing the usual covenant for production of title-deeds by Cooke, as the largest purchaser. John Algernon King died on the 28th of July 1854, and his surviving partners continued the business of the firm under the name of Sturton & Key. On the 19th of February 1856, Sturton & Key were declared bankrupt, they having previously absconded.

On the 10th of February 1856, Vorley, the plaintiff in the first suit, and defendant in the second suit, sent Cooke a

notice to the effect that a mortgage of the premises purchased by him had been assigned by Messrs. Sturton, Key & King to him, Vorley, in the then preceding month of August. Cooke thereupon upon inquiry, became, for the first time, aware that the conveyance which he had executed in December 1851 at the request of Key, was not of the character which Key had represented, but was in fact a mortgage of the fee of the premises which Cooke had purchased (subject to the said prior mortgages in favour of Messrs. Bell, Farrer, and Allen) to Messrs. Sturton, Key & King, by way of security for the payment to them of the sum of 780*l.*, recited thereby to be then due to them as Cooke's solicitors, upon balance of an account that day stated, with interest at 5*l.* per cent.; and that by deed dated the 14th of August 1855, an assignment of such mortgage from Sturton, Key & King had been executed to Vorley, in consideration of 780*l.*

The bill in the first of the above-mentioned suits merely stated the alleged mortgage by Cooke to his solicitors, and the assignment thereof by them to the plaintiff Vorley, and prayed an account of what was due upon such mortgage security, and payment thereof to the plaintiff, and in default that the defendant's equity of redemption in the mortgaged premises might be foreclosed.

The bill in the second suit prayed that Vorley might be decreed to deliver the said deed of mortgage of the 27th of December 1851 up to be cancelled, and to pay the costs of the suit. The same bill, after stating the facts above set forth, alleged that the recital in the deed of December 1851, of an agreement by Cooke to execute a mortgage to his solicitors, and of the existence of a stated account between them and him, were equally false; and after setting forth a pretended statement of accounts, it averred the same to have been inserted by the solicitors in their books, in order to give colour to their fraud. It averred also that the plaintiff Cooke was not indebted to his said solicitors at the date of their bankruptcy, but that, on the contrary, a balance was then due from them to him; and, lastly, that he had never

been furnished by his said solicitors with their bills of costs.

The defendant Vorley, by his answer to the bill in the second or cross-suit, stated that at the time of the assignment of the mortgage to him Messrs. Sturton & Key were his solicitors, and that he made such advance to them on the faith of the validity of the said mortgage, they delivering to him the deeds of mortgage and assignment, and stating at the same time that they could not deliver to him the prior deeds relating to the title of Cooke to the property, as they were in the possession of the prior mortgagees; and he denied all knowledge or suspicion on his part of any fraud having been practised upon Cooke.

At the hearing of both suits, which were brought on together, it appeared that Sturton & Key still remained out of the jurisdiction, and that the case made by Cooke, in his cross-bill, must depend entirely upon his own evidence and the collateral circumstances bearing upon the case. Counsel for the defendant Vorley had not availed themselves of their right to cross-examine Cooke.

Mr. Bacon and *Mr. Schomberg*, for Vorley, the plaintiff in the first and the defendant in the second suit, submitted that Cooke, had he not been wilfully blind, might have easily known that the deed presented to him for execution in December 1851, was a mortgage, and not, as represented, a covenant to produce title-deeds; and that having no notice that any fraud had been practised on Cooke, Vorley ought not to be prejudiced by a fraud, which the solicitors had been enabled to practise upon him through the gross negligence of Cooke. They cited—

Waldron v. Sloper, 1 Drew. 193.

Rice v. Rice, 2 Ibid. 73; s. c. 23 Law J. Rep. (N.S.) Chanc. 289.

Hiorns v. Holtom, 16 Beav. 259.

Mr. Malins and *Mr. Baggallay*, for Cooke, said that their client, who was a farmer, had relied entirely on the truth of the statement of Key, that the deed of December 1851, which he was required to execute, was a covenant to produce title-deeds to the purchasers of other lots of the estates, of the largest portion of which

he had been declared the purchaser, *i. e.* a deed of the same character as a great number of others which he had previously executed in respect of other lots of the said premises, and that he had a right to rely upon the representation of Key, who had all along acted as his solicitor and agent in the matter of the purchase.

STUART, V.C. said, he thought Cooke, the alleged mortgagor, had established a case for relief as against Vorley, the alleged assignee of such mortgage. The difficulty he had felt in the case was, that the only direct evidence adduced in support of it was the evidence of Cooke himself. A recent enactment had made it imperative on the Court to receive as evidence in a suit a statement on oath made by the plaintiff in such suit. It appeared, however, to him to be the duty of the Court, while obeying the enactment, to look most carefully at every collateral fact and circumstance, with the view of testing evidence adduced by a party interested in support of his own case. Cooke, the plaintiff in the cross-suit, had sworn in the plainest and most direct terms to the truth of that case which he had averred. Vorley, the defendant in that suit, had an undoubted right to cross-examine Cooke, and, if possible, to shake thereby the credibility of his testimony. This right his advisers had abstained from exercising; and Cooke's evidence being thus left unimpeached, the collateral circumstances were the only means left for testing that evidence. These circumstances, however, went rather to support than to contradict the testimony of Cooke. The fact was undeniable, that the agent who produced the mortgage-deed sought to be cancelled for Cooke's signature, was Cooke's own professional adviser, to whom he might legitimately give credit. There was moreover not a particle of evidence in the case, going to shew the existence of any debt by Cooke to his solicitors, or of any demand by them, either by letter or by parol, or that the plaintiff intended to give a security of any kind whatever. There was no evidence contradictory of the plaintiff's clear testimony on oath to the contrary. With reference to the statement made on behalf of Vorley, that at

the time of the alleged mortgage Cooke was indebted to his solicitors, it was to be observed, that the Court always regarded with the greatest jealousy a transaction which resulted in a security obtained by solicitors from their own client, without the intervention of another professional person acting on his behalf. Upon examination of the circumstances of this case, it appeared, even if a debt had been shewn to exist, that no evidence had been adduced shewing that any account of their demand had been delivered by the solicitors to the client, or that the client had ever given any acknowledgment of the amount of such debt. The entries in the solicitors' books went to contradict the recital in the mortgage deed, that a stated account of the solicitors' demand had been rendered by the solicitors. It appeared, moreover, that these solicitors had misconducted themselves, and had in consequence been obliged to abscond. The inference therefore was, that Key was a person quite capable of deceiving his client. The plaintiff and the defendant being both farmers, had been doubtless both in the power of their professional advisers, and a gross fraud had been practised upon both. Vorley, however, the assignee of the mortgage, had been guilty of great negligence in not writing to Cooke to ask whether the alleged mortgage was a valid instrument, and whether it had been executed by Cooke as mortgagor. The fact that Vorley believed that the mortgage assigned to him was valid, was immaterial; and no relief could be given in the absence of the assignor, upon the assignment of the mortgage, taken as it had been without any inquiry of or communication with the alleged mortgagor. The bill in the first suit must, therefore, be dismissed; and a decree made in the second suit for delivery up of the mortgage deed to be cancelled. Upon the question of costs, it was to be observed, that, though Cooke had been defrauded, that fraud had been used for the purpose of defrauding another innocent party: and the object of Cooke's bill was to be relieved from the consequences of his own act. The Court, therefore, could not give him his costs of suit—but would leave each party to the litigation to bear his own costs. There

would be one decree in both suits, dismissing the bill in the first suit, and directing the mortgage deed of December 1851 to be delivered up to be cancelled—and that no costs be given on either side.

KINDERSLEY, V.C. } BRANDLING v. PLUM-
Dec. 5. } MER.

Creditors' Deed — Period fixed for Signing—Discretion in Trustees—Subsequent Execution.

Certain trust-deeds were prepared for the benefit of creditors, and a time was fixed within which the creditors were to execute or be excluded from the benefit of such deeds, the trustees having discretion to allow creditors to sign after the period fixed. A judgment creditor relying upon his claim as paramount to the deeds, declined to execute during twenty-two years. The judgment subsequently turned out to be invalid, and he now petitioned the Court, in a suit instituted for carrying into effect the trusts of the deeds, to be allowed the benefit of such deeds, and offered to execute them:—Held, that there was no such case of mistake or misapprehension as to constitute an equity, and the petition was dismissed.

In this case it appeared that certain deeds, dated on the 31st of December 1835 and the 31st of May 1836, were executed for the benefit of the creditors of Charles John Brandling, and by these deeds it was, amongst other things, provided that such of the creditors as should execute the same within six months of the date thereof should be entitled to the benefit of the trusts contained therein; and such of the creditors as should not execute the said deeds within the period aforesaid should be excluded from the benefit of such trusts, unless the trustees should permit them, or any of them, afterwards to execute, in which case the parties so executing should be admitted to the benefit of the trusts from the date of their execution of such indentures.

Amongst other liabilities of the said Charles John Brandling there were two mortgages, one of them to Messrs. Robarts & Co. for 21,000*l.* and another to Messrs. Littledale and others for 17,000*l.*

The mortgage to Robarts & Co. was assigned to Messrs. Littledale, together with a judgment, by which it was secured, for the sum of 9,000*l.*

The creditors' deeds of 1835 and 1836 were not signed by either Robarts & Co. or Messrs. Littledale, as they relied upon the mortgages and judgment as a security paramount to those deeds.

In 1850 a suit was instituted to carry into effect the trusts of the deeds of 1835 and 1836, and the estates were sold under a decree of the Court, when certain sums were paid to Messrs. Littledale, but a balance of 7,900*l.* remained due to them upon their mortgage, also secured as before stated by the judgment.

In 1856 a petition was presented for payment out of court of the sum remaining due to the Messrs. Littledale, but upon the petition coming on to be heard, it was dismissed by the Vice Chancellor, on the ground that the judgment was invalid, inasmuch as the entry thereof in the docket-books appeared to be incomplete and not in accordance with the statute 4 & 5 W. & M. c. 20. s. 2.

This decision was appealed against to the Lords Justices, and, in consequence of one of their Lordships coinciding with the Vice Chancellor's decision, the appeal was dismissed.

The case now came on upon the petition of the Messrs. Littledale, praying that they might be allowed the benefit of the trust-deeds of 1835 and 1836, the petitioners expressing their readiness to execute these deeds.

It did not appear that any application had been made to the trustees of these deeds by the petitioners for leave to execute them, but it was admitted that the consent of the trustees would not have been granted.

Mr. Anderson and *Mr. Rasch*, in support of the petition, contended that the petitioners had been misled as to their rights, and the Court ought now to assist them by putting itself in the place of the trustees and exercising the discretion vested in them and allowing the petitioners to have the benefit of the deeds. The petitioners, it was submitted, had made out a case for indulgence.

Mr. Glasse, Mr. Toller, Mr. Schomberg, Mr. Dickinson, Mr. W. D. Lewis, Mr. Freeling, Mr. W. Forster, and Mr. Bales appeared for the other parties in the suit, but were not called upon to address the Court.

The following cases were cited :—

Raworth v. Parker, 2 Kay & J. 163 ;
s. c. 25 Law J. Rep. (N.S.) Chanc.
117.

Gould v. Robertson, 4 De Gex & Sm.
509.

Broadbent v. Thornton, Ibid. 65.

Watson v. Knight, 19 Beav. 369.

Johnson v. Kershaw, 1 De Gex & Sm.
260.

Nicholson v. Tutin, 2 Kay & J. 18.

Forbes v. Limond, 4 De Gex, M. & G.
298.

KINDERSLEY, V.C.—The legal effect of the trust deeds, irrespective of special circumstances, was, that a certain time was limited within which creditors might come in to execute them, and any one who did not execute within that time should be excluded the benefit of the trusts, unless the trustees thought fit to allow them to do so at any subsequent period. There was therefore, irrespective of any equity, a plain discretion in the trustees, notwithstanding the expiration of the period originally fixed, to allow any creditor to come in at any time after that period. *Prima facie*, this is the plain rule of the Court, that where it is discretionary in the trustees, and they are not willing to exercise that discretion, from no corrupt motive, the Court will not interfere. The equity alleged by the petitioners is this state of circumstances ; for if it is a ground, it must be an equitable one. The deed is dated in December 1835, and at that time and ever since, the petitioners have been aware of its existence and nature. They were mortgagees subject to a mortgage to Roberts, Curtis & Co., who had also got a judgment. In 1840 or 1841 the petitioners purchased the debt of Roberts & Co. and took an assignment, not only of the mortgage, but of course, of the judgment also. Holding this judgment, Roberts & Co. considered that they were not bound

to execute the deed, which they might have done, but properly and advisedly abstained, it must be assumed for this very good reason that they felt they had a claim paramount to the deed. It was not necessary for them to execute the deed, for the judgment and mortgage not only gave them such paramount claim, but the judgment extended over a moiety of the whole property, their mortgage only affecting a portion. By the assignment the petitioners stood in the place of Roberts & Co., and they would have availed themselves of their security if the trustees had not paid their interest, which they regularly did. When the property was sold, they made a claim before the Master upon the proceeds of the sales, that is, of the whole fund, to which they were clearly entitled if the judgment was valid. It was discovered, however, that it was not, and when the case came before me I was compelled, with great regret, so to decide upon a technical ground, it being a mere slip in the number of the docket, probably a mistake of the officer ; and that decision was affirmed on the opinion of one of the Lords Justices. In the mean time twenty years have elapsed, during which period the petitioners have advisedly abstained from executing the deed, and have never applied to the trustees to be allowed to do so, and they now ask notwithstanding, that they may have the benefit of it, expressing their willingness to execute. The question, therefore, is, whether the Court can make an adverse order against all the other parties claiming the benefit of that deed ? I do not decide this case on the non-application to the trustees ; but, looking at the case fairly, and supposing the application had been made and refused, have the trustees exercised their discretion unfairly or corruptly ? I cannot say there is the least trace of it. Under these circumstances, I think there has been no such mistake or misapprehension after the petitioners have lain by for twenty-two years as will constitute a sufficient equity.—[The Vice Chancellor then referred to the different authorities cited during the argument, distinguishing them from the present case, and said that they did not, in his opinion,

apply to this question.]—The application was therefore refused, with costs.

L.C.
Nov. 12, 14; }
Dec. 17. } WARDEN v. JONES.

Voluntary Settlement—Wife's Estate—Husband's Creditors.

A parol agreement by a husband, who was indebted at the time of his marriage, to settle his wife's railway stock after marriage, will not support a subsequent settlement against his creditors, even though he represented to the wife that it would be as good as if made before marriage.

This was an appeal by the defendants, Mrs. Barnett and her trustee, from the decision of the Master of the Rolls, reported 26 *Law J. Rep.* (N.S.) Chanc. 427.

The suit was instituted, by a creditor of C. W. H. Barnett, to set aside a post-nuptial settlement, dated the 6th of July 1855, and made by Mr. Barnett, of his wife's property. On the 16th of June 1855, Barnett was married to Elizabeth Jones, she being then possessed of 1,000*l.* stock of the Lancashire and Yorkshire Railway Company. The shares were at that time registered in her name, but the certificates were deposited with her brother, Jonathan Jones, to secure the repayment to him of 260*l.* By the settlement of the 6th of July 1855 it was agreed that the stock should be sold, that out of the proceeds the sum of 260*l.* should be paid to J. Jones, and 500*l.* be paid to the trustees for the separate use of the wife for her life, and after her decease upon trust as therein mentioned, and that the balance should be paid to Barnett and his wife. The stock was accordingly sold, and out of the proceeds the 260*l.* was paid to Jones; 500*l.* was invested in consols. by the trustees, and the balance, 90*l.*, was paid to Barnett upon the joint receipt of himself and his wife.

At the date of the marriage and of the settlement Barnett was possessed of no property of his own, but was indebted to the plaintiff and other persons. Barnett and

his wife afterwards separated. It appeared that in conversations between Barnett and his wife and her father previous to the marriage, Barnett had promised to settle her property upon her; and that they had been to a solicitor to prepare a settlement, but as this could not be done so soon as desired, Barnett, without the knowledge of her father, induced his wife to marry him upon his representation that a post-nuptial settlement would be equally good. The question was, whether this settlement was voluntary or not, it being alleged, on the part of the wife, that the nature of the property was such as to render it liable to the wife's equity for a settlement; and that the parol ante-nuptial agreement was a sufficient foundation for the settlement. The Master of the Rolls having decided in favour of the plaintiff, Mrs. Barnett and her trustee appealed.

Mr. Palmer and Mr. S. Smith appeared for the plaintiff.

Mr. Lloyd and Mr. Langworthy, for the wife, in support of the appeal.

In addition to the cases cited in the Court below, the following were referred to:—

Page v. Horne, 11 Beav. 227; s. c. 17 *Law J. Rep.* (N.S.) Chanc. 200.

Eastwood v. Kenyon, 11 Ad. & E. 438; s. c. 9 *Law J. Rep.* (N.S.) Q.B. 409.

Wennall v. Adney, 3 Bos. & P. 247, n. *Battersbee v. Farrington*, 1 Swanst. 106.

French v. French, 2 Jur. N.S. 169; s. c. 25 *Law J. Rep.* (N.S.) Chanc. 612.

Dec. 17.—The LORD CHANCELLOR, after stating the case, said, that the question was as to the validity of this settlement. By the 4th section of the Statute of Frauds (29 Car. 2. c. 3.) it was enacted, that no action should be brought whereby to charge any person upon any agreement made upon consideration of marriage, unless the agreement upon which such action should be brought, or some memorandum, or note thereof, should be in writing and signed by the parties to be charged therewith, or some other person thereunto by him law-

fully authorized. Here there was no such agreement in writing, and, therefore, this settlement was voluntary; and if voluntary, void against creditors under the 13 Eliz. It was attempted, on the part of the wife, to support the settlement on the ground of there being a parol agreement before marriage. His Lordship would take it to be established by the affidavits of the wife and her father that there was a parol agreement, and if that were the question, there might be little doubt upon it. But the law had very wisely required all such promises to be in writing. The argument, then, was, that the parties were under a moral, if not a legal obligation, in consequence of the representations of the husband, to make this settlement, and, therefore, it could not be considered fraudulent. There was, however, no proof that the husband's statement was a fraudulent one; it appeared rather to have been made in ignorance. It was suggested whether the marriage was not in itself a part performance, but that would be suicidal, as in such cases the act would thus always be defeated. Where a party agreed to do something more than marriage, there might be a part performance; and his Lordship alluded to the cases of *Hammersley v. De Biel* (1), *Dundas v. Dutens* (2), *Randall v. Morgan* (3), and *Lassence v. Tierney* (4). It was also contended that this property could not be taken in execution, and, therefore, was not within the statute of Elizabeth. But this was not so, as by the 1 & 2 Vict. c. 110. s. 14. stock and shares in public funds and public companies, standing in the name of the debtor, in his own right, or in the name of any person in trust for him, are liable to be charged by a Judge's order. By the marriage, the right to the shares was in the husband, and though by the regulations of the company his admission was necessary, that was only a proper precaution on the part of the company. His Lordship must, therefore, dismiss the appeal, but he did it reluctantly, as this lady had been very hardly dealt with.

M.R. }
Dec. 18. } BIRON v. MOUNT.

Composition-Deed—Debtor and Creditor—Insolvency.

Creditors who sign or assent to a composition-deed are entitled to such dividends as are made previous to the insolvency of the debtor.

Creditors who assent to a composition-deed will be allowed to sign and take the benefit of the deed after the insolvency of the debtor.

If creditors neglect or refuse to execute or claim the benefit of a composition-deed, they will not be allowed to come in after the insolvency of the debtor; but any dividends which they might have entitled themselves to before the insolvency will be paid to the provisional assignee, and they will be left to such legal remedies as they may have.

The bill in this case was filed, by the Rev. Edwin Biron, on behalf of himself and other creditors of Edward Watts, of Hythe, in the county of Kent, solicitor, praying that the trusts of an indenture, dated the 26th of February 1855, might be carried into execution, and that the creditors entitled to the benefit thereof might be ascertained and allowed to prove their debts.

By an indenture, dated the 26th of February 1855, between Edward Watts, of the first part; Thomas Mount, James Kingsford, Robert Finley and Joseph Wilson, trustees, of the second part; and the several persons whose names and seals were thereunto subscribed and set, being severally creditors in their own right or in co-partnership, of the third part; after reciting that E. Watts, being unable to pay his debts in full, had agreed to assign all his real and personal estate to trustees to satisfy such debts as far as he was able; all the real and personal estates of Edward Watts (wearing apparel excepted) were released and assigned to the trustees, their heirs, executors, administrators and assigns, upon trust to sell the same, and out of the monies to pay the specific charges on his estates, and also any mortgages which the trustees might create for effecting the purposes of this deed, and out of the surplus to pay the costs of preparing the indenture and relating thereto,

(1) 12 Cl. & F. 45.

(2) 1 Ves. jun. 196; s. c. 2 Cox, 235.

(3) 12 Ves. 67.

(4) 1 Mac. & G. 551.

as well as their own costs, &c., and then to pay all such, and so many, and such part of the debts then due and owing by E. Watts to the creditors, parties of the third part, *pari passu*, without any preference or priority, and then to stand possessed of the surplus remaining upon trust for E. Watts, his executors and administrators, as part of his personal estate. It was then provided that any of the parties thereto of the second and third parts should, if called upon so to do by the trustees, make a solemn declaration, under the 5 & 6 Will. 4. c. 62, of the truth and justice of the debts claimed by them respectively, or their respective partners, before they should be entitled to claim any dividend or benefit under the indenture in respect of such debts; and that in the event of any such person, after being so called upon, refusing or neglecting to make such declaration, such person should lose all dividends, benefit and advantage under the indenture; and it should be lawful for the trustees to pay such last-mentioned dividends, and the dividends of any other creditors refusing or neglecting to take the benefit of the indenture, or the provision thereby made, unto E. Watts. It was also agreed by the parties thereto that it should be lawful for E. Watts, with the consent of the trustees, or the survivors or survivor of them, to insert in the schedule thereunder written the name of any creditor or creditors of E. Watts, whose name he might think ought to be inserted therein, upon the terms of such creditor or creditors executing the indenture; and the person or persons whose name or names might be so inserted in the schedule should be entitled to participate in all the advantages to be derived therefrom, *pari passu* with the other creditors of E. Watts, in the same manner and to the same extent as if he or they had been originally a party or parties to the indenture, so always that any dividend or distribution, which at the time of the name of such person or persons being added to or inserted in the schedule might have been made between or amongst the persons whose names should have been already inserted therein, should not be disturbed. It was then provided that the parties of the second and third parts should give a letter of licence to E. Watts freeing

his person from arrest until the 26th of May 1856; and it empowered the trustees to extend the time, so that it did not exceed five years from the date of the deed, and under this power the licence was extended until the 26th of May 1857, and it was declared that if any of the parties violated the licence, his and their debt should be absolutely released.

The parties of the second and third parts were also constrained to give an absolute release to E. Watts after one year from the time the trustees of the deed certified that the trusts had been performed. This deed was advertised in accordance with the Bankrupt Law Consolidation Act, 12 & 13 Vict. c. 106, and notice of it was given to all the creditors. Some of them executed it, and several meetings were held, notice of which was given to such of the creditors as were known to the trustees, as well those who had as those who had not signed the deed. At a meeting, held on the 7th of December 1855, it was resolved by the creditors present that when there were sufficient monies in hand, a dividend of 2s. in the pound should be paid. In December 1855 a judgment was recovered against E. Watts by Richard Page, a creditor, who had not signed the deed; and in February 1856 E. Watts was arrested on a *ca. sa.* He then wrote the following letter to each of his creditors who had not executed the deed:—

“Hythe, Dec. 18, 1855.

“Sir,—One of my creditors having commenced proceedings against me, which may render it necessary for me to petition the Court for the Relief of Insolvent Debtors, I beg to suggest for your consideration whether you should not at once sign my deed of assignment, to avoid the chance of your losing the benefit of the dividend or dividends to be declared under my estate, in the event of your not executing the deed before my arrest, at the suit of the creditor above alluded to. The deed is for the present at Mr. James Kingsford's, of 23, Essex Street, Strand; and if you decide to execute the same, you can do so by an attorney or agent in town, upon authorizing him by letter to sign for you. I am, &c., E. Watts.”

On the 6th of March 1856 E. Watts, being in custody under the writ of *ca. sa.*, filed his petition in the Insolvent Debtors

Court under the act, and an order was made vesting all his estate in the provisional assignee of the Court; and after the filing of this petition E. Watts obtained his discharge. The deed was executed by the plaintiff and others of the creditors, but some had not signed it previous to the petition of insolvency being filed, and they now claimed a right to execute it and take the benefit of the trusts; and this suit was instituted in consequence of doubts raised by these claims, to ascertain whether the trustees could in any manner distribute the estate or make any further payments to the creditors who had signed the deed. Upon the hearing of the cause inquiries were directed to ascertain the creditors of E. Watts, and the chief clerk certified that there were several creditors whom he named for very large sums who had not executed the deed, but that there was one who had assented to the deed, though he had inadvertently omitted to sign it before the petition of insolvency was filed.

It appeared, however, that Richard Page and many other large creditors refused to come in and prove their debts in this suit.

Mr. Lloyd and Mr. W. D. Lewis, for the plaintiff.—Two questions are raised by this suit: one, whether creditors who did not execute the deed are now entitled to sign it; and the other, whether the creditors who did not execute are entitled to a dividend *pari passu* with those who did. Those, however, who neither signed nor assented to the deed must be excluded. By signing the deed a special contract was made between the creditor and the debtor, but the insolvency of the debtor altogether put an end to his power of contracting. The declaration that the debt existed was a good consideration for the contract.

Field v. Lord Donoughmore, 1 Dru. & W. 227.

Lane v. Husband, 14 Sim. 656.

Drever v. Mawdesley, 16 Ibid. 511;

s. c. 18 Law J. Rep. (n.s.) Chanc. 273.

Forbes v. Limond, 4 De Gex, M. & G. 298; s. c. 1 Sm. & G. 554.

Mr. Osborne, for Mr. Sturgis, claimed beyond what was asked by the plaintiff a dividend, which the creditors would have

been entitled to if they had executed such deed.

Watson v. Knight, 19 Beav. 369.

Broadbent v. Thornton, 4 De Gex & S. 65.

Mr. Faber, for the trustees.

Mr. Biron, for E. Watts.

Mr. R. Palmer and Mr. A. E. Miller, for the creditors who had not executed the deed.—This deed was altogether voluntary, and it made all the creditors, except those who had actually disclaimed the benefit, *cestuis que trust*; all those, therefore, who were desirous to come in were still entitled to the benefit of the trusts created. This altogether differed from a case of agency: all the creditors had notice of the deed. Had it been a contract with each it would have been an act of bankruptcy, but this was not contemplated by any of the parties; and those who signed the deed, or were willing to sign it, especially consented to it, and could still claim the benefit of the trusts.

Harland v. Binks, 15 Q.B. Rep. 713;

s. c. 20 Law J. Rep. (n.s.) Q.B. 126.

Siggers v. Evans, 5 El. & B. 367; s. c.

24 Law J. Rep. (n.s.) Q.B. 305.

Synnott v. Simpson, 5 H.L. Cas. 121.

Spottiswood v. Stockdale, G. Coop. 102.

Bill v. Cureton, 2 Myl. & K. 503, 511;

s. c. 4 Law J. Rep. (n.s.) Chanc. 98.

Kirwan v. Daniel, 5 Hare, 493; s. c.

16 Law J. Rep. (n.s.) Chanc. 191.

Nicholson v. Tustin, 2 Kay & J. 18.

Jolly v. Wallis, 3 Esp. 228.

Acton v. Woodgate, 2 Myl. & K. 492;

s. c. 3 Law J. Rep. (n.s.) Chanc. 83.

THE MASTER OF THE ROLLS.—The creditors who did not come in before the insolvency are not now entitled to execute the deed, except such creditors who took some active step to express their acquiescence in the deed. In *Harland v. Binks* and *Siggers v. Evans* the question merely was, whether a good deed had been executed—whether it was valid against execution creditors—that is, whether it was revocable at pleasure by the debtor who had executed the deed. That this was a good deed is not disputed; the only question is, who is entitled to the benefit of it? It

is not then the validity of the deed, but at what time the creditors will be entitled to claim the benefit of it, that is to be considered. The principle stated in *Field v. Lord Donoughmore* is, that it is not necessary that a creditor should execute the deed if he has assented to it. If he has acquiesced in it, if he has acted under its provisions, or if he has complied with its terms, and the other side express no dissatisfaction, the law then is, that he is entitled to the benefit of the deed; but he must do some act which amounts to acquiescence. It is not necessary for him merely to stand by and take no part at all in the matter; though, as in *Nicholson v. Tutin*, something may be inferred from his standing by until he has lost a remedy, which he might have had at law if he had not come in under the deed; but that does not arise here. He must do some act; and I do not understand the expression of the Lord Chief Justice, when he says it is not necessary for him irrevocably to bind himself, to anything more than this: that he must irrevocably bind himself at law. But would it in this case, with respect to a creditor? Can I treat a creditor as having acquiesced in the deed, unless this Court were prepared to say, if you take a proceeding inconsistent with the provisions of the deed the Court will, at the instance of the assignor, stop the proceedings, because it is impossible that this Court can allow you to play fast and loose, and to say, 'I will take under the deed if it is for my advantage, or I will repudiate the deed if it is for my disadvantage'? On the present occasion, if there had been no insolvency, and if the creditors who had not signed the deed were now suing Mr. Watts at law, upon what ground, and upon what state of facts, could I restrain them from proceeding in that action? They say they have acquiesced in the deed: what act of acquiescence is there? It is true, it has been held in several cases, that it is not necessary to have more than a verbal assent; but in this case there is no statement to that effect. The question then is, up to what time are they entitled to come in under the deed? I admit that as long as they have done no act inconsistent with the deed, they may come in under it, so long as the relation between the

parties remains unchanged. Accordingly, if there had been no insolvency, there would have been nothing to prevent these creditors coming in now any more than there would have been in *Nicholson v. Tutin*. In that case fifteen years had elapsed, yet the plaintiffs had actually executed the deed with the assent and with the permission of the assignee in his lifetime; consequently shewing that the deed was an existing deed at that time, and that it was to be so treated. Therefore, holding that they were entitled to come in at any time while the relation of the parties remained unchanged, the question is, whether they are entitled to come in, having done no act to bind themselves by the deed previously, when the relation between the parties has altered. Could they come in after all the assets had been divided? Clearly not. They could not have disturbed any proceedings that had taken place. In *Nicholson v. Tutin* the plaintiff did afterwards execute the deed whilst Welbank was still alive. They were admitted to execute the deed, being told it was open to all questions that might arise. But the circumstance of their being admitted to execute, Mr. Welbank never objecting, is strong *prima facie* evidence of their being creditors. It had there the effect of carrying it down to a particular period. The question here is, whether it was a contract between the assignor and all the creditors who had come in under the deed, of which the assignor was entitled to the benefit, or whether the creditors are entitled to treat it simply as a trust for their benefit. If it was a trust for their benefit, and nothing more was to be done, then they would be entitled to the benefit of the trust, because they would be *cestuis que trust*. But the deed is only a trust deed for the benefit of such persons as came in under it, and became liable to the covenants to be entered into by persons executing it, and they must do that to constitute themselves *cestuis que trust*, so that they do not become *cestuis que trust* until after that event has occurred. Are they, then, in a situation to do that now? Clearly not. They cannot give the benefit to E. Watts which he contracted for; the insolvency has put an end to that. The

object of the deed was to prevent insolvency and bankruptcy; and all the creditors who had done what they could, either by execution or acquiescence, to prevent that, are entitled to the benefit of the deed; but this event not having occurred, those who have laid by are not entitled to the benefit of the deed. On the other point I will hear a reply.

Mr. Lloyd, in reply.—The deed ignores all the creditors except those who executed it, and it was not until the debts of those who had signed were fully satisfied that any trust arose for the benefit of E. Watts.

THE MASTER OF THE ROLLS.—It is clear that you must make all parts of the instruments cohere in construing deeds, and the last thing the Court will do is to strike out any part. If there are two parts of a deed inconsistent, the Court is compelled to act upon one instead of the other, and there is a technical rule for its guidance; but if the Court can make them agree together, it is bound so to do. Here it is impossible to have words more precise. "That in case the parties to the deed shall refuse to make the statutory declaration required, they shall lose all their dividends, and that it shall be lawful for the trustees to pay such last-mentioned dividends." If the deed went on "to the said E. Watts" there would be an end of the question, but it includes these words:—"and the dividends of any other creditors refusing or neglecting to take the benefit of these presents or the provisions hereby made." There are two classes of dividends spoken of, the dividends of persons who are named in the schedule and those who refuse to make the declaration required, and the dividends of persons who refuse or neglect to take the benefit of the deed—that is, persons who do not execute. Nobody can be said to have refused or neglected to take the benefit of the deed, if he comes in under the deed. It is impossible that can apply to a man who merely does not take the dividend which has been allotted to him by the trustees after he has executed the deed, in which case the trustees would clearly be liable to pay him or his legal personal represen-

tatives. These words must be struck out of the deed, unless, I say, in the case of creditors not executing the deed, there is to be a dividend set apart for them and paid to E. Watts. There really is no other part of the deed which is not consistent with it, with this single exception, that there is one clause which says, as soon as the 7,000*l.* are in the possession of the bankers at any time, the trustees, at their discretion, shall divide the same amongst the persons whose names are in the schedule. That is not to be taken literally, because the persons mentioned in the schedule, who have not made the declaration required, would not be entitled to receive it. That does, therefore, meet with some qualification by this clause. It certainly is, in a great measure, inconsistent with that, that there should be dividends to divide to persons who are not mentioned in the schedule, but still as that clause is to be qualified to some extent, and to be qualified by this very provision, which says, "that dividends to creditors, who do not execute the deed, are to be paid to E. Watts," it is impossible, therefore, to reject that construction, or to say he is not entitled to it, and that not as a trustee, but beneficially, leaving the other creditors who do not come in under the deed to take such course as they may be advised in that respect. He having become insolvent, it is clear that his provisional assignee is entitled to the benefit of that clause. My declaration, therefore, will be, that the creditor who assented to the deed, but did not sign before the insolvency, is entitled to come in and take the benefit of the deed as if he had executed it; that all the other creditors named in the schedule to the chief clerk's certificate, and any other creditors who neglected or refused to execute or claim the benefit of the deed, are not entitled to any dividend; and that the dividends which would have been coming to the refusing or neglecting creditors are to be paid to Mr. Sturgis, as the assignee of E. Watts. There must then be an inquiry what other creditors there are who refused or neglected to execute or claim the benefit of the deed, and the amount of their debts. The dividend already made is not to be disturbed. The costs of all parties must be taxed, and paid or retained by the

trustees out of the trust-fund, those of the trustees and the defendant as between solicitor and client.

Wood, V.C. }
Dec. 12, 14, 17. } *In re PORTER'S TRUSTS.*

Legacy—Lapse—Substitution—"Heirs."

A testatrix gave to her sister for life everything she died possessed of, and at her death she gave to her brother S. P. or his heirs 1,000l. in the 4l. per cents. S. P. died in the lifetime of the testatrix:—Held, that the legacy to S. P. did not lapse, but took effect in his heirs by substitution.

A substitutional gift to the heirs of a legatee who dies in the testator's lifetime goes to the next-of-kin of the deceased legatee, and not to his personal representatives.

Esther Maria Porter, by her will, after giving two sums of 500l. each in the new 4l. per cents. to her two brothers, Samuel Porter and William James Porter, gave to her sister, Sarah Priscilla Porter, for her life everything she died possessed of (except the two before-mentioned sums of 500l. each), whether it was furniture, books, plate, linen, china, wearing apparel, &c., and also whatever property she might have in the funds, after paying the said two legacies of 500l. each, and at the death of her said sister she gave to her said brother Samuel Porter or his heirs 1,000l. in the 4l. per cents., and she also gave and bequeathed to her said brother William James Porter, after her said sister's death, 1,000l. in the 4l. per cents., and all the household furniture, plate, linen, china, glass, books, and whatever he might think worth removing, thereby declaring that the rest he would dispose of as he thought proper.

The testatrix died on the 20th of November 1832, leaving her sister Sarah Priscilla Porter, her brother William James Porter, and her nephew John Hall Porter, her next-of-kin.

Samuel Porter died in the lifetime of the testatrix, leaving a widow and John Hall Porter, his only son, his next-of-kin.

Sarah Priscilla Porter died on the 8th of

May 1857, and shortly afterwards the legacy of 1,000l., given to Samuel Porter, was paid into court, and several petitions were presented for payment out of court of the fund. William James Porter, as the residuary legatee of the testatrix, claimed the whole fund, on the ground that the legacy had lapsed by the death of Samuel Porter in the lifetime of the testatrix. The next-of-kin of the testatrix also claimed the whole fund on the ground of lapse, and against the residuary legatee. The widow of Samuel Porter claimed one-third of the fund, as part heir by substitution for her husband. John Hall Porter, by a deed dated the 11th of November 1835, after reciting, amongst other things, that by the death of Samuel Porter in the lifetime of the testatrix, the legacy became lapsed, and that, as one of her next-of-kin, he was entitled to one-third thereof, which would be transferable upon the decease of Sarah Priscilla Porter, assigned the said one-third part to Thomas Diller. By another deed, dated the 20th of August 1839, after reciting, among other things, that by the death of Samuel Porter, leaving Ann Porter his widow, and J. H. Porter his only child and next-of-kin, the legacy became, by substitution, the property of Ann Porter and J. H. Porter, as his next-of-kin, J. H. Porter assigned one equal third part of the fund to J. Pilcher and R. E. Arden; and by another deed, dated the 27th of May 1847, after reciting that J. H. Porter, as the only child and heir of Samuel Porter, was absolutely entitled to the whole fund, he assigned one-third part thereof to J. K. Kent.

The several claimants presented separate petitions for payment of the fund out of court.

Mr. Renshaw, for William James Porter, claiming as residuary legatee of the testatrix, contended that the legacy had lapsed by the death of Samuel Porter in her lifetime.—

Corbyn v. French, 4 Ves. 418.

Tidwell v. Ariel, 3 Madd. 403.

Home v. Pillans, 2 Myl. & K. 15;

s. c. 4 Law J. Rep. (N.S.) Chanc. 2.

Smith v. Oliver, 11 Beav. 494; s. c.

18 Law J. Rep. (N.S.) Chanc. 80.

Le Jeune v. Le Jeune, 2 Keen, 701.

Penley v. Penley, 12 Beav. 547.

Mackinnon v. Peach, 2 Keen, 555;
s. c. 7 Law J. Rep. (n.s.) Chanc.
211.

Gittings v. M'Dermott, 2 Myl. & K.
69; s. c. 2 Law J. Rep. (n.s.) Chanc.
212.

Supposing the legacy to have lapsed, the next question was, who was entitled? He contended that the words of the will were sufficient to carry every undisposed-of interest to W. J. Porter as residuary legatee.—

Fleming v. Burrows, 1 Russ. 276;
s. c. 4 Law J. Rep. Chanc. 115.

Hearne v. Wiggington, 6 Madd. 119.

Boys v. Morgan, 3 Myl. & Cr. 661.

Mr. C. Hall, for one of the next-of-kin, adopted the above argument as to the lapse, citing—

Nichols v. Haviland, 1 Kay & J. 504.

Bone v. Cook, M'Cle. 168; s. c. 13
Price, 332.

Edwards v. Edwards, 15 Beav. 357,
361; s. c. 21 Law J. Rep. (n.s.)
Chanc. 324.

As to the other question, he contended that there were no sufficient words in the will to give the whole residuary estate to W. J. Porter.—

Lloyd v. Lloyd, 4 Beav. 231; s. c. 10
Law J. Rep. (n.s.) Chanc. 327.

Skrymsher v. Northcote, 1 Swanst. 566.

Mr. R. W. E. Forster, for Thomas Diller, the assignee under the first assignment.

Mr. Rolt and *Mr. Toller*, for Messrs. Pilcher and Arden, argued that there was a substitutional gift to the heirs in the event of Samuel Porter dying in the lifetime of the testatrix, and in the case of personal property, the word "heirs" meant those persons who would be entitled under the Statutes of Distribution. They cited—

Edwards v. Saloway, 2 De Gex & Sm.
248; s. c. 17 Law J. Rep. (n.s.)
Chanc. 329.

Varley v. Winn, 2 Kay & J. 700; s. c.
25 Law J. Rep. (n.s.) Chanc. 831.

Ive v. King, 16 Beav. 46; s. c. 21 Law
J. Rep. (n.s.) Chanc. 560.

Hodgson v. Smithson, 21 Beav. 355;
s. c. 26 Law J. Rep. (n.s.) Chanc.
110.

Coulthurst v. Carter, 15 Ibid. 421;
s. c. 21 Law J. Rep. (n.s.) Chanc.
555.

Ashling v. Knowles, 3 Drew. 593.

Girdlestone v. Doe, 2 Sim. 225.

Mr. Walford, for an assignee claiming under the assignment to Kent, contended that J. H. Porter took as heir to Samuel.—

De Beauvoir v. De Beauvoir, 3 H.L.
Cas. 524; s. c. 15 Law J. Rep. (n.s.)
Chanc. 305; 15 Sim. 163.

Doody v. Higgins, 2 Kay & J. 729;
s. c. 25 Law J. Rep. (n.s.) Chanc.
773.

Mr. Cracknall, for the trustee, cited—

In re Crawford's Trusts, 2 Drew. 230;
s. c. 23 Law J. Rep. (n.s.) Chanc.
625.

Salisbury v. Petty, 3 Hare, 86.

In re Sheppard's Trusts, 1 Kay & J.
269.

Price v. Lockley, 6 Beav. 180.

Mr. Cottrell, for the representatives of Samuel Porter's widow.

Mr. Renshaw, in reply.

Dec. 17.—WOOD, V.C.—The principle upon which cases of this nature must be decided has been clearly laid down by Alexander, C.B. in *Bone v. Cook*. Where a legacy is given to one by name, with a clause of substitution in the event of his death, the legacy takes effect whether the original legatee survives or not, and the question is not whether there is a gift by substitution or not, but whether or not there is any original legatee. The difficulty here is the same as arose in *Corbyn v. French*, to decide whether that which in words is a substitution is so framed that it may be an original gift to the heir by substitution in the event of the death of the legatee dying in the testator's lifetime, or whether the intention is to vest the interest in the legatee, so that in the event of his death the personal representatives may be entitled as taking by representation, and the legatee thus have the full benefit of the legacy whether he survives or not. It was upon this principle that *Corbyn v.*

French was decided. Lord Alvanley there said, "As to the legacy to John Barker, I think the question can hardly be raised upon this will; for see the preceding legacy to Elizabeth Cooper: would not that have lapsed if Elizabeth Cooper had died in the life of the testator? Beyond all question it would. It is nothing more than saying it shall go to her representatives if she dies before his wife. As to the others, I am of opinion it is nothing more than a gift to them at the death of his wife; but it was intended only as a beneficial interest to them, and must as such vest in them before it could be transmissible. The rules upon which the Court proceeds are perfectly established. A testator is never to be supposed to mean to give to any but those who shall survive him, unless the intention is perfectly clear. I will not determine now, because it is not necessary, that where a legacy is given to a person or to his representatives, it can mean anything but, in case of his death in the life of the testator; but it is perfectly clear that where the fund is given to one for life, and after the death of that person, to several others, and in case of their deaths, to their representatives, there is no reason to presume an intention that it shall not lapse by the death of the legatee in the life of the testator." Those remarks seem to some extent to have influenced Lord Brougham in coming to the conclusion he arrived at in *Gittings v. M'Dermott*. If a legacy is given to A. or his representatives without anything to postpone the gift, the Court is driven to say it is given to the representatives in substitution for A, in case of his death in the testator's lifetime, because there is no other way of interpreting the will. But where a prior life interest is given, the naming the representatives as takers is quite consistent with an intention to vest the legacy merely in A, adding the gift to the representatives merely by way of limitation, in which case, of course, A. must survive the testator in order to attain a transmissible interest. *Tidwell v. Ariel* was decided upon this principle, and is a case almost precisely similar to the one before me, for there is no substantial distinction between the periods of postponement in that case and in the present, and the only doubt, there-

fore, arises from the fact that the word "heir" has now a different interpretation put upon it from what it had when *Tidwell v. Ariel* was decided. There, amongst other legacies, the testator gave to his daughter Dorothy 600*l.*, and directed that the several and respective legacies should be paid at the end of one whole year next after his decease, or to their several and respective heirs. Dorothy died in the testator's lifetime, and the bill was filed by her only child and her widower, as co-plaintiffs, insisting that the legacy vested in the son as heir, and therefore *persona designata*, or in case the Court should be of opinion that the testator meant by the word "heir," with reference to the nature of the property bequeathed, rather to describe the personal representatives, then the other claimed as administrator to the legatee. Sir John Leach said—"The legacy of 600*l.* is in the first place given to Dorothy *simpliciter*, as a mere personal legacy failing by her death before the testator. The testator afterwards directs that his respective legacies shall be paid by his trustees at the end of one whole year next after his decease, or to their several or respective heirs. It is said that this direction is inconsistent with a mere personal gift to Dorothy, and is therefore a substitution of a new legatee in the event of her dying before the testator. If the direction had been that the respective legacies should at his death be paid to the legatees or their respective heirs, the inconsistency contended for would have existed, but a payment to the representative at the end of a year after the testator's death, if the legatee be not then living, is not inconsistent with a personal gift to the legatee."

That case was decided entirely on the ground that the legacy was intended for Dorothy personally, and that the gift to the heirs was not intended by way of substitution for, but by representation to, the original legatee. *Gittings v. M'Dermott*, in which the Court came to the conclusion that the gift to the heirs was substitutional, was decided upon exactly the same principles. With regard to the word "heir," it should be remarked that when *Tidwell v. Ariel* was decided *Vaux v. Henderson* (1) had not been published, and the au-

(1) 1 Jac. & W. 388, n.

thorities were in such a state that, if the plaintiff could not establish his title as personal representative, his bill must fail altogether. In *Vaux v. Henderson* Sir William Grant gave a new meaning to the word "heirs" with reference to personal estate, and decided that it meant, not the personal representatives, but the next-of-kin of the legatee, that is, persons who with respect to the personalty bear the analogous position to the heir in respect of real estate. The same conclusion was arrived at by myself in *Dood v. Higgins*; must they not then necessarily be *personæ designatæ*? It may be said that logically the administrators are the heirs to the personal estate, but clearly the "heirs" do not take by transmission of interest; the deceased legatee takes no beneficial or transmissible interest, and the legacy is not subject to his debts. On the construction which the Court now gives, every legacy to the heirs must be substitutional. It appears to me, looking to the effect now given to the word "heirs," that I ought to hold that the widow and only child of Samuel Porter are entitled to this legacy in the proportions of one-third and two-thirds.

M.R. } DENTON v. LORD JOHN
Jan. 12. } MANNERS.

Mortmain—Laws, general and partial—Conflict.

The general law of the country is not altered or controuled by partial legislation made without any special reference to it.

An act, the 13 & 14 Vict. c. 94. passed in general terms, for a special object, without reference to the Mortmain Act (9 Geo. 2. c. 36.), will not enable a society to take a legacy, even out of pure personalty, when its purpose is the purchase of incorporeal hereditaments to be applied for charitable purposes.

Lucius Graham Kinderley, by his will, dated the 28th of March 1848, after giving several legacies and annuities to various persons, said, "And all the residue of my property and effects of what kind soever, after paying the aforesaid annuities

and legacies, I give and bequeath to Lord John Manners, or the secretary for the time being of the Association for buying Incorporate Tithes and vesting them in the Church of England; and I declare that in case at my death any part of my property is invested in real estate or railway shares or any other security which would make a gift to a charitable use void and invalid, that such property so invested should be applied towards payment of my debts and other liabilities, and my purely personal estate be applied to the above-mentioned charitable purpose." The testator died on the 3rd of June 1855.

This claim was filed, by Henry Denton, the executor of the testator, against Lord John Manners, the chairman, and William T. Young, the secretary of an association called "The Tithe Redemption Trust," alleging that they claimed an interest in the testator's residuary personal estate, and against Elizabeth Kinderley and others, next-of-kin of the testator, praying for a general administration of the personal estate.

By a decree made in the cause, on the 16th of February 1856, inquiries were directed, and the chief clerk, on the 8th of June 1857, certified that the society was established, in 1845, under the name of "The Church Endowment Society," and that in 1847 it changed its name, and is now called "The Tithe Redemption Trust;" that it is supported by voluntary contributions, and has issued many publications, and that the objects of the society were, first, to give to owners of alienated tithes an opportunity of restoring them to the spiritual purposes for which they were originally ordained, and to assist them in so doing. Secondly, to apply any tithes thus restored towards relieving the spiritual destitution of the parish or chapelry whenever they arise, by adding to the endowment of such parish church or chapel, or by the endowment of new districts therein. Thirdly, to apply to parliament to facilitate the means of accomplishing these objects, first, by rendering the mode of the re-conveyance of tithes less expensive; second, by enabling persons having limited interests in impropriate tithes to re-convey them upon adequate compensation being given; and, third, by enabling owners of impropri-

ate tithes to give them by will for the endowment of the church in the place whence they arise. One rule of the society provided that no appropriation of acquired tithes be made without the previous sanction of the Bishop of the diocese in which they arise. That Elizabeth Kinderley and others, the next-of-kin of the testator, alleged that the society intended by the testator was "The Tithe Redemption Trust." That the objects were, first, to give owners of alienated tithes an opportunity of restoring them to their original purposes, and to assist them in so doing by paying money in aid of the purchase and restoration of such tithes; second, to buy or aid in buying tithes to be so restored; third, to apply any tithes thus restored towards relieving the spiritual destitution of the parish or chapelry whence they arise, by adding to the endowment, or by the endowment of new districts therein; fourth, to apply to parliament to facilitate the means of accomplishing these objects. That the testator's personal estate, at the time of his death, consisted of a share of the assets of the firm of which he was a partner at the time of his death, and that they comprised a mortgage debt secured upon real estate, the debts due to the firm, and also a share of certain monies secured by a railway debenture.

Mr. Follett and *Mr. Wolstenholme* appeared for the plaintiff.

Mr. Selwyn and *Mr. Kenyon*, for Lord J. Manners.—The objects of the society are framed in accordance with the law. The Statute of Mortmain does not prevent lands from being conveyed to charitable uses; it merely imposes forms, which it makes requisite to the validity of the deed. The society, therefore, could employ the money in various ways wholly independent of the purchase of tithes. The 13 & 14 Vict. c. 94. s. 23. gave owners of tithes the power of annexing them to existing churches or chapels; the promotion of this object was not illegal, and the society could take a bequest to aid that object.

Doe d. Graham v. Hawkins, 2 Q.B. Rep. 212; s. c. 10 Law J. Rep. (N.S.) Q.B. 285.

Walker v. Milne, 11 Beav. 507; s. c. 18 Law J. Rep. (N.S.) Chanc. 288.

Shadbolt v. Thornton, 17 Sim. 49; s. c. 18 Law J. Rep. (N.S.) Chanc. 392.

Philpot v. St. George's Hospital, 21 Beav. 634; s. c. 25 Law J. Rep. (N.S.) Chanc. 33; on appeal, 6 H.L. Cas. 338; ante, 70.

Trye v. the Corporation of Gloucester, 14 Beav. 173, 196; s. c. 21 Law J. Rep. (N.S.) Chanc. 81.

The Attorney General v. Davies, 9 Ves. 535.

Giblett v. Hobson, 3 Myl. & K. 517; s. c. 4 Law J. Rep. (N.S.) Chanc. 41.

Edwards v. Hall, 11 Hare, 1; s. c. 22 Law J. Rep. (N.S.) Chanc. 1078; 6 De Gex, M. & G. 74; s. c. 25 Law J. Rep. (N.S.) Chanc. 82.

Myers v. Perigal, 2 De Gex, M. & G. 599; s. c. 22 Law J. Rep. (N.S.) Chanc. 431; overruling 16 Sim. 533; s. c. 18 Law J. Rep. (N.S.) Chanc. 185.

The London University v. Yarrow, 23 Beav. 159; s. c. 1 De Gex & Jones, 72; 26 Law J. Rep. (N.S.) Chanc. 70, 430.

Anonymous, 2 Vent. 349.

Perne v. Oldfield, 2 Ch. Cas. 31; s. c. 4 Vin. Abr. 481, tit. 'Charitable Uses,' pl. 19, 20.

The Church Building Society v. Coles, 1 Kay & J. 145; s. c. 24 Law J. Rep. (N.S.) Chanc. 103, 713; s. c. 5 De Gex, M. & G. 324.

Mr. Batten, for W. T. Young.

Mr. R. Palmer and *Mr. Osborne*, for the next-of-kin of the testator, were not heard.

THE MASTER OF THE ROLLS.—This society, as constituted, cannot legally take a legacy out of pure personality from any body by will. It is prohibited by the Statute of Mortmain, which says, that "whereas gifts or alienations of hereditaments in mortmain are prohibited or restrained by Magna Charta and divers other wholesome laws, and that these things have increased to the disherison of lawful heirs, therefore it is enacted, that after the 24th of June 1736, no manors, lands, tenements, rents, advowsons, or other hereditaments corporeal or incorporeal whatsoever, shall be aliened or in any ways charged or in-

cumbered for the benefit of any charitable uses whatsoever." Words cannot be more distinct to shew that incorporeal hereditaments are included, and that they shall not be aliened in any manner whatsoever for any charitable trust, and they cannot be given except in a particular manner. Unless, therefore, this defect is removed by some statute, a gift of money for the purpose of causing hereditaments to be aliened and put in mortmain, and given for charitable purposes, would be within the words and purposes of the Mortmain Act as a bequest of money to buy lands, and have them settled for the purpose of any charitable institution whatsoever. The title of the society is "The Tithe Redemption Trust," the purpose and object to put incorporeal hereditaments in mortmain. How is money to assist persons to restore tithes, except it is given for the purpose of buying them and then giving them? It has been argued, that tithes may now be given for spiritual purposes, either under the act or without, and totally independent of the 13 & 14 Vict. c. 94. s. 23. (1), if persons only think fit to comply with the provisions and conditions of the Statute of Mortmain. Could it then be held that a society which was to act by inducement only, was one that could take and apply money as the incentive? The object was the same as a bequest to buy land, and lay it out in building alms-houses or schools, both laudable and worthy motives. The Statute of Mortmain did not prevent land being given; but if a society were established to induce persons to give land, could they take a bequest of any person when the only motive was that of buying the lands and settling them? The object of the society was interference: it was not satisfied with allowing persons to act for themselves of their own mere motion; it proposed to give a species of advice which might induce them to give away

property by aiding and assisting them in giving the property for what it was worth, and then to restore it to spiritual purposes. Then, as to the second object of the society. The 13 & 14 Vict. c. 94. s. 23. seems to give a power to the impropiator of tithes to give them exclusively to the church within the parish, but not to give them for any general spiritual purposes. The design of the society goes beyond that, it is for an opportunity of restoring them to spiritual purposes, and then, when restored, to apply them "for the purpose of endowment of such parish church or chapelry, or for the endowment of any new district therein made, or in the parish from which they arise." Whether that is within the 13 & 14 Vict. c. 94. I have not collected from what is so stated. It is, however, clear that there are a great number of parishes which in the opinion of many persons are very highly endowed at present, and in which there are impropriate tithes which might be usefully employed for the assistance of other poor livings, but not beneficially employed for increasing an endowment already sufficient. Whether the endowment of new districts might not be considered proper would be another matter not within the scope of the 13 & 14 Vict. c. 94. But this is immaterial to the question. I assume the purpose to be merely that which is made lawful by the act. How does it then differ whether a person is authorized to do an act by the general law of the country or by the late act of the 13 & 14 Vict. c. 94? Before the 9 Geo. 2. c. 36. a person might have given lands for the establishment and institution of a school in his lifetime, but since that statute he can only do so by a deed enrolled within six months after its execution, and then only provided he himself survives the execution of the instrument twelve months; at the same time he is wholly disabled from devising it. Assume, then, that he is afterwards at liberty to give lands for that purpose under particular circumstances and conditions, still the Statute of Mortmain prohibits a person from doing that by will which under certain circumstances he may be at liberty to do by the ordinary law of the land, and if there is a society established to induce persons to alien their lands

(1) 13 & 14 Vict. c. 94. s. 23.—"And be it enacted, that the owner or proprietor of any impropriation tithes, portion of tithes, or rent-charge in lieu of tithes, shall and may have power to annex the same or any part thereof unto the parsonage, vicarage, or curacy of the parish church or chapel where the same lie or arise, or to settle the same in trust, for the benefit of such parsonage, vicarage, or curacy, any statute or law whatsoever to the contrary thereof in anywise notwithstanding."

or incorporeal property for the benefit of a charity and to put the land in mortmain, I have no doubt, either upon the construction of the act or by the decisions thereon, that such a bequest would be within its provisions and void.

It is then contended that because this society is interposed to induce a man to do it by a pecuniary gift, the interposition of a third body through whom the inducement is to pass, will make the transaction valid; but I consider it altogether invalid under the Mortmain Act: were it otherwise, there might be a valid bequest of money to be laid out in land or incorporeal hereditaments to be applied to charitable purposes. The whole of this bequest, therefore, must fail without any regard to the sources from whence the money was to come, and that even upon as assumption that the whole was pure personality.

The costs of all parties must come out of the estate; but one set of costs only must be allowed to the president and secretary of the society; one appearance was quite sufficient.

M.R. }
Dec. 2, 3, 16. } JEANS v. COOKE.

Copyhold — Custum — Admittance pur autre vie—Advancement.

A copyhold estate was held by a father, who was admitted as sole purchaser, "for the lives of his three sons and the life of the longest liver of them successively," at a yearly rent, and for a heriot on the death of the cestuis que vie. The father, by his will, devised the estate to the first cestui que vie, who obtained admission to the estate for his own life, and afterwards died having devised it to A. B. The second son was then admitted for his life as one of the lives in the grant to his father, claiming the estate beneficially and by way of advancement. Upon a bill by A. B., the devisee, and an annuitant under the first son's will,—Held, (assuming the custom to be valid, and notwithstanding the father had given benefits to his sons by his will) that the names of the sons were inserted in the grant as an advancement to each son successively.

Held, also, that if the custom was bad, and the admission obtained wrongful, the plaintiff's remedy was at law: the bill, therefore, was dismissed with costs, but without prejudice to any proceedings at law.

The court-rolls of the manor of Pitton and Farley, in the county of Wilts, contained the following grant:—"6th of June 1809.—Unto this court came Henry Cooke, of, &c., yeoman, and took of the lord by the steward there, by the rod, according to the custom, one messuage, &c., with the appurtenances, to hold the same unto him the said Henry Cooke, for the lives of Henry Cooke, aged seventeen years, George Cooke, aged eight years, and James Cooke, aged seven years, his three sons, and for the life of the longest liver of them, successively, at the will of the lord, according to the custom, by and under the net and clear yearly rent of 1*l.* 5*s.* for the said premises, payable half-yearly, if demanded, and for a heriot on the death of each of them, the said Henry Cooke, the son, George Cooke and James Cooke, the best beast or good that shall be depasturing or found on the premises, and by all other works, burthens, customs, suits and services therefore due and of right accustomed; and for rent, estate and interest, so to be had in the premises as aforesaid, the said Henry Cooke, the father, as sole purchaser, hath given to the lord for a fine 1,200*l.*, and so the said Henry Cooke the father is admitted and hath done his fealty."

At the same court Henry Cooke took another grant of a close of land, called "Northfield," in the same words and for the same lives, at a yearly rent of 1*s.* 4*d.*, if demanded, and for a heriot on the death of each of the *cestuis que vie* the sum of 1*l.* And Henry Cooke the father, as sole purchaser, gave to the lord, for a fine, 100*l.*

The fines were paid by H. Cooke the father out of his own monies.

Henry Cooke the father, by his will, dated the 10th of October 1832, said, "I devise and bequeath all my copyhold estate at Pitton to my son Henry Cooke, his heirs, executors, administrators and assigns, according to the tenure thereof, for and during all my estate and interest therein respectively."

The testator gave other estates to his sons George and James, and he bequeathed the residue of his property to his five children, James, George, Ann, Jenny and Charlotte, excluding his son Henry. He appointed his sons H. and J. Cooke his executors.

The testator died on the 13th of March 1835.

At a court held for such manor, on the 12th of April 1836, H. Cooke the son was admitted to the hereditaments for the term of his life, according to the custom, &c.

On that occasion Mr. Jennings, the then steward of the manor, stated that the hereditaments belonged beneficially to H. Cooke the son during the whole of the lives named in the grants, and H. Cooke made the following memorandum in his account-book:—"1836, April 12.—A special court was held at Farley, and H. Cooke was taken tenant to a copyhold estate, situate at Pitton, which my father gave me, and then was decided by Mr. Jennings, the steward, that the estate was mine during the whole of the lives to sell or give away to whom I liked. Mr. Thomas Parsons and Mr. John Parsons, on the homage, Mr. Jennings, steward, and Mr. Moses Webb and my brother J. Cooke, witnesses."

H. Cooke the son by his will, dated the 1st of March 1854, said "I devise all my small copyhold estate at Pitton, held on the lives of my two brothers, to my son Charles Cooke, for all my estate and interest therein, subject nevertheless and I do hereby charge the same with an annuity of 20*l.* to be paid to my daughter Mary Ann, wife of Jacob William Jeans, (the plaintiff,) during such time as my estate and interest in the copyhold shall continue;" and after making other provisions in favour of his son and daughter, he gave all the residue of his estate and effects unto his son Charles absolutely, and appointed his son Charles and J. W. Jeans executors of his will.

H. Cooke the son died on the 16th of April 1855.

Charles Cooke, by his will, dated the 22nd of August 1855, said, "I give, devise and bequeath my small copyhold

at Pitton, held on the lives of my two uncles, George and James Cooke, to my brother-in-law J. W. Jeans (the plaintiff), for all my estate and interest therein;" and he gave all his residuary estate and effects to J. W. Jeans, whom he appointed his executor.

C. Cooke died on the 26th of August 1855.

Henry Cooke the father from his admission in 1809 to the year 1832 cultivated the farm on his own account; he then gave up the farm at Pitton to his son George, who became his tenant, which continued until his father's death; and George continued as tenant to his brother Henry during his life; but on his decease George claimed the farm as his own for life under the original grant, and refused to pay not only the rent, but also the annuity of 20*l.*

On the 1st of May 1856 G. Cooke was admitted to the hereditaments for the term of his life, as one of the lives named in the grant made to his father.

This suit was instituted by J. W. Jeans and his wife, against G. Cooke; and they alleged that H. Cooke the father took the grant for his own benefit, and that he never intended to place his sons in succession to himself, or to insert their names for their advancement, as alleged by the defendant; and they prayed for payment of the annuity of 20*l.*, and that the balance of the rents might be paid to J. W. Jeans.

From the evidence it appeared that the entries of admissions commenced in 1794, and numbered only forty-six; there were, however, references to earlier admissions, and a presentment of customs dated 1749. The steward certified a copy of the rolls merely; he did not make any certificate of the custom (1).

(1) Extracts from copies of the Court Rolls, certified by Mr. Martin, the steward:—

1. William Maton is admitted as sole purchaser, *habendum* to him and his two sons, John and William, for their lives successively; and he pays a fine of 40*l.*

8. Recites that William Maton held for his own life and the lives of his sons. He alone surrendered, that the lord may do his will and pleasure, and is admitted to him and his two sons, William and Thomas, for their lives; and he pays a fine of 40*l.*

Mr. R. Palmer and Mr. W. W. Cooper, for the plaintiffs.—H. Cooke the father purchased this estate from the lord of the manor, and paid for it out of his own monies; he took it for the lives of his

three sons, and for the life of the longest liver of them. To this was added the word "successively"; that could not mean that they were to take beneficially. The father was owner of the estate. A claim was

15. A William Maton claiming to hold, by virtue of No. 1, for his own life and that of John Maton, the younger, surrenders, that the lord may re-grant as therein mentioned, and is admitted, *habendum* to him for his own life, and those of his sons William and Thomas; and he pays, as sole purchaser, 40*l*.

27. The same W. Maton, claiming to hold by No. 15, surrenders, that the lord may re-grant, and is admitted, *habendum* to him for his own life and those of his two sons, Thomas and William; and he pays 5*s*. fine.

53. Thomas Maton, the son (one of the lives only), claims, and is admitted for his own life, by virtue of No. 27.

This apparently ends the entries to this property.

Another property, commencing with (No. 2), William Maton is admitted, *habendum* to him and Thomas Maton and Thomas Maton, jun., for their lives successively; and W. Maton, as sole purchaser, pays 135*l*.

7. The same William Maton is stated to hold for his own life, and the lives of Thomas Maton and Thomas Maton, jun., and surrenders, that his estate may be cancelled, and the lord do his will and pleasure, and he is admitted, *habendum* to him and his two sons, William and Thomas; and he pays 20*l*.

14. William Maton is stated to hold, by virtue of (No. 2), for the lives of himself and two other lives, and he alone surrenders, that the lord may re-grant, and is admitted, *habendum* to him for his own life and those of his two sons, William and Thomas, successively; and, as sole purchaser, he pays 20*l*.

26. The same W. Maton is stated to hold to him for lives; he alone surrenders, that the lord may re-grant, and is admitted, *habendum* to him for the lives of himself and his two sons, Thomas and William; and pays 5*s*. fine.

52. Thomas Maton, the son, and the second life, claims to be admitted for his own life by virtue of No. 26, and is admitted.

This apparently is the last entry of this property.

4. James Parsons takes, *habendum* to him and John Maton and William Maton, for their lives successively; and, as sole purchaser, he pays 210*l*.

36. John Maton claims to be admitted for life by virtue of No. 4, and is so admitted, apparently in accordance with the terms of the *habendum* in No. 4.

40. William, probably the third life named in No. 4, makes a similar claim on the death of John (as the property is called late John Maton), and is admitted accordingly for his own life.

55. Letitia Maton, widow and devisee in the will of the last-named W. Maton, (he is stated to have

held by virtue of No. 40) claims to be and is admitted for the term of her widowhood.

This ends that property.

In the presentment of customs in 1749, it is stated that no widow shall be admitted tenant to her widowhood, but enjoy it according to the custom.

The first *habendum* of a reversion is to Stephen and George Windsor for their lives successively, their father to pay a 90*l*. fine.

21. On the estate falling into possession, they surrender that the lord may do his will and pleasure; and William Windsor is admitted *habendum* to him for their lives, and he pays 5*s*.

23. William Windsor makes a conditional surrender, in consideration of a loan of 50*l*. from Henry Hinxman, to the intent that the lord shall grant unto Hinxman, his executors, administrators, or assigns, for such life or lives as he or they shall nominate, and for such fine as shall be agreed upon between the lord and him Hinxman.

There is no further entry as to this property.

6. Joseph Parsons takes and is admitted, *habendum* to him and his two sons, Stephen and Charles, for their lives successively, and pays 175*l*.

58. Stephen claims to be admitted, and is admitted for life, by virtue of No. 6.

9, 10, 42, and 57. relate to the entries in the case of *Jeans v. Cooke*.

11. Stephen Seaward is admitted to a reversion, dependent on the life of C. Alexander, *habendum* to him for the lives of his son Stephen and granddaughter E. Bryant; and, as sole purchaser, he pays 100*l*.

32. Stephen Seaward, who is evidently the son named in No. 11, and not the father, as he is stated to be forty-one years old, and in 34 is said to have a son Stephen thirteen years old, is admitted apparently on the death of C. Alexander for his own life without fine.

34. The same Stephen Seaward (as it is stated the estate was held for his life) claims to hold by 32, and takes the reversion (apparently dependent on his own life), *habendum* to his son Stephen Seaward for his life, to commence after the death, &c., or other determination of the estates therein subsisting, for the lives of Stephen Seaward and Elizabeth Parsons, formerly E. Bryant, mentioned above as the grand-daughter, and the father, as sole purchaser, pays 64*l*.

46. Elizabeth Parsons the grand-daughter and *cestui que vie* only claims to hold for her own life by virtue of No. 11, and surrenders by attorney to the intent that the lord may do his will and pleasure, upon which Stephen Seaward is admitted on a fine of 5*s*. for her life.

47. Stephen Seaward claims to hold by No. 34 for his own life, and is admitted accordingly.

The same forms are used, except that another son, George, is admitted at No. 35; and that in

made under an alleged custom to admit the *cestuis que vie* successively: its validity, however, might reasonably be questioned, especially if the names of strangers were used. The defendant, no doubt, felt his case weak on this point; he therefore said his name was put into the grant as an advancement. He, however, never had possession of the estate except as tenant to his father, who, however, by his will wholly negatived his claim, as he dealt with the property as owner and disposed of it by will.

Doe d. Nepean v. Goddard, 1 B. & C. 522; s.c. 2 Dowl. & Ry. 773; 1 Law J. Rep. K.B. 179.

Right d. the Dean and Chapter of Wells v. Bawden, 3 East, 260.

Lewis v. Lane, 2 Myl. & K. 449.

46. Stephen Seaward is admitted on the surrender of Elizabeth Parsons, *habendum* to him for her life, and there appears to be no admission corresponding with No. 47; but in

50. George Seaward, claiming to hold by No. 35, surrenders, that the lord may re-grant as therein mentioned, and Stephen Seaward is admitted, and pays 30*l*.

13. Thomas Parsons is admitted, *habendum* to him for his own life and those of his two sons Thomas and Isaac, and pays 180*l*. as sole purchaser.

43. He is stated to hold for the lives of himself and his sons Thomas and Jesse, by virtue of No. 13. He surrenders that the lord may re-grant, and is admitted, *habendum* to him for his own life and those of David and Jesse, his two sons, paying a fine of 7*l* 10*s*.

60. David Parsons claims to hold for life by virtue of No. 43 (though only as *cestui que vie*), and is admitted accordingly.

20. Thomas Parsons is admitted on the surrender of William and Richard Holloway, which is stated to be that the lord may do his will and pleasure, *habendum* to him and the said William and Richard Holloway, for their lives successively, and he pays 640*l*. as sole purchaser.

32. He claims to hold by virtue of No. 20 for the lives of the two Holloways, and surrenders that the lord may do his will and pleasure, whereupon he is admitted, *habendum* to him for his own life and the lives of Immanuel and David his sons, and as sole purchaser he pays 130*l*. By this admission the estate of any of the Holloways is disregarded.

59. Immanuel, a *cestui que vie*, only claims to be admitted for life by virtue of No. 32, and is so admitted.

5, 16, 16*a*, 17, 18, 19 and 38 relate apparently to different properties, but there is only one entry applicable to each.

24, 28, 29, 30, 31, 37, 39, 41, 44, 48, 49, 51, 54 and 56 are entries of customs or powers of attorney, &c.

Smith v. Baker, 1 Atk. 385.

Edwards v. Edwards, 2 You. & C. Exch. 123; s.c. 6 Law J. Rep. (N.S.) Ex. Eq. 79.

Edwards v. Fidel, 3 Madd. 237.

Mr. Selwyn and Mr. C. Hall, for the defendant.—The custom is legal. Had H. Cooke the father sold the estate the purchaser could have been admitted, but it would have been only for the life of H. Cooke the father. There was no allegation in the bill that the *cestuis que vie* were mere trustees. If, however, the plaintiff had any interest, it was a bare legal estate. The three sons must, on the death of their father, be admitted in succession, and all the acts of the father, as well as his will, must be controuled by a reference to the grant of the 6th of June 1809. The father held for his life, and the tenancy of the defendant lasted only so long. From that time the sons took successively under the grant, by way of advancement.

King v. the Lord of the Manor of Hexham, 5 Ad. & E. 559; s.c. 6 Law J. Rep. (N.S.) K.B. 33.

Dyer v. Dyer, 2 Cox, 92.

Skeats v. Skeats, 2 You. & C. C.C. 9; s.c. 12 Law J. Rep. (N.S.) Chanc. 22.

Murless v. Franklin, 1 Swanst. 13.

Scawin v. Scawin, 1 You. & C. C.C. 65.

Anonymous, Loft's Rep. 390.

Smith v. Warde, 15 Sim. 56; s.c. 15 Law J. Rep. (N.S.) Chanc. 105.

Grey v. Grey, 2 Swanst. 594.

Finch v. Finch, 15 Ves. 43, 50.

Prankerd v. Prankerd, 1 Sim. & S. 1. 1 *Watkins on Copyholds*, 343.

1 *Scriv. on Copyholds*, 379.

Mr. R. Palmer, in reply.—The question of advancement depends upon the law relating to resulting trusts. It has no application at all to the present case. The defendant obtained an admission by some means at the manor court, and he asks the Court to support him against the legal right. The plaintiff has full power to change the *cestuis que vie*, and substitute others. The custom can recognize the legal estate only; it could not deal with equitable estates.

Dec. 16.—The MASTER OF THE ROLLS. —The materials do not enable me to come to a conclusion either as to the existence or validity of the custom alleged by the plaintiffs. The evidence is conflicting. There is, however, upon the rolls one case of an admittance under a devise. In *Doe d. Nepean v. Goddard*, a similar custom of admitting the *cestui que vie* successively in default of a devise by the grantee was held good, but this case is different. The plaintiff does not allege that there is a custom to admit a devisee. On the contrary, he apparently admits that the *cestui que vie* has the legal right to admittance notwithstanding a will, but, at the same time, contending that the beneficial ownership passes to the devisee of the grantor. *Right d. the Dean and Chapter of Wells v. Bawden* was the case of a grant by copy of court-roll of a reversionary estate to A, to hold to him for the lives of two persons, during the lives of either of them longest living, successively according to the custom, and it was held that A. and not the *cestui que vie* took the legal estate in reversion, there being no custom to enable them to take, although they were stated to be admitted tenants in reversion. In *Edwards v. Fidel* the custom of the manor was stated to be, that if a tenant for life of a copyhold obtained a grant of a reversion in the name of a third person, such person was entitled beneficially, unless a trust was mentioned on the rolls of the manor; and it was held, that the custom was reasonable, and that the persons who were named in the reversionary grants of the copyholds were not trustees, but beneficially entitled. *Lewis v. Lane* overruled that case, and, at the same time it questioned the validity of the custom then alleged. Lord Cottenham, in his judgment, says, "in the case of *Edwards v. Fidel*, the late Sir John Leach, M.R., considers this as a question of custom, and says it was a reasonable custom, and prevented disputes. I cannot agree that this is a question of custom at all, or that if it were, it would be reasonable. So to consider it, would be contrary to the principles of resulting trusts, and would be inconsistent with what was decided in *Smith v. Baker* and assumed in *Dyer v. Dyer*." At the same time he did not send

the case to law, or consider that any question remained to be disposed of there. I feel it, therefore, difficult to admit the validity of the custom, but assuming it to be valid, I have come to the conclusion that the transaction was an advancement, and that the bill must, in any case, be dismissed. A father obtains, for value, a copyhold, part of a manor, to himself and his three sons, and the longest liver of them successively, subject to a heriot payable on the admission of each. The grant contains no words of inheritance or limitation. The grant is not to the father, his heirs and assigns, or to him, his executors, administrators and assigns, during the lives of his three sons, but it is a grant to him *simpliciter*. He knew the custom was, that upon his death, his son Henry must be admitted, and that no one could dispute this right: He knew that on the death of Henry, George must also be admitted, and that on his death, James, if alive, must be admitted. This is equivalent to a limitation of these hereditaments to himself for life, with successive limitations to his three sons. If he had bought freeholds, and had so limited them, there could be no question that it would have amounted to an advancement in favour of his three sons. This case is exactly similar, and the custom of the manor, of which the father must be held to be cognizant, supplies the legal limitations necessary to constitute an advancement in the case of freeholds. It is true that this is a presumption arising from the form of the instrument conveying the property, coupled with the presumption arising from the relationship of father and son, which shifts the burthen of proof upon those who argue against the advancement. Still, however, this is a presumption which can be rebutted by evidence, and therefore it lies upon the plaintiff to rebut the presumption by evidence sufficiently strong to lead to an opposite conclusion. The evidence of the plaintiff amounts to nothing, and there are no parol declarations worth noticing. The grounds principally relied on by the plaintiffs are, *first*, the form of the grant; *second*, the occupation of the father; *third*, the tenancy of the son George; and *fourth*, the wills of the father and Henry the son. But of these, the first, taken in conjunction

with the alleged custom of the manor, establishes the case of the defendant. The father must be taken to have known the custom of the manor. When he obtained the grant to himself for the lives of his three sons in succession, he knew and intended that his three sons should take after him. The grant contained no limitation to the father or his heirs or assigns after his death. His was simply a life interest. Henry could not claim an admittance under the grant during his father's lifetime: he could be admitted only upon the death of his father. The father had the first legal estate in the hereditaments, and his enjoyment and occupation were in strict accordance with the terms of the grant. The court-rolls shew that the practice has been to admit the *cestuis que vie* in succession, giving them life estates, and it would be contrary to the custom to admit trustees for the *cestuis que vie*, the custom not dealing with trust estates. This disposes of the other grounds relied on. The life occupation of the father gives him a beneficial interest in the first place, and after him the sons in succession have a like interest, and the occupation of the father and the tenancy of the son George are quite in accordance with the form of the grant, and consistent with the reverſionary advancement which the defendant claims. The wills of the father and Henry the son are inconsistent with the terms of the grant, but these subsequent devises cannot affect the original transaction. Although there is upon the rolls an admittance under a will, yet the son Henry was not admitted under the will of his father, but under the original grant. In the absence of any evidence to the contrary, and so far as the custom can be gathered from the rolls, I am of opinion that the case of advancement is made out, and accordingly that the case of the plaintiff fails; but I will not, in any way, prejudice the case of the plaintiff as to the existence or validity of the custom, and in making the order I shall do so without prejudice to the plaintiff's right of bringing such action at law as he may be advised. I shall, however, dismiss the bill with costs.

KINDERSLEY, V. C. }
1857. } CLARKE v. THE ROYAL
Feb. 11, 18. } PANOPTICON.

Mortgage—Power of Sale—Trustees.

*An institution was incorporated by royal charter and deed of settlement, authorizing the council or managing body to hold lands, tenements or hereditaments, and to sell, grant, demise, exchange and dispose of the same; but no sale, mortgage, incumbrance, or other disposition of any such lands, tenements or hereditaments to be made except with the approbation and concurrence of a general meeting of the proprietors of the said corporation. At a general meeting of the proprietors the council were authorized to mortgage the property of the corporation for 25,000*l.* :—Held, that the council had no power to grant a mortgage with a power of sale.*

The bill in this case was filed by Edward Marmaduke Clarke, on behalf of himself and all the other proprietors of "The Royal Panopticon of Science and Art," except the defendants, against the Royal Panopticon and seven persons, comprising the members of the council, and the mortgagees of the freehold and personal property in the Panopticon.

The bill stated, that, by a charter made under the Great Seal, dated the 21st of February 1850, it was declared that the plaintiff and certain persons afterwards to become shareholders in "The Panopticon" should be incorporated in manner therein mentioned; that the capital stock of the institution should consist of 80,000*l.* in the first instance, to be extended according as circumstances should require to the sum of 100,000*l.*, to be divided into shares of 10*l.* each; that a certain number of such shareholders should be elected to form a council, who should have power on behalf of the corporation to enter into and execute all contracts, purchases, sales, assurances and other acts to which the corporate seal should require to be affixed, and generally to do all acts necessary for the well ordering of the affairs of the institution, and to execute all powers in relation to the corporation as if the same were done with the consent of the whole body, so as the same were done in conformity to the

provisions of the said charter, and of the deed of settlement to be subsequently entered into. And Her Majesty did thereby grant and declare that it should be lawful for the said corporation at all times thereafter, notwithstanding the Statutes of Mortmain, or any other statutes or laws to the contrary, to purchase, acquire and hold to them and their successors in perpetuity, or for any term of lives or years or other estate, any lands, tenements or hereditaments of what nature or kind soever, which might be necessary and proper for conducting and carrying on the objects, affairs and business of the institution, and to sell, grant, demise, exchange and dispose of the same as therein mentioned; but no sale, mortgage, incumbrance, or other disposition of any such lands, tenements or hereditaments should be made, except with the approbation and concurrence of a general meeting of the proprietors of the said corporation.

The deed of settlement provided for by the charter was prepared and executed on the 18th of December 1850, and it contained various clauses for the due performance of the objects of the institution; and, amongst other things, it was provided, that general and special meetings of the shareholders should be convened by advertisement in manner therein mentioned, and that notice of the matters to be transacted at such meetings should be given; that twelve persons therein mentioned should constitute the first council of the corporation, to be subsequently named and elected as therein specified, and that the general affairs, business and concerns of the corporation should be under their superintendence and controul, and that they should have the entire sole and exclusive controul, management and disposal of the funds, estates, property and revenues of the corporation, and that they should make all rules and regulations necessary for the carrying on of the affairs of the institution, but so that the same should not be inconsistent with or repugnant to the said charter or the deed of settlement; that if the said council should, pursuant to the powers of the said charter, purchase, rent or take upon lease or otherwise, any house, houses, offices or buildings, or any land for the purpose of building any house, houses or

offices to carry out the objects of the institution, they were authorized from time to time to erect such buildings, and to furnish and fit up the same as they should see fit, and such lands, houses and premises so purchased or erected should be deemed personal estate and transmissible as such, and should be deemed part of the capital stock of the corporation. And the council were thereby authorized from time to time to sell, exchange, let to hire, mortgage or otherwise dispose of, alter, vary and renew such furniture, &c. as to them should seem proper and expedient: provided always, that no such sale, exchange or mortgage should be made except by the authority of a meeting of council specially convened to consider the same; and it was further provided, that if at any time the council should find that the losses of the corporation should have exhausted three fourth-parts of the subscribed capital of the corporation which should have been actually paid up, they should as soon as possible call a special general meeting of the proprietors for the purpose of dissolving the corporation and winding up their affairs: and though such loss as aforesaid should not have occurred, it should be lawful for the corporation to be dissolved at any time with the express consent of three-fifths of the votes of the shareholders present at each of two special general meetings of the proprietors, to be held as therein provided.

The bill then stated, that the defendant Augustus Massey advanced, by way of loan, to the council of the institution the sum of 9,000*l.*, and a deed of security was given to him upon that occasion, with the sanction of the members of the council convened for that purpose. That on the 30th of September 1853, an ordinary annual general meeting of the proprietors of stock in the institution was held in pursuance of a requisition convening the same for the transaction of ordinary business, as also to consider the propriety of authorising the council to borrow 25,000*l.*; whereupon a resolution was passed, to the effect that the meeting did approve of and concur in the corporation raising any sum or sums of money, not exceeding 25,000*l.*, on mortgage of the lands, tenements and hereditaments of the corporation. That,

in pursuance of the foregoing resolution, the council of the said institution borrowed of Henry Hoare, Esq. the sum of 20,000*l.*, and, by two indentures, dated the 15th of December 1853, they assigned to the said Henry Hoare, by way of mortgage, the building and appurtenances and fixtures of the said institution, with a power of sale thereof. That various subsequent dealings took place with the property of the corporation, and by virtue of three several indentures, dated the 30th of May 1855, the defendant Richard Massey became the assignee of the mortgage of 12,000*l.*, (to which the debt of 20,000*l.* had been reduced) as trustee of Augustus Massey; and the sum of 10,000*l.* was secured to the last-named defendant, and 2,000*l.* to Samuel Gurney, and the mortgage debt to Henry Hoare was satisfied; and by two deeds of covenant, bearing the same date, the council covenanted to execute mortgages to the said S. Gurney, to secure the sum of 3,000*l.*, and to the defendant John Wilson to secure the sum of 10,000*l.* That, at a general meeting, held on the 28th of September 1855, it was resolved that the meeting approved of and concurred in the corporation mortgaging the lands, tenements and hereditaments of the corporation for the sum of 13,000*l.* over and above the sum of 12,000*l.* remaining on mortgage, so that the entire sum for which the lands and hereditaments of the corporation were charged should not exceed the aforesaid limit of 25,000*l.* That on the 15th of August 1856 a special general meeting of the shareholders of the institution was held, for the purpose of considering the propriety of winding up the affairs of the institution, but no resolution was come to upon the subject. That the defendants who claimed to be the mortgagees of the property of the institution had taken possession of the building of the institution and its contents, and had advertised the same for sale. That since the filing of the original bill in this suit, a suit of foreclosure had been instituted by Augustus Massey, or some other of the defendants, claiming to be mortgagees of the said institution, against the corporation; and, by consent of all parties, an order had been made for such sale, and a contract for sale had been entered into, but

the plaintiff was not made a party thereto.

The bill prayed, that the several mortgages of the property of the Panopticon claimed by the defendants, or any of them, might be declared illegal and void as against the corporation and the proprietors of stock therein, or, at all events, that it might be declared that any powers of sale contained in such mortgages, or any of them, were void and of no effect, and that an injunction might be granted to restrain the sale of the said property of the institution, or any part thereof, by the defendants, and to restrain the defendants from further proceeding with the said foreclosure suit, and from carrying into effect any order for sale made therein, and from conveying to any purchaser any portion of the property of the said institution.

The motion for an injunction was heard, before the Vice Chancellor, at Southampton, during the long vacation of 1856, when his Honour granted the injunction.

The case now came on upon motion on behalf of the corporation and council of the institution, and also the mortgagees, to dissolve the injunction.

Mr. Baily and *Mr. C. Hall*, for the mortgagees, contended that the power to make a mortgage included the granting of a power of sale. A mortgage without such power would be incomplete, and very few persons would be found to advance their money unless the mortgage contained a power of sale. It was now the universal practice of conveyancers to insert a power of sale in all mortgages. It was undoubted that the general meeting had power under the charter and deed of settlement to authorize the council either to sell or to mortgage with a power of sale; and it must be taken that the general meeting intended to authorize the council to give a mortgage in the usual form, and therefore to include a power of sale, without which the power to mortgage would be altogether ineffective.

Mr. Terrell and *Mr. Stiffe*, for the plaintiff and some of the proprietors, submitted that the Court must be bound by the strict letter of the law. The council had no power to sell or mortgage without the sanction of a general meeting, and the general meeting did no more than autho-

rize a mortgage, and not a sale. The council were the trustees of the general body of the shareholders, and had no power to exceed the precise authority given them by the general meeting. The trustees had no power given them to sell, and certainly could not delegate such a power to others. It was true that mortgages were very commonly made with a power of sale, but this practice was not universal, and where it was omitted, the Court, upon the application of a mortgagee, could give power either to sell or foreclose.

Mr. Rawlinson appeared for *S. Gurney*.

Mr. Glasse and *Mr. Beales*, for the council.

The following cases were cited:—

Clay v. Rufford, 5 De Gex & Sm. 768.

Russell v. Plaice, 18 Beav. 21; s. c. 23 Law J. Rep. (N.S.) Chanc. 441.

Stroughill v. Anstey, 1 De Gex, M. & G. 635; s. c. 22 Law J. Rep. (N.S.) Chanc. 180.

Sanders v. Richards, 2 Coll. 568.

Mr. Bailly was heard in reply.

Feb. 18.—KINDERSLEY, V.C.—This was a motion to dissolve an injunction granted in the long vacation, not *ex parte* but on notice, to restrain a mortgagee from exercising a power of sale under his mortgage. There was a motion by another party, a mortgagor of the Panopticon Institution, which is an incorporated society, to dissolve the injunction, on the ground that there was no reason to include that party in this injunction. The motion made by the mortgagee to dissolve the injunction raises two material questions. The first question is, whether it was competent to the mortgagor, the party who executed the mortgage, to give a power of sale. That is one question. The other question is, assuming it was not competent to him, whether the party who is seeking relief against the exercise of that power of sale is not precluded by concurrence or acquiescence from seeking any relief upon the subject. With regard to the first question, it is rather remarkable that there should be a dearth of authority upon the subject, but it appears to me that there are

certain clear settled principles, by reasoning from which, according to a fair and logical course of reasoning, the conclusion ought to be that it was not competent to give such a power of sale. Now, the principles which I refer to are these: it is clear, I apprehend, beyond all doubt, that although a special power to sell given to a trustee may comprise power to mortgage, and in the absence of any indication of intention to the contrary, would, as a general rule, involve a power to mortgage, which, after all, is but a conditional sale; yet a special power to mortgage, given to a trustee, does not comprise a power to sell. That, I apprehend, is a proposition beyond all doubt or controversy. Another general proposition, which I take to be equally clear, and numerous authorities might be cited in support of it, is this: that if a special power is given to a trustee involving any confidence or personal judgment or discretion in the trust, it is not competent to that trustee to delegate the exercise thereof to another person. Many authorities might be cited in support of it, but the proposition is so clear that it is quite unnecessary to refer to any cases on the subject.

Now, let us take those two propositions, and see what is the legitimate, and I may say, the necessary conclusion to be arrived at, by reasoning from those premises. Take the second proposition, namely, that it is not competent to a trustee who has a special power given him, involving confidence in his personal discretion, to delegate the exercise of that special power to another. The first consequence is, that if there be a special power (and it will be observed I am speaking now of a special power given to a trustee for sale, involving a confidence in that trustee and an exercise of discretion as to whether the sale should take place or not), or if it be a confidence and discretion as to the time at which or the circumstances under which a sale shall take place, it appears to me, as a matter of course, that the trustee cannot delegate to another the exercise of that discretion, that is, the exercise of the power.

Now, if that be so, how can a trustee who has not vested in himself or reposed in himself any power to sell—how is it

possible that that trustee can give an authority to another to sell? Now, only let it be looked at as a single question. The principle is, that a power to mortgage does not comprise a power to sell: I mean a special power to a trustee to mortgage, does not comprise a power to sell. If so, a trustee, with a special power to mortgage only, that is, a discretion, cannot sell property. He may mortgage it, but he cannot sell it. But if, as is contended by the defendants, a power to mortgage comprises as an incident a power to give an authority to a mortgagee to sell, then this absurd result must follow, that here is a trustee who had no power to sell himself, but who is yet authorized to delegate that power to another person. It appears to me, when it is considered simply, that it is too clear almost for argument.

It is said that the practice of giving to a mortgagee a power of sale (that is, in an ordinary mortgage) is now so universal, that a power of sale must be considered as a necessary incident of a mortgage. I must say, to that proposition I demur. In the first place I cannot admit the universality of the practice. There is no doubt that it is much more common now than it used to be in an ordinary mortgage for the mortgagor to give, or rather, I should say, for the mortgagee to require, and for the mortgagor, who is the owner of the property, to give a power of sale, but it is by no means universal. It is very common, and it is much more common than it was even at the commencement of the thirty or forty years since I have had any acquaintance with the practice of conveyancers in this respect, but it is by no means universal; and it appears to me that when a mortgage is now made, where the mortgaged property is a clear satisfactory property to advance money upon, not houses and buildings, but agricultural property, and of a large marketable value, a mortgagor may say, I shall not give a power to sell; if the mortgagee does not choose to advance the money without a power of sale, I will get somebody who will. There is no difficulty in getting a mortgagee to advance money on a good title and good property, without a power of sale: at the same time I am ready to admit it has become a general practice. But let us con-

sider for a moment the proposition, that a power of sale has become an incident to a mortgage, I will not say a necessary incident,—perhaps that is carrying the proposition further than is suggested,—but that it has become so much an incident that it is a matter of course (unless there is something to the contrary) to insert a power of sale. Consider for a moment what power. A power of sale to be given to whom? Is it to be given to the mortgagee alone, that is, that the trustee may delegate it to a particular individual, or does it mean that he may delegate it not only to the mortgagee himself, but to the executors or administrators of that mortgagee, whoever they may be, or to the assignee of that mortgagee, whoever that assignee may be? Surely it is rather startling that a trustee who has no power of selling, may not only delegate to a particular individual, in whom he may have confidence, a power of selling, but that he may delegate it to that individual and to anybody who may represent him and stand in his shoes either as executor or administrator, or the person to whom he may assign the mortgage. And, further, if it involves a power of sale, a power to give an authority to sell, on what terms is that to be? On what terms with respect to the notice, and the period of notice that is requisite? Is it to be after a failure to pay a half-year's interest, or after notice to pay principal? And after what notice? Three months, six months, three weeks, or one week? What is the power to give an authority to sell that is thus incident to a mortgage? It appears to me it is utterly impossible to hold that it is an incident.

Then, it is suggested, that unless it be held that a power to mortgage does involve as an incident the power to give to the mortgagee, or to those who may represent him, a power of sale, unless that be so it would be a disadvantage in fact to the mortgagor, that is, to the *cestuis que trust* of the property which is thus vested in the trustee with a power to mortgage, because it is suggested that the property may be of such a character that it may be impossible, or, at least, very difficult, to find a mortgagee who would advance his money without a power of sale, and, at all events, that you may not be able to get a mortgage on

the same advantageous terms for the benefit of the mortgagors, that is, for those beneficially interested in the property as *cestuis que trust*, unless you have such a power, and that it would be for the benefit of the *cestuis que trust* that a trustee with a power to mortgage should have the power to do what any prudent owner would do. Now, that argument appears to me to be fallacious in this respect. It goes too far—it is suicidal—it destroys itself, because it is clear that a trustee is not armed with the power to do what a prudent owner could do. A prudent owner may deal with his property in any way that he thinks fit; but it would be a strong proposition to say that a trustee may deal with that property in any way he thinks fit. A prudent owner may deal with his own property in various ways, which, if followed by a trustee, would be a downright breach of trust in him. A prudent owner, at least a person prudent not only in his own eyes but in the eyes of the world, may lend his money on railway shares, or purchase railway shares. A person with the same character of prudence may embark money in the Royal British Bank, or the Newcastle Commercial Bank, or the Tipperary Bank, or in any of those bodies that have become so notorious of late years. Many a man who was called prudent, and in the eyes of the world is deemed prudent, would do that. But might a trustee do that? A trustee is not to be armed with a power of doing that which a person so called a prudent person might do with his own property. He is tied down by the letter, of course I do not mean to exclude the spirit, but he is tied down by the letter and the spirit to that degree of power and discretion which is vested in him. Then I may further observe, with regard to the suggestion that it has become very common of late years to introduce a power of sale in a mortgage, it is perfectly true that it has been so, as I have said, but it has become far less necessary, that is, far less desirable, or far less important since the passing of the act for the improvement of the jurisdiction in equity; because, by the 48th section of that act a mortgagee coming with a bill to foreclose, may at his own option, but subject to the discretion of the Court, have a sale if he prefer that to a foreclosure. And

not only so, but the mortgagor may, unless the mortgagee objects, have a direction to sell, instead of a decree for foreclosure. The mortgagee is armed with the absolute option to have a sale if he prefers it, and he is moreover armed with a power to say, No, I will not have a sale, I prefer foreclosure. So that by that act of parliament a very great power is given to a mortgagee for the purpose of getting a sale, though not of selling at his own mere option. Now, that is a very wise and beneficial provision for both parties, both for mortgagor and mortgagee; and, taking the case of a trustee, a very beneficial arrangement for *cestuis que trust*: I mean a trustee having power to mortgage, because if a mortgage is made without a power of sale, if no authority is given to the trustee to give the power of sale, if the mortgagee files his bill, he may get a sale subject always to the Court exercising a reasonable discretion for the benefit of the mortgagor and the mortgagee.

In taking this view of the question, I adhere entirely to the view I took when the case was heard before me in the long vacation. I adhere to this view that a power of sale is not incident to a mere power to mortgage; that a power to mortgage (I mean a special power to a trustee to mortgage) does not give him the authority to sell himself, and, therefore, certainly *à fortiori* does not give him authority to give another the power to sell. So far, therefore, as the case rests on the first question, it appears to me that I should decide entirely in favour of the plaintiff in this case. I have now been speaking of the reality only, that is, the leasehold estate. With regard to the personality, it stands thus. The personality, the chattel property, such as in this case the apparatus and instruments, and the various matters of art and science that were collected in this building, chattels of that description, or any ordinary personal chattels, are in a different situation, for this reason. They are not yielding any profit. The only way in which you can make personality an effective mortgage is, in the shape of a bill of sale, or something tantamount to a bill of sale, that is, handing them over to the mortgagee, and giving him the power to sell the property; otherwise there would be no mortgage at all, for

no man would be unwise enough to advance his money on mere personal chattels except in the shape of a bill of sale, or, at least, a power of sale.

Now, what are the circumstances with regard to the power given to the trustees? This case is not the case of a common individual trustee, not an ordinary trustee, but it is this:—By a charter, dated in February 1850, in the 13th year of the reign of Her present Majesty, this body was incorporated, and by the charter Her Majesty granted and declared "that it should be lawful for the said corporation at all times thereafter, notwithstanding the Statute of Mortmain, or any other statutes or laws to the contrary, to purchase, acquire, and hold to them and their successors in perpetuity, or for any term of lives or years or other estate, any lands, tenements or hereditaments of what nature or kind soever, which might be necessary and proper for conducting and carrying on the objects, affairs and business of the said institution, and to sell, grant, demise, exchange and dispose of the same as therein mentioned." Now, it appears to me the object of that clause was simply this, to enable this body to take any lands; there was a limit of 5,000*l.* a-year, I think, but they are to take and to become the absolute owners of any lands, tenements or hereditaments for any estate or interest whatsoever. That was the power given to them, and the only object of this clause was to make them the absolute owners that they might deal with the property which they purchased as they pleased. That is, the body at large. They might sell the property or mortgage it, or mortgage it with a power of sale, or do what they pleased. Then follows the limit of 5,000*l.* in value, and then follows this clause:—"But no sale, mortgage, incumbrance or other disposition of any such lands, tenements or hereditaments should be made, except with the approbation and concurrence of a general meeting of the proprietors of the said corporation."

There is another clause in the charter which gives very large powers to the council, that is, the governing and managing council, but there is this clause expressly declaring, that there shall be no sale, no mortgage, no disposition of any kind of the lands, tenements or hereditaments, except

with the approbation or concurrence of a general meeting of the proprietors.

Now, no doubt a general meeting of the proprietors could give to the governing body, to the council, power to sell, could give them power to mortgage with a power of sale; in short, to do just as they pleased with this property. The deed of settlement follows that out, and the charter prescribes that that deed of settlement shall not contain anything repugnant to the charter. The deed of settlement contains nothing which appears to me to affect the case beyond what I have already referred to in the charter itself. In the year 1853 Mr. Augustus Massey, who is one of the present defendants, advanced a sum of 10,000*l.* on the security of the chattel-property, which was afterwards paid off, and therefore that is entirely out of all question now. On the 30th of September 1853 a general meeting of the proprietors took place. That was the period at which, by the terms of the deed of settlement the general annual meeting was to be holden, and special notice was given of one of the objects to be considered at that general meeting, which was the propriety of authorizing the council to borrow any sums, not exceeding the sum of 25,000*l.*, whereupon a resolution embodying that special purpose was duly proposed to the meeting and passed, to the effect that the meeting did approve of and concur in the corporation raising any sum or sums of money not exceeding 25,000*l.* on mortgage of the lands, tenements and hereditaments of the corporation. In pursuance of the foregoing resolution the institution borrowed of Henry Hoare, Esq. the sum of 20,000*l.*; and by two indentures, dated the 15th of December 1853, they assigned to the said Henry Hoare, by way of mortgage, the building and apparatus and fixtures of the institution, with a power of sale. One of the deeds was a mortgage of the lands and building, and the other a mortgage of the chattels and of the monies to arise from selling shares, and the surplus monies, after paying expenses to arise from the admission of the public to the exhibition. As far as the question relates to the reasonableness of the terms, they appear to me to be perfectly reasonable, and nothing more than any prudent owner might do.

On the 20th of September 1854 a general meeting of the proprietors took place, at which the council presented a report, wherein they stated that a scheme had been arranged by which the mortgage debt would be reduced from 20,000*l.* to 12,000*l.*, and this was carried into effect accordingly. A general meeting was subsequently held, on the 28th of September 1855, at which it was resolved to the effect that the meeting approved of and concurred in the corporation mortgaging the lands, tenements and hereditaments of the corporation for the sum of 13,000*l.* over and above the 12,000*l.* remaining on mortgage, under the authority of the proprietors at the annual general meeting, held on the 30th of September 1853, so that the entire sum for which the said lands and hereditaments were charged should not exceed the aforesaid limit of 25,000*l.*, and this arrangement was also carried into effect by a transfer of the existing mortgages, and by other deeds mortgaging the property for the residue of the proposed sum, which deeds also contained a power of sale. And this gives rise to the question whether, according to what took place, it was competent for the managing body, that is, the council, who, in this respect, were merely trustees, so far as any power was concerned in respect of selling and mortgaging, being merely trustees for the general body, with a special power to mortgage only,—whether they could give a mortgage with a power of sale. I have already expressed my opinion on that point, that it was not competent for them to give that power of sale.

His Honour then went into the second question—whether, under the circumstances, Mr. Clarke, the plaintiff, was precluded, on the ground of acquiescence, from coming forward, by a bill filed, on behalf of himself and all the other shareholders, except the defendants, to complain of the transactions? After discussing the different circumstances in the case, His Honour decided that the plaintiff was precluded from maintaining the injunction, and that on this second question, the injunction must be dissolved. What he had hitherto said referred to the motion by the mortgagee. The other motion was made on behalf of the body of share-

holders at large, as a corporate body, asking that the injunction might be dissolved as to them. He did not see why the injunction should have extended to them, for, as it was now worded, it was an injunction to restrain the body generally from selling their property and from concurring in any sale. This body, by the very terms of their charter, as well as by the deed of settlement, had entire power over their own property. They might do what they pleased with it. They might sell it, they might mortgage it, they might mortgage it with a power of sale, or, in short, they might do whatever an owner, whether a prudent or an imprudent owner, might do. Therefore, as to the body, it was a mistake in drawing up the injunction to comprise the body at large. Under these circumstances, as to all the parties, the injunction must be dissolved, with costs, including the costs of the application for the injunction.

M.R. }
Nov. 21, 24. } WALLER v. BARRETT.

Executor—Leaseholds—Onerous Covenants—Indemnity.

A testator was possessed of leasehold estate in respect of which he was liable upon onerous covenants. In a suit for the administration of his estate the leaseholds were sold and the money brought into court:—Held, that the suit indemnified the executor from all future breaches of covenant; that no part of the testator's estate ought to be set aside to meet contingent liabilities; that the estate ought to be distributed, and that the remedy of any future creditor was not against the executor, but against the parties among whom the estate had been distributed.

Thomas Scarman, by his will, dated the 12th of January 1816, gave all his leasehold estate and other property to his wife Eleanor for life, and after her death (which took place on the 26th of September 1836) to his three daughters equally.

The testator died, shortly after making his will, possessed of several leasehold premises.

It appeared that Arthur Robinson Chauvel and James Chauvel were lessees under the corporation of the city of London, of divers premises in Bond Street, and on the 28th of February 1793 they demised the house and premises, 68, Bond Street, to James Melvin, from Midsummer 1793, for ninety years, (which will expire at Midsummer 1883), at a yearly rent of 78*l.* 15*s.*

The lease contained covenants by the lessee to pay the rent and taxes; to insure the premises against fire, to rebuild in case of fire, to keep the premises in repair, to set up the arms of the city of London, and to continue the same to the end of the term, not to carry on any noisome or offensive trade, or make any drain into the common drain or sewer, or obstruct the light belonging to any messuage or tenement belonging to the city.

On the 1st of March 1793 James Melvin assigned the lease of the same premises to Thomas Scarman, the testator, subject to the covenants in the lease, and he covenanted to indemnify the lessee against the breach of any of them.

On the 8th of March 1793 Thomas Scarman demised the same premises to Matthew Warne, from Christmas 1792, for eighty years (which expires at Christmas 1872), at a rent of 105*l.* The lease was subject to covenants similar to those contained in the original lease, and Thomas Scarman also covenanted with the lessee for quiet enjoyment.

On the 21st of October 1793 Messrs. Chauvel granted a lease of some stables and warehouses in the rear of the house in Bond Street to James Melvin, from Lady-day 1809, for seventy-four years and a quarter, at a rent of 13*l.* 13*s.*, and subject to covenants similar to those contained in the lease of the house in Bond Street.

On the 1st of August 1794 J. Melvin assigned the lease to Thomas Scarman, who covenanted to indemnify him from the covenants contained in the lease.

On the 19th of December 1798 Thomas Scarman assigned the same premises to Robert Kennett, subject to the covenants contained in the lease, and the assignee covenanted to indemnify him against any breach thereof, and Thomas Scarman covenanted with the assignee for his quiet enjoyment.

On the 21st of December 1798 Robert Kennett demised the stables and warehouses to John Calloway, from Michaelmas 1798, for eighty-four years and three-quarters less eleven days, at a rent of 50*l.* This lease, which expires eleven days before Midsummer 1883, contained covenants by the lessee similar to those in the original lease, except the covenant to insure. The lessee also covenanted not to make any erection or building without the consent of Messrs. Chauvel and Kennett.

On the 2nd of October 1800 Robert Kennett re-assigned the stables and warehouses to Thomas Scarman, subject to the underleases granted to J. Calloway, and Thomas Scarman covenanted to indemnify R. Kennett against the rent and covenants of the original lease.

On the 13th of August 1813 the assignees of J. Calloway assigned the underlease of the stables and warehouses to John Parkes, who covenanted to indemnify John Calloway and his assignees against the rent and covenants in the underlease.

On the 17th of November 1814 J. Parkes demised a part of the stables and warehouses as underleased to John Calloway to Peter Delawney, from Midsummer 1814, for sixty-eight years and three-quarters, less thirteen days, at a rent of 35*l.* This lease contained covenants by the lessee similar to those contained in the original lease of the 21st of October 1798, omitting the covenant to insure, and the covenant not to build without consent; also a covenant by the lessor to pay the rent of 50*l.* reserved by the lease of the 21st of December 1798; it also declared that it should be lawful for the lessee to pull down any part of the buildings and erect new buildings thereon as he thought proper, so that he observed the covenant against obstructing lights.

On the 6th of February 1815 J. Parkes assigned to Thomas Scarman the stables and warehouses in the underlease to John Calloway, subject as to part of the premises to the underlease to Peter Delawney, and T. Scarman covenanted to indemnify the assignor against the rent and covenants of the underlease to J. Calloway.

The premises not comprised in the underlease to Peter Delawney have since been let by the executors to Robert Jupe, from Midsummer 1838, for thirty-one years, at a

rent of 42*l.*; this expires at Midsummer 1869.

This suit was instituted by claim for the administration of the estate of Thomas Scarman, and the leasehold premises were sold under an order made in the cause, and covenants to indemnify the assignors and the estate of T. Scarman against the rent and covenants contained in the several leases, were entered into by the assignees.

The chief clerk now certified that the covenants of the purchasers with a bond from the parties beneficially entitled to the testator's personal estate, to refund such part of the money paid to them as the Court should direct in the event of any claim being established against the testator's estate or his representatives, would be a sufficient indemnity against any contingent liabilities which might arise under the covenants.

The executors, however, claimed to have sufficient funds set apart to indemnify them against any future breaches of covenant under the leases.

Mr. Selwyn and *Mr. Sheffield*, for the executors.—The executors' indemnity is the estate they hold of the testator: they cannot be required to part with it so long as there are any liabilities to answer. If a testator held leasehold at a ground rent, the Court might possibly distribute his estate regardless of his covenants, as in *Dean v. Allen* (1); but in the present case the testator is not only liable on the covenants in the original lease, but he is also liable to under-lessees in respect of covenants entered into with them. The Court, therefore, will not leave the executors responsible at law, but it will see that sufficient is retained to exonerate them from any demands which may be made.—

Fletcher v. Stevenson, 3 Hare, 360; s. c. 13 Law J. Rep. (N.S.) Chanc. 202.

Brewer v. Pocock, 23 Beav. 310.

Mr. R. Palmer, *Mr. Giffard*, *Mr. Follett* and *Mr. Hetherington*, for the parties beneficially entitled to the funds in court, were not called on.

Nov. 24.—The MASTER OF THE ROLLS.

—There is a good deal of involution about the title. The facts, however, afford sufficient indemnity to the executors. The only way in which the testator or his estate could be affected would be by an action against the first lessee by the ground landlord, and the facts shew that it would be obviously for his interest to proceed against the person in possession by ejectment, instead of bringing an action upon the covenant against the first lessee. I think, therefore, that there is a sufficient indemnity.

One or two further observations may be necessary. I wish the view I take of these cases to be clearly expressed, that they may be understood, and if wrong that it may be set right. In *Dean v. Allen* I expressed my opinion, which is, that the executor who was ejected, having placed all the circumstances before the Court, and having explained everything in court, is indemnified on all future occasions; and the cases I shall refer to will make the grounds on which I proceed plain. In the first place, I hold this to be quite established by all the authorities, that in case of a breach of covenant, supposing the covenant was broken at this moment, and the creditor did not come in and seek to prove under the decree, he would be barred of all remedy against the executor, and the executor would be perfectly safe; that in the case of an existing debt, if an existing creditor does not come in to prove under the decree, the Court administers the assets, and it protects the executor on all future occasions. The creditor is not left without his remedy, but in point of fact that remedy is not against the executor. That is quite established in this court, and it is not necessary to cite many authorities on the subject. In *Gillespie v. Alexander* (2) Lord Eldon says, "If a creditor does not come in till after the executor has paid away the residue, he is not without remedy, though he is barred the benefit of that decree. If he has a mind to sue the legatees, and bring back the fund, he may do so; but he cannot affect the legatees, except by suit, and he cannot affect the executor at all." The *dicta* upon authorities of this kind are numerous; they

(1) 20 Beav. 1.

(2) 3 Russ. 130.

are to be found in *Brooks v. Reynolds* (3), *David v. Frowd* (4), *Williams v. Jones* (5), *Knaichbull v. Fearnhead* (6). The last contains the following observation:—"Where an executor passes his accounts in this court, he is discharged from further liability, and the creditor is left to his remedy against the legatees; but if he pays away the residue without passing his accounts in court, he does it at his own risk." That is the principle upon which the Court proceeds in such cases. In *Low v. Carter* (7) there is this observation:—"It is to be regretted that the jurisdiction of the Court in such cases cannot be exercised at a less expense; but when we so frequently see suits instituted against executors after a considerable lapse of time, and find them held personally responsible for acts done by them in mistake, but with the most honest intention, the necessity of giving them every opportunity of exonerating themselves by passing their accounts in this court is obvious."

These are only some of the observations to which it is possible to refer, to shew that in this case of an existing debt the executor is perfectly exonerated if he brings all the facts before the Court, and pays away the assets under the direction of the Court. I am at a loss to conceive on what principle a debt, which may arise hereafter but which is not now existing, is to be treated on a different footing from an existing debt. It is quite different on the part of a creditor. The creditor, although he may have been advertised for, may have been abroad; he may be ignorant of the whole transaction; and yet it is absolutely necessary for him to establish his case in this court against the legatees. In *March v. Russell* (8) is this observation:—"Formerly, when legacies were paid, it seems to have been the practice to oblige the legatee to give security to refund, in case any other debts were discovered. That practice has been discontinued, but the legatee's liability to

refund remains. The creditor has not the same security for the refunding as when the legatee was obliged to give security for that purpose, but he has the personal liability of the legatee." I hold that to be the principle which governs these cases; that it is for the purpose of giving a greater degree of security to the executor (in case a creditor should arise hereafter) that the Court requires this to be done in the form of an indemnity to the executor. It is called an indemnity to the executor, and if he has told the facts before the Court, I apprehend his indemnity is complete and perfect so far as he is concerned, as he acts under the direction of the Court.

Fletcher v. Stevenson was a case of indemnity, and a certain sum of money was ordered to be retained. In that case, Wigram, V.C. observed, that "so far as the executor is personally concerned, he would, I apprehend, be safe in acting under the direction of the Court; but in considering what degree of protection is due to the absent covenantee, I am bound to consider, whether the Court taking the fund out of the hands of the executor, can do less than it would expect the executor to do if the fund remained in his hands." Accordingly, in *Dean v. Allen*, I made the same observations, and referred to those cases, stating that if the executor acted under the direction of the Court, and laid everything he knew fully and fairly before the Court, he would be protected for the future, and that the Court would be enabled to prevent him from sustaining any injury in case of being sued, if a creditor should afterwards arise. There are some *dicta* on the points which would bear perhaps a different construction, but I am unable to find a *dictum*—certainly no decision—which bears deliberately against that view of the case, which appears to be the principle and good sense of the matter.

Simmons v. Bolland (9) was referred to in the last-mentioned case, and Sir W. Grant says, "The decree of the Court is no protection to the executor;" but Mr. Beavan, in a note which seems to contain the proper answer to that, says, "It appears from the argument in *Simmons v.*

(3) 1 Bro. C.C. 183; s. c. Diok. 603.

(4) 1 Myl. & K. 200; s. c. 2 Law J. Rep. (N.S.) Chanc. 68.

(5) 10 Ves. 77.

(6) 3 Myl. & Cr. 122.

(7) 1 Beav. 426.

(8) 3 Myl. & Cr. 31, 41; s. c. 6 Law J. Rep. (N.S.) Chanc. 303.

(9) 3 Mer. 547.

Bolland, that the suit was not for the general administration of the estate, and this circumstance might therefore justify the observations of Sir W. Grant, that the decree would not protect the executors."

This must be guarded against in my observations. I do not mean to say, that where an executor is ordered to pay a sum of money it will protect him from creditors in a suit for the administration of assets; but in a suit for the administration of assets, I apprehend that the Court ordering him to pay the money is, personally, a perfect security to him. Unless that were so, it would paralyze the functions of this Court; and this Court, in fact, acts on the same principle with respect to non-existing debts which may hereafter arise, as it would in the case of existing debts not proved. This is only to effect a security in case the Court sees a reasonable probability that a creditor may afterwards come forward, who is not now able to establish his case. My opinion does not interfere with, but carries out rather, although in a different form, the view which Lord Cottenham stated was the old practice in *March v. Russell*.

That is the view which I take of this case, and I thought it desirable to state it, although it does not at all affect my judgment; because it in either event proceeds on the facts. I think the facts themselves are a sufficient proof that the ground landlord would proceed by ejectment, and not by an action of covenant against the original lessee, in which case alone would this testator's assets be affected.

M.R.
Nov. 20, 21; } WILLIAMS v. HUGHES.
Dec. 2. }

Legacies, Specific or Demonstrative — Real Estate.

*A testatrix had power, under her brother's will, to appoint real and personal estate; she gave the real estate to trustees to raise 1,000*l.* and pay the amount as legacies to various persons, and subject thereto for E. P. and his heirs. She then gave several legacies, payable out of her own personal estate, and other legacies*

payable out of an unappointed moiety of her brother's personal estate, after the decease of his widow, and she directed the duty on all the foregoing legacies to be paid out of her personal estate, and if deficient for full payment either of duty or legacies, such deficiency was to be made good out of the said real estate, on which she charged the same. By two codicils the testatrix left other legacies, and directed that the sums bequeathed out of her brother's estate should be paid, with the other legacies, immediately after her decease:—Held, that the legacies given by the codicils were charged on the real estate, and that the legacies payable out of the brother's estate were not specific, but demonstrative.

Elizabeth Williams, by her will, dated the 5th of July 1850, after reciting that under the will of her brother, Robert Williams, she had power to dispose of not only the real estates thereby devised, but also the personal estate, subject to the life interests of Frances Williams, her brother's widow and of herself, and reciting that she had by a deed, dated the 10th of March 1851, exercised her power of appointment over the personal estate to the extent of one moiety thereof, she, in exercise of her power, appointed all the real estates, after the decease of her sister-in-law and herself, unto and to the use of Thomas Hughes and his heirs, in trust, by mortgage of the same, or a competent part thereof, to raise a sum of 1,000*l.*, to be paid in several sums to divers persons at the several times and in manner therein mentioned, and subject thereto she directed that the estates should be held in trust for Ellis Price, but in case he should die under twenty-one, and without leaving issue, then in trust for his elder brother, John James Price, and his heirs. She then bequeathed several legacies, and directed that they should be paid out of her own personal estate immediately after her decease. She then gave other legacies out of the moiety remaining unappointed of her brother's personal estate, to be paid after the death of her sister-in-law; and she also directed that the duty upon all the foregoing legacies should be paid out of the residue of her personal estate, in order that the parties might receive their legacies in full; and if there should be a deficiency

of her personal estate either for the payment of the legacies in full, or for payment of the duty, then such deficiency must be made up out of the said real estate, on which she thereby charged the same, and she gave whatever residue might remain of her said brother's personal estate, or of her own undisposed of, to Jane Williams, but in case she should die before her, then to Jane Watkins Williams, and in case of her death before her, to Margaret Sophia Williams.

By a codicil, dated the 20th of July 1854, the testatrix revoked several legacies given by her will, and bequeathed other sums in lieu thereof to the same persons. She also bequeathed other pecuniary legacies to different persons, and in regard to the legacies she had bequeathed out of the moiety remaining unappointed of her brother's personal estate, she thereby revoked the directions there given that the same were to be paid after the death of her sister-in-law, and her will then was, that the same should be paid immediately after her decease, in common with the other legacies named in her will and in that codicil.

By a second codicil to her will, dated the 19th of January 1855, after varying some of the legacies and giving others, she said, in case there was any surplus of the money, after payment of debts, funeral and testamentary expenses, and the several legacies directed by her will and codicil to be paid out of her own personal estate immediately after her decease, she gave and bequeathed one-half of the said surplus (if any) to her executrices, Mrs. Frances Williams and Mary Elizabeth Roberts, to be equally divided between them; and as to the other half thereof, she gave the same to her executrices and executor in trust to distribute the same amongst her poor relations and servants, in such shares and proportions as they, in their discretion, should think proper; and in other respects she confirmed her will and codicil.

The testatrix died on the 1st of February 1855.

Two questions were now raised, the one whether the legacies given by the codicils were charged on the real estate, the other whether they were general or specific.

Mr. R. Palmer, with *Mr. W. W. Cooper*, for the plaintiff Frances Williams, an executrix, and one of the residuary legatees.

Mr. Selwyn and *Mr. Fischer*, for the legatees, whose legacies were given out of the personal estate of the testatrix.—The charge upon the land is general, and in case of deficiency the legatees are entitled to payment out of the real estate appointed by the testatrix—*Hannis v. Packer* (1).

Mr. Follett and *Mr. Amphlett*, for the parties entitled to the real estate.—The charge upon the real estate is confined to the legacies given by her will: it is a partial, and not a general charge; there is nothing to extend it beyond the will.—

Early v. Benbow, 2 Coll. 342; s. c. 15 Law J. Rep. (n.s.) Chanc. 169.

Bonner v. Bonner, 13 Ves. 379.

Hall v. Severne, 9 Sim. 515.

Radburn v. Jervis, 3 Beav. 450.

Byne v. Currey, 2 Cr. & M. 608; s. c. 3 Law J. Rep. (n.s.) Exch. 177.

THE MASTER OF THE ROLLS. — The charge on the real estate was general; it applied to all the legacies which the testatrix gave out of her own personal estate both by her will and the codicils; the last codicil in effect confirmed both the preceding instruments. In case, therefore, the personal estate should be insufficient to meet all demands, the deficiency must be supplied out of the real estate charged. I assume there is no question as to whether the legacies made payable out of the brother's personal estate are made a charge on the real estate.

Mr. Cary and *Mr. W. D. Griffith*, for the legatees whose legacies were given out of the brother's personal estate.—The testatrix charges all her real estates with the payment of her legacies; the real and residuary legatees are entitled to nothing until the legacies are paid. They cannot claim any particular preference—*Spong v. Spong* (2). They also asked the Court, if necessary, to marshal the assets.

Mr. Lloyd and *Mr. Shapter*, for the residuary legatees.—The real estate was

(1) Amb. 556.

(2) 1 You. & J. Exch. 300.

made the security for the legacies given by the will and codicils, and for the duty payable thereon.—

Hanby v. Roberts, Amb. 127.

Masters v. Masters, 1 P. Wms. 421.

The Attorney General v. Parkin, Amb. 566.

Ellis v. Walker, Ibid. 309.

Kirby v. Potter, 4 Ves. 748.

Colville v. Middleton, 3 Beav. 570.

Gillaume v. Adderley, 15 Ves. 384.

Campbell v. Graham, 1 Russ. & M. 453; s. c. 9 Law J. Rep. Chanc. 234.

Walker v. Laxton, 1 You. & J. 557.

Ashburner v. Macquire, 2 Bro. C.C. 108.

Kirkpatrick v. Kilpatrick, 13 Ves. 476.

Dickin v. Edwards, 4 Hare, 273; s. c. nom. *Dickin v. Barker*, 14 Law J. Rep. (N.S.) Chanc. 22.

Willox v. Rhodes, 2 Russ. 452.

Fowler v. Willoughby, 2 Sim. & S. 354; s. c. 4 Law J. Rep. Chanc. 27.

Spurway v. Glynn, 9 Ves. 483.

Mann v. Copland, 2 Madd. 223.

Welby v. Rockcliffe, 1 Russ. & M. 571; s. c. 8 Law J. Rep. (N.S.) Chanc. 142.

Dec. 2.—THE MASTER OF THE ROLLS.—

The question upon which I reserved my judgment was, whether the legacies given by the testatrix out of a moiety of her brother's estate, over which she had a power of appointment, after the death of her sister-in-law, were demonstrative legacies, or whether, if the brother's estate failed, the legacies were to abate. The cases upon this subject are numerous. In *Dickin v. Edwards* it was observed, "There is no doubt that where a testator bequeaths a sum of money in such a manner as to shew a separate and independent intention that the money shall be paid to the legatee at all events, that intention will not be held to be controuled merely by a direction in the will that the money is to be raised in a particular way, or out of a particular fund. It may be difficult in some of the reported cases to discover the evidence of that separate and independent intention which the Court has ascribed to a testator rather than allow the objects of his bounty to be disappointed; but I understand the prin-

ciple of all the decisions to be that which is relied upon by Sir T. Plumer in *Mann v. Copland*, and is expressed, I think, with sufficient distinctness by Lord Macclesfield, in *Savile v. Blacket*" (3). In the former case it is observed that what constitutes that evidence is a matter of great nicety, and varies considerably in different cases. In *Savile v. Blacket*, *The Attorney General v. Parkin*, *Kirkpatrick v. Kilpatrick*, *Fowler v. Willoughby*, *Willow v. Rhodes*, and *Colville v. Middleton*, the legacies were held to be demonstrative; there are, however, many cases which go the other way: where the direction is to pay the legacy out of the proceeds of a particular piece of land, if the land fails the legacy fails also; and it is very difficult to draw a distinction between the case of land and a particular fund of money. *Walker v. Laxton* is the strongest of that class of cases, and it is not easy to reconcile it with *Savile v. Blacket*. If this case stood upon the will alone, the legacies would be specific, but the clause in the codicil varied the case materially; by it the testatrix put all the legacies upon the same footing, and removed one of the most important matters, viz., that the legacies were not to be paid until after the death of the sister-in-law. An intention, therefore, was to be collected from the codicil that the legacies should be paid at all events, whether the fund pointed to was sufficient or not. I consider, therefore, the legacies to be demonstrative.

L.C. }
Dec. 10. } ROBERTS v. CROFT.

Equitable Mortgage—Priority.

A, to secure a loan, deposited with *B*. title-deeds relating to an estate, but not the deed of conveyance to himself, and signed a memorandum of deposit, which represented that these were all the deeds. *A*. afterwards deposited with *C*, who had no notice of *B*'s claim, the conveyance to himself, and duplicates of some of the earlier deeds, and also signed a memorandum of deposit as to this loan:—Held, that *B*. was entitled to priority.

(3) 1 P. Wms. 777.

This was an appeal from a decision of the Master of the Rolls, whereby he had given priority to Miss Willes, an equitable mortgagee, over Messrs. Butt, the appellants, who were also equitable mortgagees, of Roberts, deceased, whose estate was being administered in this suit.

The property in question was the subject of a settlement, dated in August 1768. In 1826 the estate was vested in Mr. Williams and his son, who, by a deed, dated the 22nd of December 1826, which recited the earlier deeds, mortgaged to Hughes. In April 1833 the equity of redemption was conveyed to Roberts; and in February 1838 the mortgagee's interest was also conveyed to him. In 1838 Roberts, who was the solicitor of Miss Willes, obtained from her a loan on the security of this estate, and deposited with her the deeds from 1768 to that of December 1826 inclusive, describing them in the memorandum of deposit as "the title-deeds relating" to the estate. Subsequently, Roberts obtained another loan from Messrs. Butt, and deposited with them the deeds of April 1833 and February 1838, and also duplicates of the settlement of August 1768, and the mortgage of December 1826, and signed a memorandum of deposit, concealing, however, the fact of the previous charge in favour of Miss Willes.

Mr. Palmer and Mr. Goldsmid, in support of the appeal, contended that the deposit with Miss Willes could not be considered as a deposit of title-deeds, when no title was shewn by them in the depositor. The appellants had no notice of any prior charge, and receiving, as they did, the deeds which shewed the title to be in Roberts, they must be entitled to priority. They cited—

Hewitt v. Loosemore, 9 Hare, 449 ;
s. c. 21 Law J. Rep. (N.S.) Chanc.
69.

Marjoribanks v. Hovenden, Dru. 11.

Colyer v. Finch, 5 H.L. Cas. 924 ;
s. c. 26 Law J. Rep. (N.S.) Chanc.
65.

Waldron v. Sloper, 1 Drew. 193.

Worthington v. Morgan, 16 Sim. 547 ;
s. c. 18 Law J. Rep. (N.S.) Chanc.
233.

Rice v. Rice, 2 Drew. 73 ; s. c. 23
Law J. Rep. (N.S.) Chanc. 289.

Mr. Selwyn and Mr. Baggallay said, that the question was merely one of priority. Between equitable mortgagees the question was very different from that arising between an equitable and a legal mortgagee, to which most of the cases cited referred. Miss Willes could not be considered guilty of fraud or gross negligence in not having all the deeds. A similar objection might be made to Messrs. Butt's conduct in taking only the later deeds, which were of so very recent date. They referred to *Kennedy v. Green* (1).

Mr. Goldsmid, in reply.

The LORD CHANCELLOR said, that both deposits were accompanied by a memorandum in writing, amounting in each case to an agreement by Roberts to execute a legal mortgage when called upon to do so. There had been different opinions as to what was the right of an equitable mortgagee by deposit, whether to have a legal mortgage or to have the estate sold. In the present case, however, the right of each party was clear. But supposing there had been no deposit, as in a case where there were no deeds, Miss Willes would then have been entitled under an agreement in 1838, and Messrs. Butt under an agreement in 1839. There could then be no doubt, on the principle *qui prior est tempore potior est jure*. But there were title-deeds; and when Miss Willes took the deposit she had a right against all other persons coming after her, unless she was guilty of gross negligence. His Lordship was, however, clearly of opinion, with the Master of the Rolls, that she was not guilty of gross negligence. What took place amounted to a representation by Roberts to her that the deeds given to her were all the deeds relating to the estate. It was true that they were not all, as the most material deed, the conveyance to himself, was omitted. But was that gross negligence on her part? His Lordship thought not, considering the representation made to her by Roberts that they were all, although

(1) 3 Myl. & K. 699.

Roberts was guilty of something very much like fraud. The appeal must therefore be dismissed, with costs.

Handwritten: Hancock v. Loblache 3x R.C.P.D. 199

WOOD, V.C. }
Jan. 12, 15. } VANSITTART v. VANSITTART.

*Baron and Feme—Contract between—
Specific Performance—Public Policy—Demurrer.*

A wife has power to contract with her husband without the intervention of a trustee not only in respect of her separate property, but in respect of all matters in which she is in the position of a feme sole. Therefore, where a wife has instituted a suit in the ecclesiastical court for a divorce, an agreement between the husband and wife alone for the compromise of the suit will be supported, provided it contains no stipulations which the Court cannot enforce. But where an agreement for the compromise of a suit for a divorce provided, amongst other things, that the wife should have the custody of two of the children, and should educate them in a particular manner: the first part of such provision being contrary to public policy, and the latter incapable of being enforced against the wife, a demurrer to a bill filed by her for specific performance was allowed.

The plaintiff, Mrs. Vansittart, was married to her husband, the defendant, on the 27th of May 1845, and there were four children of the marriage, three sons and a daughter, of ages ranging from ten to five years. In January 1857, Mrs. Vansittart instituted a suit against her husband in the ecclesiastical court for a divorce by reason of cruelty and adultery; but a negotiation for an arrangement was entered into between the solicitors of the parties, in consequence of which the libel, on the part of the plaintiff, was not carried in, and the negotiation resulted in the following agreement, which was signed by Mr. and Mrs. Vansittart at the office of the latter's solicitor.

"Re Vansittart and Vansittart.—Instructions for deed of separation and covenants. Trustee—Hans Busk, jun., of, &c. trustee on behalf of Mrs. Vansittart. The

*deed to contain all usual and necessary covenants, clauses and agreements. To protect Mrs. Vansittart from molestation, &c. To receive her present income under the marriage settlement, or otherwise, stated at 180*l.* per annum. Mr. Vansittart to allow her the further annual sum of 120*l.*, payable half-yearly, to make up her present income to 300*l.* per annum, to be payable out of the income receivable by Mr. Vansittart under the marriage settlement. Mr. Vansittart, upon due payment of separate income, secured, by trustees' covenant, from debts of Mrs. Vansittart. The children—Mrs. Vansittart to have the custody of two of the children, viz. the daughter (after she is removed from school at Midsummer) and one of the sons, viz. Cyril Bexley, and, in the mean time, Sidney to be given into her charge for half the intervening time, viz. the first ten weeks Sidney to be with Mr. Vansittart and the remaining period with Mrs. Vansittart, and Arthur also, if Mr. Vansittart does not object, and Alice to spend the Easter holidays with Mrs. Vansittart. Mr. Vansittart to have the custody of the other two sons, viz. Sidney Nicholas and Clement Arthur, should he desire it, on the daughter joining her mother. In the event of the death of either Alice Rosalie or Cyril Bexley, or both, Mr. Vansittart to be at liberty to place either one or both of the surviving children, in their stead, under her charge, but no reduction to be made in the allowance to Mrs. Vansittart. The children not to be sent to any school in Berkshire, or at a less sum than 60*l.* a year for each child. That neither Sidney nor Arthur be sent to any school without the written consent of both Mr. and Mrs. Vansittart, except the public schools at Harrow, Eton, Westminster or Winchester, the naval academies, or Oxford or Cambridge University when they shall have arrived at sufficient age. Those in the custody of Mrs. Vansittart to be instructed in the doctrines of the Church of England; and those above seven years of age to attend its worship, and to be taught the Catechism as in the Book of Common Prayer; and should a resident governess or tutor be engaged, the same to be a Protestant. In case of illness of either of the children in Mr. Vansittart's charge, Mrs.*

Vansittart to have the care of such during the period of their illness, with a proper allowance. The holidays and the half-holidays of the children who may be at school to be equally divided between the two parents. If inconvenient to either parent to receive them at such times, they may remain during the whole of the holidays with the other parent. Both parents to have equal liberty to visit and to correspond with them while at school at all convenient times. Any of the sons, who may be with Mrs. Vansittart, to be allowed to visit Mr. Vansittart for any spaces or spaces of time mutually convenient, not exceeding two months in a year; and the daughter in like manner, not exceeding one month in a year; and in like manner, those who may be with Mr. Vansittart. That a further sum of 40*l.* per annum be paid to Mrs. Vansittart for board and education of each child beyond the two which may remain with her, but no allowance to be made for occasional or holiday visits as above. That the allowance of 120*l.* per annum commence from the first day of this present month of March. Mr. Vansittart paying her bills and other outgoings up to that day not exceeding 30*l.*, besides 20*l.* due to her for furniture as soon as the recent sale at White Waltham shall be completed. That the policy on the life of Mr. Vansittart for 1,200*l.*, now in the possession of Mrs. Vansittart, shall be assigned over by Mr. Vansittart to her trustee for her sole and separate benefit. That the plate and linen be equally divided. That the deed assigning over to trustees the sum of 4,000*l.* be for Mr. Austin's (the lady's solicitor's) inspection and assurance. That the deed of separation be approved by Dr. Addams on behalf of both parties; and any dispute which may arise thereon, or in the settlement thereof, be referred to and decided by him, and which deed is to be executed by all parties forthwith. That all the law charges be paid by Mr. Vansittart. Should Mr. Vansittart's income be augmented by a presentation or otherwise, one-third of such increase to be paid to Mrs. Vansittart, and *vice versa* should Mrs. Vansittart's income be increased from any other source, except under the wills of her father and mother, in which case Mrs.

Vansittart to invest one-third of such additional income for the benefit of her children. That should Mr. or Mrs. Vansittart, at any time, take the children abroad, they should give written notice of such their intention to each other previous to doing so. We hereby agree to the above.

March 11, 1857.

(Signed) { Charles Vansittart.
Frances Rosalie Vansittart."

A copy of this memorandum was forwarded to Mr. Vansittart's solicitor, who expressed his surprise at his client having been allowed to sign it without consulting him, and refused to recognize it. Mrs. Vansittart's solicitor then caused a draft deed of separation and covenants to be prepared in accordance with the memorandum of agreement, and this draft was laid before Dr. Addams, who perused and approved of it for both parties. A copy of the draft was then sent to Mr. Vansittart's solicitor, who returned it unperused. Afterwards Mrs. Vansittart's solicitor caused the deed of separation to be engrossed in two parts from the draft approved of by Dr. Addams, and such deed bore date the 9th of May 1857, and was expressed to be made between Mr. Vansittart of the first part, Mrs. Vansittart of the second part, and H. Busk of the third part, and was stated to be in strict accordance with the terms of the memorandum. Mrs. Vansittart's solicitor produced this deed, with one part executed by his client and Mr. Busk, to Mr. Vansittart's solicitor, and at the same time tendered to him the other part for the purpose of his obtaining the execution thereof by the defendant, but he refused to do so. The bill was then filed, by Mrs. Vansittart and Mr. Busk, against Mr. Vansittart, and it prayed that the defendant might be decreed specifically to perform the agreement of the 11th of March 1857 on his part, and in pursuance thereof to execute and deliver to the plaintiffs one part of the deed of separation and covenants so engrossed in exchange for the part already executed.

The defendant demurred.

Mr. Cairns and Mr. Dart, in support of the demurrer, cited—

Legard v. Johnson, 3 Ves. 352.

St. John v. St. John, 11 Ves. 526.

Elworthy v. Bird, 2 Sim. & St. 372 ;
s. c. 3 Law J. Rep. Chanc. 190.

Warrender v. Warrender, 2 Cl. & F.
488.

Worrall v. Jacob, 3 Mer. 256.

Wilson v. Wilson, 1 H.L. Cas. 538 ;
s. c. 6 Moo. 484 ; 5 H.L. Cas. 40 ;
23 Law J. Rep. (N.S.) Chanc. 697.

Westmeath v. Westmeath, Jac. 126.

Mr. Rolt and Mr. Bilton, in support of
the bill, referred to the Vice Chancellor's
judgment in

Wilson v. Wilson, 14 Sim. 405, 414 ;
s. c. 14 Law J. Rep. (N.S.) Chanc.
204.

2 *Roper's Husband and Wife*, 273, note
by Jacob.

Wellesley v. Wellesley, 4 De Gex, M.
& G. 537 ; s. c. 22 Law J. Rep. (N.S.)
Chanc. 966.

[WOOD, V.C. referred to *More v. Freeman* (1).]

Mr. Dart, in reply, cited *Emery v. Wase*
(2).

Jan. 15.—WOOD, V.C.—The bill in this case was filed for specific performance of an agreement entered into between a husband and wife to execute a deed of separation. After a litigation had been commenced by the wife in the ecclesiastical court for a divorce on the ground of cruelty and adultery, several communications passed between the solicitors of the parties with a view to a compromise, and the result was, that at a meeting between the husband and the solicitor for the wife the following document was signed.—[His Honour read the agreement of the 11th of March 1857.]—This agreement was executed by the husband and wife alone, the trustee for the wife, who is joined as a co-plaintiff, being no party to it. After this a correspondence takes place in which the husband's solicitor complains of his client being allowed to execute the agreement without consulting him. I must assume the agreement, however, to have been fairly entered into, and there is no reason to suppose otherwise ; but still the solicitor complained. The result was, that several other letters passed between the solicitors, until finally Mr.

Vansittart's solicitor, on the 24th of June, writes a letter, which I must take to be on his behalf a rejection of the contract as far as he could reject it. As to the trustee, he was no party to the agreement, and from the statements in the bill as to the execution of the deed, it appears that the dates were as follows :—It is stated to have been approved by Dr. Addams on the 4th of May, and a copy of the draft as so approved was forwarded to the defendant's solicitor some time before the 13th of April, because it was returned on that day unperused, that is, before Dr. Addams had approved of it, but it does not appear to have been executed till after the 24th of June, because the paragraph which states the engrossment and execution follows immediately after the statement of the letter of the 24th of June, and though it states the deed to bear date the 9th of May, it does not allege that it was executed on that day, and I must assume that it was executed after the 24th of June. The objections raised to the bill were, first, that it was contrary to every principle of law and equity for a husband and wife to contract with each other ; and, secondly, as to the stipulations affecting the children, it is said, that the husband cannot contract to part with that controul over his children which the law gives him, such a contract being against public policy. Upon these points I was anxious to look at some of the authorities, and for that purpose I reserved my judgment. There is no doubt it is well settled that as a general rule there can be no valid contract between husband and wife, they being considered as one person in law. But there is one well known exception to this rule, and that is the case of the wife's contracts in respect of her separate estate. In such a case the rule ceases to have application. It was said, by Lord Justice Turner, in *Hope v. Hope* (3), that the case of *Wilson v. Wilson* had not altered the law as to the incapacity of a husband to enter into such a contract as was there attempted to be made with his wife without the intervention of a trustee ; but with regard to the wife's power to contract, it appears to me that so far as regards any matter in which she is in the position of a feme sole she may enter

(1) 1 Bro. P.C. 237 ; s. c. Bunb. 205.

(2) 8 Ves. 505, 514.

(3) 4 De Gex, M. & G. 328 ; s. c. 23 Law J. Rep. (N.S.) Chanc. 682.

into a contract, and I cannot say, therefore, that this agreement is invalid on the sole ground of its being a contract between husband and wife. Where the wife is actually suing for a divorce and enters into an agreement for a compromise of that suit, that seems to me just one of those cases where being at arm's length with her husband she is in the position of a *feme sole*, and capable of entering into any contract as to the terms of such compromise. There is one very strong authority as to a wife's capacity to contract in such a case. It is the case of *Bateman v. the Countess of Ross* (4), and the authority is all the stronger for having the judgment of the House of Lords moved by Lord Redesdale and assented to by Lord Eldon, and, as Lord Cottenham remarked in *Wilson v. Wilson*, materially diminishes the force of the latter learned Judge's observations in *St. John v. St. John*. In that case disputes between the husband and wife having been referred to arbitration, an award was made directing certain property to be given up to the wife during the joint lives of herself and her husband, provided they should so long live separate and apart. The award was established and enforced by the decree of Lord Redesdale, and his decree was affirmed in the House of Lords. The Lord Chancellor said, "It was objected to the award that it assumed the jurisdiction of the ecclesiastical court, and went beyond the submission in awarding a separation. But it did no such thing. It assumed that there must be a separation, and provided accordingly." He, therefore, treats it as a case in which the wife being at arm's length with her husband must be considered as a *feme sole*; and, if it were not so, if the wife litigating for a divorce could not settle the suit without procuring a trustee to enter into covenants on her behalf, there would be great difficulties in the way of a compromise, which would have the effect of preventing all settlement of the suit. It would be impossible to enter into any compromise at all. Of course, however, these remarks must be confined to cases where the wife is dealing with her interests as a *feme sole*. If, in consideration of the wife abandoning her suit for a divorce, the husband covenants

to grant her an annuity, that is a contract which can be enforced, the stipulations being such as the Court can enforce against the wife. But if there are other stipulations not strictly relating to such interests which the Court cannot enforce against her, she can have no relief. Now, there are two difficulties in the way of granting relief upon the particular contract before me; one is the stipulation that the husband is to be secured by the trustee's covenant against Mr. Vansittart's debts; and, secondly, there is a very serious objection on the ground of public policy to those parts of the agreement which provide for the custody of the children; and with regard to that part of the agreement there are stipulations on the lady's part which I could never enforce against her, even assuming it not to be against public policy. Mrs. Vansittart is to have the custody of some of the children after they are seven years old, and there is a very special stipulation as to their being taught the Church Catechism, and the governess or tutor being a Protestant, which I could never enforce against her if she failed to observe it. I have no means of making the children wards of Court, for they have no property, and there are, therefore, no means of compelling performance of this part of the contract. Another part of the contract which is clearly against public policy, is that provision which stipulates that in the event of the death of one of the children residing with the wife, the husband is to be at liberty to place one of the other children under her charge in its stead, treating the care of the children as a burthen. Under the circumstances it seems to me that though the wife's power to contract in consideration of her right to sue for a divorce is clearly established, particularly by that case of *Bateman v. Ross*, still the difficulty remains insuperable with regard to those other clauses of the agreement of which the performance cannot be compelled; and the demurrer must be allowed. There will be no liberty to amend (5).

(5) The Vice Chancellor's judgment was affirmed, on the 11th of March, by the full Court of Appeal. See *post*.

(4) 1 Dowl. P.C. 235.

WOOD, V.C.	}	BROOKE v. GARROD.
1857.		
July 20.		
L.C.		
Dec. 9.		

Will—Vendor and Purchaser—Right of Pre-emption—Laches.

*A testator directed his trustees to offer his real estate to his brother M. for 2,500*l.* ; but in case M. should not be living at the time of his decease, or should not within one calendar month after that event signify to the trustees his intention to take the estate at that sum, or should not at the expiration of two calendar months from the time of signifying such his intention pay the said sum of 2,500*l.* to the trustees, the trustees were to sell the estate. M. signified his intention to accept within the month after the testator's death, and he asked for an abstract of title. Nothing further was done until after the expiration of the two months. It was held, by one of the Vice Chancellors, and affirmed on appeal, that the right of pre-emption was gone.*

Samuel Garrod, of Gooderstone, in the county of Norfolk, by his will, dated in 1843, devised to his sons, Mallocks Garrod and Henry Garrod, all his messuages, &c. in Gooderstone, as tenants in common, charged with an annuity of 50*l.* for his wife for life, and with several legacies amounting to 1,800*l.* At the time of the testator's death the estate was subject to a mortgage for 2,200*l.*, and in 1846 M. Garrod and H. Garrod mortgaged the devised estate for 4,400*l.*, out of which they paid off the 2,200*l.* mortgage and 800*l.* of the legacies.

H. Garrod, by his will, dated the 23rd of July 1856, directed his trustees to offer all and every his messuages, &c. in Gooderstone or elsewhere to his brother Mallocks, at the price or sum of 2,500*l.* ; but in case the said M. Garrod should not be living at the time of his decease, or should not within one calendar month after that event signify to the said trustees or trustee his intention to accept and take the said hereditaments and premises at the price or sum aforesaid, or should not at the expiration of two calendar months from the time of signifying such his intention pay the said sum of 2,500*l.* to the said trustees or trus-

tee as aforesaid, then he authorized, empowered and directed the said trustees or trustee to make sale and absolutely dispose of the said messuages, &c. with their appurtenances, either together or in parcels, at one or separate time or times, and either by public auction or private contract as therein mentioned; and he directed the said trustees or trustee to stand possessed of the money to arise from such sale or sales, or in the event of the said M. Garrod electing to accept and take the said hereditaments and premises at the price or sum aforesaid, then to stand possessed of the said sum of 2,500*l.* and the rents and profits of the said hereditaments and premises, until the same should be sold and conveyed as aforesaid, in trust, in the first place, to pay off and discharge any mortgage or mortgages, if any, affecting the same hereditaments and premises, and the expenses of paying off and discharging the same and of the sale, and to stand possessed of the residue of the trust-moneys, upon trust for his brother William and his sisters Sophia Reynolds, Mary Brooke and Ann Garrod.

H. Garrod died on the 11th of October 1856, and at the time of his death the estates were subject to the 4,400*l.* mortgage, and the legacies of 1,000*l.* given by S. Garrod's will. S. Garrod's widow died in Henry's lifetime, having received her annuity up to the time of her death.

On the 29th of October 1856 M. Garrod's solicitor, by his direction, sent to the trustees a notice of his intention to purchase the estate at the price fixed by the will, and on the 1st of November he wrote to the solicitor of the trustees, requesting him to send the necessary abstracts of title as early as possible. To this application the following answer was sent on the 3rd of November:—"Dear sir,—Garrod deceased,—I beg to acknowledge the receipt of your favour herein, and will take an early opportunity of seeing my clients thereon." After this nothing appears to have been done until the 14th of January 1857, when M. Garrod's solicitor again applied to the solicitor of the trustees for an abstract of title; but no abstract was furnished, nor did M. Garrod tender the purchase-money or any conveyance, and on the 11th of February, upon his solicitor calling upon

the solicitor of the trustees, he was informed that the executors were advised they had then no power to convey the estate, except under the direction of the Court, as the purchase-money had not been paid within two months from the time when M. Garrod signified his intention of purchasing the estate on the terms mentioned in the will.

The bill was filed, by the trustees, for the purpose of carrying into effect the trusts of H. Garrod's will; and the question now argued was, whether the right of pre-emption given by the will to M. Garrod was or was not lost by reason of the non-payment of the purchase-money within the time limited.

Mr. Cairns and *Mr. Pitman* appeared for the plaintiffs.

Mr. Osborne and *Mr. Hastings*, for the defendant M. Garrod, cited—

Gaskell v. Harman, 11 Ves. 489, 507.

Dawson v. Dawson, 8 Sim. 346.

Pyke v. Northwood, 1 Beav. 152.

Pegg v. Wisden, 16 Beav. 239.

The Earl of Radnor v. Shafto, 11 Ves. 448.

Mr. Dart, for the legatees interested in the purchase-money, referred to—

Barrell v. Sabine, 1 Vern. 269.

Davis v. Thomas, 1 Russ. & Myl. 506;

s. c. Tam. 416; 9 Law J. Rep.

Chanc. 232.

Master v. Willoughby, 1 Bro. P.C. 125, fol. edit.

Smith v. Pawson, 25 Law Times, 40.

Mr. Osborne, in reply.

WOOD, V.C.—In this case I may take it that it is a trust with a double aspect of this description—a trust to convey to Malloes Garrod, at the price or sum of 2,500*l.*, provided that he do, within one calendar month after the testator's death, signify his intention to take the property at that price, and that he do, within two calendar months after signifying that intention, pay the sum of 2,500*l.* to the trustees; and if he does not do that, then that they shall hold in trust to sell generally. Therefore, supposing the offer is accepted within the calendar month, and

supposing the money is paid within the two calendar months following, they had no option on the one hand; and on the other hand, they had no option with regard to the other legatees, in the event of the two conditions not being complied with, to take any other course than that of selling by auction. This being a privilege given by the will, it is a condition that must be strictly complied with, and is somewhat analogous to a case between vendor and purchaser, where time is of the essence of the contract, and where the parties have not, by their dealings, waived any privilege arising from that element in the original contract. On the other hand, if one had seen anything in the shape of fraud, or possibly laches,—a more difficult case with reference to those who take subject to the condition not being complied with,—but such a degree of laches on the part of the trustees as to induce the Court to say that that was the sole cause of Malloes Garrod not complying *modo et forma* with these conditions, in such a possible case relief might be given to Malloes Garrod in that respect. But the case, in fact, on the evidence, is this: how Malloes Garrod has fallen into the difficulty may not be very easy to see. It is just probable (as suggested by Mr. Dart) that he may not have had the money ready; but certainly he shews not the slightest eagerness or desire to comply with the condition for payment of the purchase-money. It is much easier to say you intend to buy than to find the money and make the payment. He does simply this: he indicates his intention on the 29th of October 1856; of course very early after the death of the testator, as the testator died on the 11th. Therefore, he was clearly within the time as to the indication of his intention to purchase. It then became his duty by the 29th of December to pay the purchase-money, and the duty of the trustees on such payment to make the conveyance.

The next step he takes is a singular one, and does not look very much like an intention of fairly completing the purchase. He had been co-owner with his brother, and had concurred with him in mortgaging the property; and either one of two things must have taken place, either the abstract must have been left with them, and in that

case it would be in Mallows Garrod's possession as much as his brother Henry's, or it would be in the possession of the mortgagees. That being the case, his solicitor gives to the trustees the notice; and after the notice has been duly given, he writes then to the solicitor of the trustees, on the 1st of November 1856, "I did not know until to-day that you were concerned for the executors herein. My client, Mr. M. Garrod, wrote to me on the 28th ult., requesting me to give notice to his late brother's executors that he would accept the estate at the price it was directed to be offered to him, and to-day he has called on me with a copy of his brother's will, and placed the matter in my hands." Here I have Mallows Garrod clearly aware of all the conditions which it was necessary for him to observe to become the purchaser. He has got a copy of his brother's will, and leaves it with the solicitor. Then he says, "I presume there will be no difficulty in carrying out the testator's directions, as Mr. M. Garrod, through me, has signified his intention to take the estate at the price fixed thereon by his brother, and I have informed the executors thereof. I will thank you, therefore, to send me the necessary abstracts of title as early as possible, that the matter may be carried through in accordance with the testator's will." That is somewhat of a singular application, inasmuch as Mallows Garrod had an abstract of title down to the mortgage of 1846. It may be possible that the testator, Henry Garrod, might have made some mortgage since that, and it might not be an unreasonable request, therefore, in that view, although from the subsequent correspondence I rather collect that this gentleman was insisting, and that the solicitor was advising, that he should call for the title, in order that if he found a flaw in the title he might fly off. I do not think that is the right which the testator intended to offer him. He intended to offer him the option of purchasing, aye or no, will you take it? And if you agree to take it, I expect the money will be paid within that limited time. The answer to this application, on which Mr. Osborne relies as shewing that there has been, he cannot say fraud—that would be much too high a term—but laches on the part of the

trustees, from which he says he is not to suffer, is this:—"Dear Sir,—I beg to acknowledge the receipt of your favour herein, and will take an early opportunity of seeing my clients thereon." He does not say whether there will be any difficulty or not, but he says, I will inform my clients that you have asked for an abstract; that is the highest it can be taken at. I assume he did tell his clients that this gentleman had asked for an abstract; but this gentleman does not take a single step from that time till the 14th of January, seventeen days after the two months had expired; he never stirs or evinces the slightest anxiety to complete his purchase under that notice up to that time: and then the question is, whether I am to say, assuming for the moment that the trustees' duty would be to furnish him with such abstract as he requires, that the simple fact of their continuing for two or three months not to furnish the abstract would, in the absence of any further application or the slightest movement on his part to accelerate or to expedite the trustees, be a species of laches as between him and the trustees, which would authorize him to say to the other *cestuis que trust* that the trustees' conduct had been of that unconscientious description that he can found on it a right against the *cestuis que trust*. The question is, whether I am to say this description of laches, simply not answering a letter when you have asserted your right, you taking no further step, keeping the money in your pocket as many months as you may be willing to keep it without the least effort on your part to come to a conclusion, having the will before you, and knowing the prescribed time within which the money is to be paid; that all that is to be simply laches on the part of the trustees, and no laches on the part of the intended purchaser. I confess that if this case had been the ordinary case between vendor and purchaser, with a condition that time was to be of the essence of the contract, I could not say that this was not the purchaser's laches when he simply asked for something which he was expecting all this time, and nothing had been done on the other side; but to say that there is any such laches on the part of the trustees as has prevented this gentleman from proceeding on the contract, is im-

possible; he cannot say that something that the trustees had done or had not done has inevitably prevented him from completing the contract; the case does not depend upon a condition being fulfilled by third persons, but simply on whether the negligence of trustees should vary the rights of persons who are to take benefits under the testator's will.

It seems to me that I cannot hold in this case that this gentleman has placed himself in that position in which he ought to be placed before he is entitled to make the purchase of the property. He never suggested to the trustees to expedite themselves, or asked a further question. The subsequent correspondence shews that he was wanting an abstract for a purpose that he ought not. He does not say that he wants the abstract to prepare the conveyance or anything of that kind. He does not prepare a conveyance, or tender the money and say, "here is the money ready; all this delay is your delay, and not mine, and I wish to put myself right with regard to the testator's will." It seems to me as nearly as possible to fall within the case of *Dawson v. Dawson*, and more nearly falls within that case of *Masters v. Willoughby*, cited by Mr. Dart, where the legatee had the right to purchase an estate worth 10,000*l.* for 6,000*l.*, if she tendered the money within a given time. She filed a bill, but not having tendered the money within the time, she was not entitled to the benefit of the contract. I cannot say, therefore, that as against third persons this benefit has not been lost, and entirely lost by the laches of the beneficiary. It is clear the money is to be paid within a given time, or the benefit is not to be received; and it seems to me that Mallows Garrod has lost the benefit by his laches. There will be a direction for the sale of this property, and there ought to be a declaration that the purchase-money of 2,500*l.* not having been paid, or tendered by the defendant Mallows Garrod within the period prescribed by the testator's will, the testator's estate ought now to be sold by auction by the trustees.

Mr. Dart.—The trustees have full power to sell. There is no necessity to put the estate to the expense of selling it in court.

Wood, V.C.—The trustees have brought it on, and have taken the case out of the limits of the will. The common course is to have a sale in court.

Dec. 9.—The case came on to be heard, before the Lord Chancellor, on appeal by the defendant M. Garrod; when

Mr. Osborne appeared for the appellant.

Mr. Bevir, for the plaintiffs; and

Mr. Dart, for the legatees interested in the purchase-money.

Mr. Osborne, in reply.

The case of *Lechmere v. the Earl of Carlisle* (1) was referred to, in addition to those cited below.

The LORD CHANCELLOR said that his first impression was in favour of Mr. Osborne's argument, but that impression had been removed by Mr. Dart. It had been said that what the defendant Mallows Garrod did, in demanding the abstract of title, was equivalent to the payment required by the will to be within two months; and that he was prevented from fulfilling the condition by circumstances which the Court would consider as sufficient to entitle him still to the exercise of this right of pre-emption. On that subject his Lordship had often had occasion to say that the Courts had gone to a mischievous extent in altering the express contracts of parties. The only sound principle in such cases was, that if there was a contract to do one thing, and another independent contract to do it within a particular time, the Court may separate them, and give effect to the first where time was not of the essence of the contract; but if there is a contract to sell an estate for a sum of money, to be paid on a particular day, the Court will enforce the contract, and not vary it by adding to the time for payment. Cases were to be found in which, undoubtedly, where time would be at law of the essence of the contract, Courts of equity had adopted a different construction. There was, however, no authority to shew that this Court would vary the terms which a testator had imposed upon his gift, or that the Court would consider anything as

(1) 3 P. Wms. 211.

equivalent to the conditions imposed by the testator. *Cujus est dare, ejus est disponere*. There might be a distinction where the party being ready and willing to pay the money had been prevented by the act of the other party, and in such a case his Lordship would be loth to say that the Court would not give relief. In the present case Mr. Osborne ingeniously argued that Mallows Garrod was, in substance, prevented paying the money within the stipulated time by the conduct of the trustees. It was contended that it was the duty of the trustees, on receiving the appellant's letter, to send an answer, and that he could not prepare the conveyance until he heard from them. There were several fallacies in this. The testator meant to stipulate that the money should be in the hands of the trustees within the two months, or that they should sell the estate. That went to the root of the case. If it were not so, his Lordship would be unwilling to say that the not obtaining a conveyance was attributable to the laches of the trustees. But to extend the time limited by the testator himself would be to defeat his deliberate intention.

Appeal dismissed, with costs.

L.C. }
Dec. 10, 17. } PELL v. DE WINTON.

Vendor and Purchaser — Mortgage to Trustees.

Where a mortgage was made to secure a sum of stock, which was for the purpose sold by trustees who had power to give receipts for monies and power to vary securities, the mortgage was held, as between vendor and purchaser, not to be sufficiently discharged on payment of a sum of money to the trustees, the money not appearing to have been again invested in stock or upon security.

This was a suit for specific performance of an agreement for the sale of an estate, as to which the only question was, whether a good title had been shewn. The point upon which it was said that a good title, as alleged by the defendant, was not shewn was stated in the tenth paragraph of the plaintiff's bill thus,—“that it does

not appear that the two-sixths of the purchase-money paid to the said Frances James, as surviving trustee of the marriage settlement of Charles Clifton, and the one-sixth of the purchase-money paid to the trustees of the marriage settlement of the said Mary Ann Clifton were properly invested in stock, according to the trusts of those settlements respectively.” The title to the estate arose thus : in the year 1815 Charles Claude Clifton purchased the property. He had married, about the year 1805, one of the two daughters of Thomas Young, and having survived his wife, was a widower with three children, two daughters and a son, Charles Clifton. Under the will of Thomas Young his property was distributed in such a manner that Mrs. James, one of the daughters of Thomas Young, took one moiety; and the other moiety, which would have gone to Mrs. Clifton if she had been alive, had, by virtue of the settlement made on her marriage, been so disposed of that Charles Claude Clifton, the widower, was entitled to it for his life, with remainder to his children, after his death, in equal shares. Mr. Charles Claude Clifton being thus entitled to an interest in the residuary estate of Thomas Young, purchased this estate, and in order to raise money for enabling him to pay for the same, he borrowed of the executors and trustees of Thomas Young two large sums of stock, one of 14,498*l.* 1*s.* 3*d.* per cent. consols and the other 1,168*l.* 1*s.* 9*d.* 3*d.* per cent. reduced, which formed either the whole or the main part of the purchase-money. The estate was then conveyed to Mr. Charles Claude Clifton, subject to a mortgage to the trustees and executors of Thomas Young's will to secure those two sums, the beneficial interest in those sums being such as already stated. In 1832 one of the daughters of Charles Claude Clifton married Mr. Elliott, and upon her marriage her share of the interest in the estate of Thomas Young was assigned to trustees in trust for her and her husband and children of the marriage. Another of the daughters died, and consequently her interest became vested in the father as her next-of-kin. In the year 1831, Charles Clifton, the son, married, and upon the occasion of his marriage he assigned his share also upon trust for the benefit

of his family in the same way; and eventually the share which had belonged to the daughter who died, and which became by her death vested in Charles Claude Clifton, was assigned or given, by the father's will, so that his son, Charles Clifton, or the trustees of Charles Clifton's settlement, took it. The result consequently was, that the beneficial interest in the estate of those claiming under the will of Thomas Young became disposed of in this manner:—one-half to Mrs. James, and the other moiety, which would have gone to Mrs. Clifton if she had survived, became so vested that two-thirds of it went to Charles Clifton, the son, or the persons claiming as his assigns under his marriage settlement, and the other third of that moiety became vested in the trustees of Mrs. Elliott.

In that state of things, in the year 1848, Charles Claude Clifton's representatives put up for sale a portion of the estate, and sold the same to the present vendor, Mr. Pell, for 14,610*l.* The whole of that purchase-money, instead of being paid to the representatives of the vendor, who was the substantial owner of the inheritance (Mr. Clifton), was paid, as to one moiety, to the person who was entitled in right of Mrs. James, who was entitled to one moiety of the estate, and the moiety which would have gone to Mrs. Clifton was paid, as to two-thirds, to the trustees of Charles Clifton's settlement, and as to the other third, to the trustees of Mrs. Elliott's settlement. It was paid in money, and the objection that was made was that there was no authority to do that—that what ought to have been done was, that the stock should have been transferred, and that the person purchasing from Mr. Pell, who purchased in 1848, was at least entitled to have it ascertained that the money did eventually become stock in pursuance of the settlement.

The cause came on to be heard before Vice Chancellor Stuart, on the 13th of July 1857, when his Honour, without hearing the counsel for the defendant, said that he did not think that the power of the trustee to give a receipt was enough when the question was with the purchaser in a case of this kind, but as he considered that the objection was capable of being

cured in an effectual manner, declared that the objection was a valid objection, and referred it to chambers to settle the conveyance by the necessary parties, the plaintiff to pay the costs of the suit.

From this the plaintiff appealed.

Mr. Malins and *Mr. Erskine*, for the plaintiff, relied on the powers of the trustees to give a valid receipt and to vary securities as being sufficient to protect the purchaser.

Mr. Hobhouse, for the defendant, contended that an estate charged with stock could not be discharged by the production of a receipt for a sum of money which might not be equal to the amount of stock—*Nicholson v. Wright* (1). The receipt in this case might have been good if the trustees had power to receive money. If an investment of the money had been shewn, that would have been evidence of a receipt of the money, and something more. He cited also—

Chambers v. Minchin, 7 Ves. 186.

Brice v. Stokes, 11 *Ibid.* 319.

Pyrke v. Waddingham, 10 Hare, 1.

Dec. 17.—The LORD CHANCELLOR, after stating the facts of the case as before mentioned, said that the most favourable way to put the case for the plaintiff was to treat it as an advance made by the trustees of Young's will with the sanction of the residuary legatees of Young, and an assignment by them to the trustees of their respective marriage settlements. If the mortgagor had sold the whole, or sufficient to raise the full amount of the stock in 1848, and had transferred the requisite amount to the trustees of the settlement, of course that would have been perfectly good; but, in his Lordship's opinion, he had no power to sell any part without satisfying the whole mortgage, unless by the consent of the mortgagees, because if there were a mortgage, the mortgagor could never part with a portion of that which was the security without consent, as the mortgagee had a claim on each and every part and upon each and every acre of the estate. But here the mortgagees did consent, but

(1) 5 Weekly Rep. 431; s. c. 26 Law J. Rep. (N.S.) Chanc. 312.

whether they could do so must depend upon the language of the power that they had to vary securities. In the absence of express power, the burthen was on them to shew that they acted with prudence, and the same burthen would now be cast upon the purchaser, as it might be done very imprudently. This, however, his Lordship must observe, was not the precise point taken on the occasion of the present purchase. The objections seemed to assume that the sale of a part had been authorized, and that if made in consideration of a retransfer of part of the stock, it would have been good. The question, therefore, must be considered just as if it had been the case of a sale of the whole, and if so, he thought, although he had had very great doubt upon the subject, that the objection was a valid objection. The strict terms of the mortgage required a retransfer of the stock to the trustees, and the power to give receipts could only be to give receipts for that which they were authorized to receive, and they were not authorized to receive money. Now, his Lordship felt the force of the observation that was very ably pressed in argument, both by Mr. Malins and Mr. Erskine, that if there was here a power to vary securities, therefore it might have been converted into money; and if in this transaction there had been a statement that the trustees had agreed to invest the proceeds of the stock upon a new security, and that for this purpose it would have been necessary to sell the stock, and, therefore, in order to save trouble and expense to the objects of the trust, it had been agreed that this consideration should be received in money at once instead of stock, he should have been very unwilling to hold that that was bad: the substance of the power would have been complied with. But here there was nothing to shew that these trustees had any intention of investing on real securities, and they would not have been justified in selling the stock, merely converting it into money without the intention of investing it upon some other security; and therefore, although the objection seemed to his Lordship to be one of a somewhat refined character, yet he could not say that it was an objection that the purchaser was not entitled to

take. Therefore he concurred with the Vice Chancellor in thinking that it was a well-founded objection, although, perhaps, it was not an objection that would occur to many purchasers; but it seemed to him, it having been taken, that it was well taken, and consequently that the decree of the Vice Chancellor was right, and this appeal was unfounded and must be dismissed, with costs.

L.C. }
Feb. 1. } TURNER v. TURNER.

Practice—Settled Estates Act, s. 38.—Commissioner.

The Court appointed a gentleman, practising as an advocate and solicitor in Quebec, as a Commissioner, under the 38th section of the Settled Estates Act, to take the consent of a married woman resident there.

Mr. Swanston, jun. applied to the Court to appoint Mr. Stuart, a gentleman practising as an advocate and solicitor at Quebec, a commissioner under the 38th sect. of the Settled Estates Act (19 & 20 Vict. c. 120.) to take the consent of a married woman residing there. The object of the consent was to enable the granting of building leases. The 38th section provided that "the examination of such married woman should be made either by the Court or by some solicitor duly appointed by the Court for that purpose." Kindersley, V.C. considered that the commissioner must, under the terms of the act, be a solicitor of this Court, and declined to make the appointment.

Mr. Stuart, the gentleman referred to, was in court, and stated that in Canada the offices of advocate and solicitor were always united, and that he practised in both capacities.

[The LORD CHANCELLOR inquired whether the lessees would be willing to take the leases in this manner.]

Mr. Swanston, jun. replied in the affirmative; and accordingly

The LORD CHANCELLOR made the order asked.

KINDERSLEY, V.C. }
 Nov. 7; Dec. 18. } BOND v. BELL.

Usury—Judgment—Security upon Land
 —2 & 3 Vict. c. 37.

The plaintiff advanced money in 1853 at usurious interest, upon a bill of exchange at six months' date, and secured by a judgment. The bill was renewed from time to time until January 1856. The borrower became bankrupt in December, 1855, and a suit was instituted for the purpose of having it declared that the freehold and leasehold property of the borrower was bound by the judgment, and ought to be sold in order to satisfy the amount due to the plaintiff:—Held, that the judgment was a security upon land, and could not be enforced upon the freehold and leasehold property. Bill dismissed, but without costs.

The bill in this case stated, that in the month of October, 1853, the plaintiff agreed to lend to Adam Glen the sum of 600*l.* by way of discount of the acceptance of the said A. Glen of a bill of exchange for that amount, payable six months after the date thereof, and to be renewed, when due, for a further term of six months; the payment of the said renewed bill when due to be secured by a judgment at law in an action by the plaintiff against the said A. Glen, for the sum of 600*l.*, with a stay of execution for twelve months; and in pursuance of the said agreement, an order was obtained from the Judge at chambers, in an action by the plaintiff against A. Glen, and upon the consent of the said A. Glen to the following effect;—that on payment of the said sum of 600*l.* all further proceedings should be stayed, the plaintiff being at liberty to enter an appearance, sign final judgment and register the same forthwith; and in default of payment as aforesaid, the plaintiff should be at liberty, and also his executors, administrators or assigns, in case of his death either before or after judgment or execution, to issue execution or executions for the amount remaining unpaid at the time of such default, with costs as therein directed. Adam Glen had, previously to the drawing up of the said order, duly accepted a bill of exchange

for 600*l.*, dated the 5th of October, 1853, and payable six months after the date thereof, drawn upon him by the plaintiff, and had delivered the said bill to the plaintiff; and the plaintiff's solicitor thereupon paid to the said A. Glen the amount of the bill, less 100*l.*, the agreed amount of discount for the same for twelve months.

On the 6th day of October, 1853, judgment was duly signed, upon and pursuant to the said Judge's order, at the suit of the plaintiff against the said A. Glen for 600*l.* debt; and on the same day a memorandum or minute of the judgment was duly registered in the Court of Common Pleas. On the bill of exchange arriving at maturity, it was renewed by A. Glen pursuant to the said agreement, and a new bill for 600*l.*, and which was payable on the 8th day of October, 1854, was delivered to the plaintiff. The last-mentioned bill however was dishonoured by A. Glen when it became due; and he being unable to pay the said sum of 600*l.*, the bill was renewed from time to time by fresh bills of exchange at six months' date; and the last bill, which became due upon the 17th of January, 1856, was also dishonoured, and the amount still remained unpaid to the plaintiff. Upon each of the renewals of the bill, the said A. Glen paid to the plaintiff a sum of money by way of discount thereof; and it was expressly agreed that the said judgment should be a security for the payment by the said A. Glen of the amount of the said bills.

On the 25th of September, 1855, the plaintiff caused a memorial of the judgment so entered up by him against A. Glen to be duly registered in the office for the registry of deeds in the county of Middlesex.

On the 12th of November, 1855, A. Glen was adjudged a bankrupt, and the first defendant, William Bell, was appointed the official assignee of his estate and effects; and W. Rose and E. Fountain, two others of the defendants, were appointed creditors' assignees.

The plaintiff charged that A. Glen, at or since the time of signing and registering the judgment against him at the suit of the plaintiff, was or had become seised of or otherwise entitled to some freehold land,

tenements and hereditaments at Haverhill, in Suffolk, and elsewhere; and that he was also or had since become possessed of or entitled to divers leasehold tenements in the county of Middlesex and elsewhere; and that all the said freehold and leasehold hereditaments and tenements were charged and bound by the said judgment, and that the same ought to be sold under the authority of the Court, and the proceeds thereof applied in satisfaction of the said judgment.

The bill also charged that certain mortgages had been effected by the said A. Glen upon portions of the property which he was so seised or possessed of; but in consequence of the decision of the Court it becomes unnecessary to enter into the circumstances relating to this portion of the case.

The bill prayed, that it might be declared that the plaintiff was entitled to a lien in the nature of an equitable mortgage upon all the freehold and leasehold estates of or to which the said A. Glen was seised, possessed or entitled, at or subsequent to the time of entering up the said judgment against him at the suit of the plaintiff, subject to the prior mortgages effected upon such estates; that an account might be taken of what was due to the plaintiff for principal and interest on his said debt; and that such of the defendants as should not be entitled to a priority over the plaintiff, might be decreed to pay what should be so found due to the plaintiff upon his judgment debt; and that in default of such payment, the several premises subject to the plaintiff's said charge, might be sold, and the proceeds applied in payment of what should be so found due to the plaintiff.

Mr. Glasse and *Mr. Cracknall* appeared for the plaintiff.

Mr. Baily and *Mr. Caldecot*, for the principal defendants.

Mr. Baggallay, *Mr. Bury* and *Mr. Southgate*, for the other defendants.

The following cases were cited—

Neate v. Duke of Marlborough, 3 Myl. & Cr. 407; s. c. 5 Law J. Rep. (N.S.) Exch. Eq. 98; 2 You. & C. 3.
Rolleston v. Morton, 1 Con. & L. 252.

Ex parte Knight, 1 Deac. 459.

Ex parte Warrington, 3 De Gex, M. & G. 159; s. c. 22 Law J. Rep. (N.S.) Bankr. 33.

James v. Rice, Kay, 231; s. c. 23 Law J. Rep. (N.S.) Chanc. 243, 819.

Lane v. Horlock, 5 H.L. Cas. 580.

Whitworth v. Gaugain, Cr. & Ph. 325; s. c. 10 Law J. Rep. (N.S.) Chanc. 317.

Nixon v. Phillips, 21 Law J. Rep. (N.S.) Exch. 88; s. c. 7 Exch. Rep. 188.

Smith v. Hurst, 10 Hare, 30; s. c. 22 Law J. Rep. (N.S.) Chanc. 289.

Statutes—3 & 4 Will. 4. c. 98, 7 Will. 4. & 1 Vict. c. 88, 1 & 2 Vict. c. 110, 2 & 3 Vict. c. 37.

Mr. Glasse, in reply.

Dec. 18.—KINDERSLEY, V.C.—The first question in this case is, whether the plaintiff's security is or is not void on account of its being of a usurious nature. By the Statute of Anne all loans on which more than 5l. per cent. was taken were rendered void; and so the law remained for upwards of a century, when a conflict of opinion arose as to the principle. The general view of the landowners was, that if the usury laws were repealed, they would not be able to borrow except at a higher rate than 5l. per cent.; but when the Bank Act, 3 & 4 Will. 4. c. 98, was passed, a clause was inserted, which introduced the first relaxation of the usury laws; the 7th section enacted, "that no bill of exchange or promissory note made payable at or within three months after the date thereof, or not having more than three months to run, shall by reason of any interest taken thereon or secured thereby, or any agreement to pay or receive or allow interest in discounting, negotiating or transferring the same, be void, nor shall the liability of any party to any bill of exchange or promissory note be affected by reason of any statute in force for the prevention of usury."

Now, it is obvious that the intention of that act was merely to relax the law as to three months' bills, i. e. the ordinary mer-

cantile bills. No doubt, it was an admission, that though it might be expedient to retain the usury laws generally, it was also expedient to allow persons to borrow at higher rates in times of mercantile pressure; and not long afterwards, in 1837, by the 7 Will. 4 & 1 Vict. c. 88, the exemption was extended to twelve months' bills; but this act was temporary, and only extended to the 1st of January 1840. It could not have been contemplated under these acts that you could have a mortgage upon land at more than 5*l.* per cent. interest. It was determined, however, upon the acts, that if money was borrowed upon a bill, the bill being legal, there was no reason why you should not have security upon the land to secure payment of the bill, and therefore in that indirect way means were found to give mortgages on land at more than 5*l.* per cent. interest.

The last act would expire on the 1st of January 1840, and therefore in the preceding session another act was passed (2 & 3 Vict. c. 37.), upon which the present question arises. It introduced two new provisions, relaxing the law altogether as to any contracts for the loan or forbearance of money above the sum of 10*l.*, but providing that nothing therein contained should extend to the loan or forbearance of money upon security of any lands, tenements or hereditaments, or any estate or interest therein. That act was only temporary, but was renewed from time to time until the 17 & 18 Vict. c. 90, by which the usury laws were swept away. Now, under the 2 & 3 Vict. c. 37, a question arises, whether, if a security were given by bill or note, and also on land, at more than 5*l.* per cent., it was totally void, or only void as to the security upon land. The security on land was clearly void; and it did not signify how that was made, whether by deposit of deeds, or by written documents, or in any other manner. So that if a man had agreed to deposit title-deeds as a security at a greater rate than 5*l.* per cent., that agreement was void and could not be enforced; and if the deposit was made, the depositor could recover his deeds back again. What, then, is the operation of the act in a case like the present, where the money was borrowed at more than 5*l.* per cent., on a bill at six months and a

judgment? The case is correctly stated in the bill; and the only question seems to be, whether the judgment is a security upon land or not. If it is on land, then it is void under that statute. If not, the plaintiff has a right to establish his claim. Now, in order to determine this, let us consider what a judgment was prior to the act, 1 & 2 Vict. c. 110, and what it was subsequently to that act. Irrespective of that statute, it was, of course, nothing but the sentence of a Court of law, which declares that the plaintiff is entitled to recover a certain sum of money; and its nature is still the same, whether it is a proceeding *in invitum*, or issued with the consent of the defendant. The execution which was issued upon that judgment was merely the process of the Court to enforce its sentence by causing the money to be raised out of the defendant's property. Neither judgment nor execution made the defendant's property security, though by the execution the money was raised. Now, independently of the statutes, the only species of property which could be taken in execution was goods and chattels, and the profits of the land. The sheriff seized and sold the goods and chattels, and seized the profits of the land, handing the proceeds over towards satisfaction of the debt. The lands themselves, however, could not be touched; but even if they could, the judgment would not, in any sense of the term, have been a security upon the land. The Statute of Westminster did introduce a new rule, under which the sheriff could seize a moiety of the land, and also the goods and chattels, and have them appraised by a jury, handing the moiety of the lands over to the judgment creditor; but that was all, and there was no sale of the land by the plaintiff. Still this was only process to work out the judgment, and the land was not delivered to the plaintiff by way of security. It is true that the judgment was often spoken of as being a lien upon the lands of the defendant; but that only meant that under the Statute of Westminster the plaintiff was entitled to have a moiety of the lands put into his possession by writ of *elegit*, and that the judgment debtor could not by any means withdraw the land from the operation of the *elegit*. Also a judgment

creditor could, before the statute, 1 & 2 Vict. c. 110, come into equity to enforce his rights, but that was only after he had sued out his writ of *elegit*. That was decided in the case of *Neate v. Marlborough*. The judgment debtor could not withdraw his land from the writ, and that is all that is meant by the lien; and thus before that statute a judgment was not, in any reasonable and proper sense of the term, a security upon land. But that statute gave a totally new and additional character to the judgment. Besides making it extend to the whole of the land, it enacted, section 13, that a judgment should operate as a charge upon all lands, &c., and that every judgment creditor should have the same remedies in a court of equity against the hereditaments so charged as he would be entitled to in case the person against whom such judgment should have been entered up had power to charge the said hereditaments, and had by writing under his hand agreed to charge the same, with the amount of such judgment debt and the interest thereon. Now the operation of this is totally different from the operation of the Statute of Westminster. The judgment retains its ancient property, and may be enforced by *elegit* as to the whole land; but besides that, it has acquired the character of an actual charge upon the defendant's land; and this is entirely irrespective of the intention of the parties, whatever they may have intended when the judgment was entered up. This appears by the case of *Rolleston v. Morton*. If, then, an agreement to charge land with money would have been a loan upon the security of land, it is impossible to escape the conclusion that a loan of money upon a judgment is also a loan upon the security of land, and if so, void. But it has been argued, that the consequence of this doctrine would be most alarming, for not only would it be impossible for a person borrowing to give security by judgment, but even if the money was secured by a six months' bill, then it has been argued that if the holder of the note brought his action and obtained judgment, it would be void; and certainly if that were the legitimate conclusion from the premises, it would shew that there was some error in the premises; but such a conclusion is

not admissible: and this brings us to a question upon which learned Judges have expressed different opinions. Suppose A. lends to B. a sum of money at 6l. per cent., on having B.'s promissory note, and also a mortgage on land, is that transaction void *in toto*? The mortgage is void, but is the promissory note void also? I think the intention of the legislature must have been, not to make the promissory note void, but to make void that portion only of the transaction which related to land. The intention was, that in times of pressure persons should not be prevented from borrowing at higher rates; but this would not apply to judgments or securities on land. Another doctrine is, that the intention of the parties when they made the agreement must be considered, and that if they intended the security to be on land, it would be void; if not, it would be good, though it might be afterwards enforced on land. This principle is, I think, inapplicable, for otherwise extortionate money lenders, to whom the usury laws were intended to apply, would always contrive to escape. It is certain, however, that different opinions have been entertained upon this subject, as in *Ex parte Knight*, *Ex parte Warrington*, *James v. Rice*, and *Lane v. Horlock*. Now, is there any distinction between a warrant of attorney to confess judgment and a judgment? If the borrower gives a mortgage, that is void; so is an agreement to mortgage or to create an equitable charge; so is an agreement to deposit deeds. But suppose the deeds are not in the borrower's hands, but in those of his solicitor, and the borrower gives an order to deliver up the deeds, surely that would be void. The parties agree that a judgment shall be given, and work this out by giving the lender authority to enter up judgment. It would be contrary to the spirit of the act to decide that the judgment is void, but that the warrant is not void. As, therefore, it has been decided that the judgment is void, so the warrant is void also. But even if this distinction could be taken, there is no ground for applying it to the present case. Not only then upon my own opinion, but upon very great authority, notwithstanding opinions of great weight on the other side, I feel bound to come to the conclu-

sion that if a loan at a high rate of interest was secured by bill at six months, or by any other security, not being upon land, and if there was also a security upon land, whether by mortgage or agreement, then the transaction was not void *in toto*, but only as to the security upon land. Applying this principle to the present case, we find two things involved: one the security not upon land; the other the security upon land, which was void. For these reasons, I must decide that I cannot give the plaintiff any relief in this case; but having regard to the doubts and adverse decisions about the principle, I shall dismiss the bill without costs.

M.R. }
Nov. 21. } MOCATTA v. BELL.

Principal and Agent—Pledge—Foreign Bonds—Redemption—Crossed Cheque—Custom of Stock Exchange.

Spanish bonds, passing by delivery, were left by the defendant with his stockbroker, to obtain money for him on them, by deposit. The stockbroker borrowed money from the plaintiff, also a member of the Stock Exchange, and deposited a part of the bonds; this was done without disclosing, as is the custom, the name of the principal. On others of the bonds the stockbroker, without the knowledge of his principal, obtained a further sum of money, which he applied to his own use. The defendant, afterwards, gave notice that he should settle his account, and on the settling day he sent a cheque to his stockbroker for the principal and interest then remaining due, and the stockbroker applied this money to redeem the bonds deposited to secure the money he had applied to his own use, and a part of the bonds deposited to secure the loan obtained for the defendant; and on delivering the redeemed bonds to the defendant, the stockbroker informed him that his assets were not sufficient to redeem the other bonds, and that he had postponed the further settlement to the following settling day. The stockbroker, on that day, informed the defendant that his assets were still insufficient. It was then arranged, between the stockbroker and the defendant, that the stockbroker should give his

cheque to the plaintiff, for the sum due, and that the defendant, on receiving the bonds, should give him his cheque for a sum sufficient to enable the stockbroker to meet the cheque he was to give to the plaintiff. The bonds were obtained by the stockbroker on his crossed cheque, and delivered to the defendant, but he refused to give his cheque for the sum required, and the stockbroker's crossed cheque, in passing through the clearing house, was dishonoured. In a suit instituted for a re-delivery of the bonds,—Held, that the plaintiff was not deficient in caution when he took the crossed cheque, and that he was not bound to inquire whether it would be honoured before delivering the bonds.

Held, also, that the defendant had induced his stockbroker and agent to give the crossed cheque by his promise to supply assets to meet it, and that the bonds would not otherwise have been obtained by his agent, and therefore that the defendant must either pay the amount due to the plaintiff with interest, or give up the bonds to him.

The bill in this case was filed, by Emanuel Mocatta, against Alexander Bell, to obtain a declaration that the plaintiff was entitled to a charge upon certain Spanish bonds, (representing 10,710*l.*, Spanish deferred 3*l.* per cent. stock,) for 2,000*l.* and interest, for which the same had been pledged to him, and praying that the defendant might be ordered to deliver up the bonds or to pay the plaintiff the 2,000*l.* and interest. The bill also asked for an injunction to restrain the defendant from parting with the bonds.

On the 6th of November 1855 the defendant instructed Thomas Backhouse, a stockbroker, to borrow for him 11,000*l.* upon the security of 40,800*l.* Spanish deferred 3*l.* per cent. stock, represented by bonds of 510*l.* each, which he deposited with him. These bonds were negotiable, and the title to them was transferred by delivery.

On the 15th of November 1855, T. Backhouse obtained a loan of 2,000*l.* from the plaintiff, also a member of the Stock Exchange, upon the security of 10,710*l.* of the Spanish deferred stock, and 211 bonds for 50*l.* each were delivered to the plaintiff.

The loan was first made for a month, at

7l. per cent interest, but it was afterwards continued from one account-day (or fortnightly day of settlement) to another, upon terms varying with the stock market.

The remainder of the 11,000*l.* was obtained through Mr. Backhouse from other parties, upon the security of some of the other bonds, a portion of which were afterwards redeemed. Mr. Backhouse also received from Mr. Bell other bonds representing 6,120*l.* like stock.

On the 3rd of June 1856 T. Backhouse obtained from the plaintiff a further sum of 4,000*l.*, and a portion of these bonds were handed to the plaintiff.

Thomas Backhouse also raised unknown to the defendant by pledge upon other parts of the Spanish bonds in deposit with him a sum of 2,000*l.*, which he applied to his own use.

On the 26th of August 1856 Mr. Bell told Mr. Wilkinson, the clerk of T. Backhouse, that as money was easier he should redeem all his securities and settle his account with him on the 29th of August, the following account day.

Mr. Backhouse found that he should not be able to redeem all the plaintiff's securities on the day mentioned, and he therefore made an arrangement with the plaintiff (who was ignorant of the transaction between Mr. Bell and his agent) to pay off the 4,000*l.* and to continue the 2,000*l.* loan until the following account day, and Mr. Backhouse communicated this arrangement to the defendant's son, who was also his partner in business.

On the 29th of August Mr. Bell sent to Mr. Backhouse a cheque for 6,317*l.* 12*s.* 8*d.*, the balance of account between them for principal and interest on the sums borrowed through Mr. Backhouse, and Backhouse on the same day paid to the plaintiff the 4,000*l.* loan, and the interest due thereon, and also the interest due on the 2,000*l.* up to that day, and received back the securities for the 4,000*l.* loan. Mr. Backhouse also thereout paid off the loan of 2,000*l.* obtained by him for his own use. On the 1st of September Mr. Backhouse delivered to the defendant Spanish bonds representing 36,210*l.* stock, the securities for the 4,000*l.* loan, and for the 2,000*l.* he had obtained for himself, and he then repeated to the defendant the statement

that he had continued the loan of 2,000*l.* on the bonds representing 10,710*l.* until the next account day, and that therefore the bonds which were deposited as security for such loan could not be delivered to the defendant until that day; and the defendant said, "It is of no consequence; but mind, I don't pay any more interest"; and he afterwards said, "Then I shall have the bonds on the 16th of September," the next settling day.

On the morning of that day Mr. Backhouse informed the defendant that he was unable to redeem the bonds pledged with the plaintiff for the 2,000*l.*, and he then first stated to the defendant that they were pledged to Mr. Mocatta; an explanation took place, and it appeared that Mr. Backhouse's account at his bankers' was deficient by about 1,500*l.* of what would be necessary to redeem the bonds.

Ultimately, with a view to the immediate redemption of the bonds pledged with the plaintiff, the defendant agreed to advance Mr. Backhouse the sum of 1,500*l.* as a loan, and also to purchase two Spanish bonds, the property of Mr. Backhouse, for 450*l.*; and it was arranged that Mr. Backhouse should redeem the bonds, and that the defendant should call at Mr. Backhouse's office at half-past 2 o'clock in the afternoon, and give him a cheque for 1,950*l.* in exchange for the bonds pledged with the plaintiff and the two bonds he had agreed to purchase from Mr. Backhouse. In consequence of this arrangement, Mr. Backhouse went to the plaintiff and gave him (according to the regular course of business in settlements on the Stock Exchange) a crossed cheque upon his bankers for 2,000*l.* (the interest on the loan being left to be afterwards settled), and received from him the bonds, the security for the same; and by the statement of Mr. Backhouse, it appeared that he gave this cheque upon the faith that by the receipt of the defendant's cheque for 1,950*l.* there would be an ample balance at his bankers' to meet the cheque he had given to the plaintiff.

On the same afternoon the defendant's son called at Mr. Backhouse's office and asked for the bonds, which Mr. Wilkinson delivered to him, and then asked for the cheque, when he referred him to the defen-

dant. He accordingly went with the defendant's son to the office of the defendant, and the son delivered the bonds to the defendant, and Mr. Wilkinson then asked the defendant for the cheque, which the defendant refused to give, and said, "These bonds are mine; I have a right to do the best I can to get my own property back. I owe Mr. Backhouse nothing." The defendant alleged, as the reason for his refusal, his belief that the bonds were in the possession of Backhouse at the time the promise was given, and that he had seen them in his safe.

Mr. Backhouse immediately informed the plaintiff of the circumstances, and that his cheque would be dishonoured, and the plaintiff then saw the defendant and requested him to pay the money, but he declined.

Mr. Backhouse's cheque was dishonoured for want of effects. The next morning he was declared a defaulter on the Stock Exchange, and he subsequently became a bankrupt, and died on the 16th of April 1857.

Mr. R. Palmer and Mr. Waley, for the plaintiff.—The manner in which Mr. Bell acted induced his agent to commit a fraud, as Mr. Backhouse would never have given the crossed cheque had he not relied upon the promise of Mr. Bell to find funds to meet it. Mr. Mocatta knew nothing of what took place between them, but as a member of the Stock Exchange he was bound to take the crossed cheque, as he had not given notice before 11 o'clock on the day of settlement that he should require payment in notes of the Bank of England. It seemed as if Mr. Bell was fully aware of the practice of the Stock Exchange, and that he must have calculated that the crossed cheque would enable him to obtain the bonds before it was passed through the clearing-house.

Mr. Selwyn and Mr. Amphlett, for the defendant.—The plaintiff has no right to take the bonds out of the hands of Mr. Bell. He knew nothing of the plaintiff in the transaction. The dealing for the loan as well as for the redemption of the bonds was between the plaintiff and Mr. Backhouse; and there was no promise made by the defendant to Mr. Backhouse by which

the plaintiff could properly be considered to be injured. The plaintiff, however, by taking the crossed cheque of Mr. Backhouse, adopted him as his creditor and his agent, and he had received a dividend of 882*l.* from his estate.

THE MASTER OF THE ROLLS.—This case, as Mr. Bell himself states it, cannot be put more favourably for him than this: that having deposited certain bonds with Mr. Backhouse to obtain money for him which Mr. Backhouse did obtain, and having afterwards paid Mr. Backhouse the money to redeem those bonds, he goes to him on the 16th of September and asks for the bonds. He is then informed by Mr. Backhouse that he had pledged them to the plaintiff, whom he then names, and that the money paid for the redemption of the bonds had been misapplied, and that a part of it had been used for his own purposes. Mr. Bell then induced Mr. Backhouse to believe that if he went to the plaintiff and gave him a cheque for 2,000*l.* in exchange for the bonds, it should be honoured, not by means of any funds which Mr. Backhouse had at his disposal, but by means of funds which he, the defendant, would supply him with for the purpose of meeting that demand. Upon the strength of that Mr. Backhouse went to the plaintiff and gave him a cheque, which, though he had not sufficient funds of his own at his bankers, yet he firmly believed at the time he would be enabled to meet by funds supplied by the defendant according to the promise which he had made. Mr. Backhouse did not know that he was committing a fraud; and though it is established by the evidence of Mr. Bell that no fraud was intended to be committed by Mr. Backhouse, as Mr. Bell himself admits clearly that Mr. Backhouse firmly believed that the cheque would be honoured by means of a cheque for 1,950*l.*, which, coupled with his own funds, would be sufficient for the purpose. If Mr. Bell intended at the time (which I do not believe he did) merely to give a delusive promise and to induce Mr. Backhouse to make a fraudulent representation unknowingly to the plaintiff, he would have been clearly using Mr. Backhouse as his agent for the committal of a fraud

against the plaintiff. But the moment that he gets the bonds back again, that moment, by refusing to give the cheque, he does, as it were *ex post facto*, commit a fraud; he does—by making the statements made by Mr. Backhouse (he believing them to be true, but which turn out to be utterly false)—obtain the bonds by a trick, which is nothing less than a fraud; and this Court treats as fraudulent all transactions of the same nature. It is said that this case must be put upon a question of agency. It is, however, not at all necessary; but if it were, the evidence which bears upon the subject leads to the conclusion that it was within the scope of the implied authority of a member of the Stock Exchange when securities were deposited with him for the purpose of his advancing money upon them, to pledge those securities to some other person for that purpose. If that was within the scope of his authority, then he was the agent of Mr. Bell for the purpose of raising this money from Mr. Mocatta, and there is no evidence whatever to shew that what was done by T. Backhouse was not within the scope of his authority. But assuming that it was not, what was it the duty of Mr. Bell to do when the matter came before him on the 16th of September? He should have said to Mr. Backhouse—"You had no authority to pledge these bonds to anybody. If you were not able to advance the money to me from your own funds upon the security of these bonds, you should have informed me, because I would not have allowed you to part with them to any other person, and you ought to have given me that information at once." And thereupon he ought to have gone to Mr. Mocatta and said, "Mr. Backhouse had no authority to part with these bonds, and you have no right to hold them, and I insist upon your returning them to me, and obtaining the money from Mr. Backhouse as you can." But he never disputed the propriety of the transaction, and in that conference on the 16th of September he never disputed the authority of Backhouse to pledge his securities for the purpose of raising money upon them from other members of the Stock Exchange. On the contrary, his evidence states that he was perfectly indifferent where the money came from. He states

that it was not for him to inquire, provided he got the money. All that would tend to shew that there was an implied authority in Mr. Backhouse to pledge the bonds; and, on the contrary, instead of disputing the authority, Mr. Bell makes an arrangement by which the bonds are to be obtained from the plaintiff upon a promise to be made by Mr. Backhouse, which promise Mr. Bell knew from the best possible authority it was totally impossible for Mr. Backhouse to make good, unless he furnished him with the means of so doing. What possible defence is there to a case of that description? Again, Mr. Bell says, "I believed at the time that the bonds were in Mr. Backhouse's safe, and I thought I saw them there." What was the course for him to adopt? Ought he not to have said, "I will have nothing to do with any transaction of this description"? He might have said, "Let me see those bonds which you have got." Is it not obvious that unless Mr. Bell had really lulled Mr. Wilkinson into the belief that the money he had promised would to a certainty have been paid, he never would have got the bonds? Is it not obvious that Mr. Wilkinson when he delivered the bonds to the defendant's son, believed that he had got a cheque to give him in return for the amount which he had promised, and that the defendant only could have got the bonds by reason of that belief in consequence of the promise made by Mr. Bell previously? It is said that Mr. Bell might have taken these bonds wherever he found them. I concur in this so far, that in the possession of Mr. Backhouse, as the owner of them he would have been entitled to take them. I concur that if he had found them anywhere accidentally lying about, he would have been entitled to take them. But I dissent entirely from the notion, that he would have been entitled to take them from the plaintiff. They were not his property; they were only his property subject to the charge upon them. They were no more his property than an estate is the property of a man who has mortgaged it, he having only that interest in the estate which is subject to the payment of what is due upon it. The bonds were not in the possession of Mr. Backhouse as the owner, or of Mr. Wilkinson, when they

were taken. In truth, the moment that Mr. Backhouse had obtained possession of these bonds from the plaintiff by giving him a crossed cheque, they were, until Mr. Backhouse was certain that Mr. Bell would perform the promise, and enable him to pay it, held by Mr. Backhouse as the agent of the plaintiff, and Mr. Wilkinson was the agent of the plaintiff for the purpose of holding those bonds until he received the money for them, just as much as when a mortgagee delivers his mortgage bonds and the deeds of the estate to his solicitor to receive a cheque in return, he holds them till he has got the money, and is the agent of the person until the money is paid. The mistake is obvious, and the distinction is as plain as possible in the course which has been adopted. Now, Mr. Bell might have adopted the course which I have stated. If he believed that these bonds were really in Backhouse's safe, he might have insisted upon seeing them. If that had been refused, and he had reason to believe they were there, he might have obtained an injunction from this Court in the course of twenty-four hours, to prevent Mr. Backhouse from parting with these bonds, and he might have impounded them in his possession and obtained possession of them. Then, it is suggested, that Backhouse might possibly have done this—that he might have obtained the bonds by fraud from the plaintiff upon the crossed cheque, and that he might have pledged them to another person without any knowledge of it, and then he could only have obtained them from that person upon payment of the money. I concur in that argument. It is true that he might have committed a fraud upon Mr. Mocatta, and he might have made Mr. Mocatta the victim of such a fraud, but he had no intention to do it; he had no desire to do it. But if a stranger had said to Mr. Backhouse, "If you will obtain these bonds from Mr. Mocatta upon such a statement, I will advance money to you upon them," then this Court would not have allowed that person to have held them for a moment, but would have said that he was liable to make good to Mr. Mocatta the whole amount for which the cheque had been given, and as to which the fraudulent representation had been made.

The only other argument is, that there

was a want of caution or some misconduct on the part of Mr. Mocatta, particularly in taking Mr. Backhouse's crossed cheque, which ought to disentitle him to the favourable consideration of the Court. But the whole transaction seems to have been perfectly straightforward on the part of Mr. Mocatta; he acted just as one would suppose any merchant or man of business would act in the conduct of such business. It is stated that one of the rules of the Stock Exchange is, that a stockbroker is bound to take a crossed cheque unless he give notice before 11 o'clock in the day, that with respect to that particular transaction he insists upon payment in Bank of England notes. That makes it so much the stronger in favour of Mr. Mocatta, but it does not in the slightest degree alter the transaction; for even without that, what reason was there to doubt the word of a stockbroker, known upon the Stock Exchange, that he could really pay him the money, who at the same time firmly believed that the cheque would be duly honoured, and that in consequence of the defendant's representations? What, then, is there that can be pointed out as wrong on the part of Mr. Mocatta? It is suggested, that though a crossed cheque is only payable to a banker, he might have gone to the banker who had to pay it and have asked whether it would be honoured. The banker might say, "Now, there are not assets, but there may be assets paid in before it is presented, and I cannot tell how that is." But it would put an end to all business, if it were held that before a man was to take a crossed cheque as what it represented itself to be, it was necessary for him to go personally and inquire of the banker whether that cheque would be duly honoured or not. When you consider the enormous number of cheques which must necessarily pass on the same day upon the Stock Exchange, it would be putting an end to all business. Besides which it would be a most dangerous consequence, and would most seriously interrupt all business, if this Court in a transaction of this sort could suppose that for one moment a stockbroker who had obtained possession of bonds by such means, could be allowed to hold them against the rightful owner to the extent to which they were pledged. The result, therefore, is, that there must be a

decree for an account, unless the amount due, verified by affidavit, is paid with interest at 7l. per cent. by the first day of next term, and in default of payment the bonds must be delivered up to the plaintiff. In the mean time the defendant must be restrained from parting with the bonds, and he must pay the costs of the suit.

M.R. }
1857. } PAGE v. MAY.
July 23, 27. }

Legacy—Contingency—Vesting—Divesting.

A legacy given absolutely will not be divested if the event on which it is given over does not strictly happen.

After the cesser of a life estate, "a gift to three persons equally, or in case of the death of each or either of them, to be divided between the survivors or survivor, or their representatives:"—Held, on the death of the three before the tenant for life, that their legal personal representative was entitled to the fund.

William Slow, by his will, dated the 6th of June 1801, after stating that he was entitled to 1,000l. consols, expectant on the decease of his mother, Ann Slow, gave the same and the interest and dividends to arise therefrom after his decease unto his mother for life, and after her decease to Sarah Triggs for life; and after her decease he gave the 1,000l. unto John Page, Edward Page and Samuel Page, to be equally divided, share and share alike, or in case of the demise of each or either of them, to be divided between the survivors or survivor or their representatives; and the testator appointed his mother to be his executrix. The testator died in June 1801. On the 27th of July 1801, Ann Slow proved the will, and by her will, dated the 7th of January 1819, she appointed Thomas Harding, since deceased, and Osborn May, the defendant, her executors.

Ann Slow died in July 1819.

Sarah Triggs afterwards married Mr. Hughes; she survived J. Page, who died in February 1807, E. Page, who died in May 1813, and S. Page. S. Page, by his will,

dated the 29th of September 1836, made several specific bequests in favour of his wife, the plaintiff, Sarah Mary Page; but he appointed no executor, and made no bequest either of the 1,000l. consols, or of the residue of his personal estate.

S. Page died in November 1836.

Sarah Hughes died in January 1840.

Sarah Mary Page, the plaintiff, took out letters of administration to her husband and also to J. and E. Page, and she instituted this suit against O. May, the surviving executor of A. Slow, in order that she might be declared absolutely entitled to the 1,000l. consols.

Mr. Jessel, for the plaintiff.—The gift of the fund was absolute, and though the legatees did not survive the tenant for life, the original bequest was never divested; it now belonged to the plaintiff as their personal representative.

Harrison v. Foreman, 5 Ves. 207.

Surgess v. Pearson, 4 Madd. 411.

1 *Jarman on Wills*, 704.

Mr. Beavan, for the defendant.—The Messrs. Page were none of them living at the death of the tenant for life; none of them therefore became entitled to the fund. Survivorship referred to the period of enjoyment. It might be said that each took a vested interest; but that was prevented by the time of payment being contingent. It must, therefore, be considered as a specific legacy which had been assented to, and which remained in the hands of the executor undisposed of.

Macdonald v. Bryce, 16 Beav. 581;
s. c. 22 Law J. Rep. (N.S.) Chanc.

779, overruled by this case.

Cripps v. Wolcott, 4 Madd. 11.

Mr. Jessel, in reply.

July 27.—The MASTER OF THE ROLLS.—*Harrison v. Foreman* must govern this case, and the plaintiff, as the legal personal representative of the three legatees, who died in the lifetime of the tenant for life, is entitled to the fund. Upon considering *Macdonald v. Bryce*, which I neither recollect nor have a note of, I find that the will is not stated in the exact words. I regret that it did not go further.

It is material that the rules and decisions of the Court should be consistent. It is singular also that the point then decided does not seem to have been raised in the argument: there may have been words to distinguish it from the authorities which govern the present case.

M.R.
Nov. 18, 19, 20; }
Dec. 7. } AUSTEN v. BOYS.

Partnership—Solicitors—Retiring Partner—Goodwill—Estimated Value.

F. H. and B. carried on the business of solicitors in partnership. A. was afterwards admitted as a partner, and in 1838 F. retired; he reserved to himself the right of introducing T. as a partner in the firm. In 1846 H. B. and A. entered into new articles of partnership, the term of which was extended to 1853, and articles were inserted for the valuation and purchase of the share of any retiring or deceased partner during the term; these articles were made subject to the right reserved by F. of introducing T. In 1848 H. died, and his widow was paid the value of his share. In 1849 F. introduced T. as a partner. A memorandum was then drawn up without reference to the articles of 1846, declaring that from September 1850 T. should have one-fifth of the profits until September 1853, from which date he was to take an equal share in the partnership profits. A clause was afterwards added, that in the event of the death or retirement of either of the partners, his two-fifths should be divided into thirds, two-thirds to be taken by the senior partner and one-third by T. In August 1853 A. signified his intention of retiring from the business, and he claimed the value of his share of the partnership and of the goodwill; this was refused by the continuing partners, who alleged that the clause relating to the purchase of a partner's share had no operation after T. became a partner; and in a suit by A.—Held, that the articles of partnership between B. and A. could not affect T.; that they were inconsistent with the terms on which T. was admitted a partner, and could not be carried into effect between the parties; that A, by his notice, had dissolved the partnership, and that his interest both in the partnership and

the goodwill expired with the notice; that the time between the notice and the expiration of the partnership term had no marketable value; and that A. was only entitled to the profits during the continuance of the partnership.

This suit was instituted, by Frederick Lewes Austen, against Daniel Boys and Alexander Forbes Tweedie to obtain a declaration that the partnership which had been carried on between them as attorneys and solicitors was dissolved as from the 30th of August 1853; and the bill prayed for an account of the partnership dealings and transactions, and that the value of the plaintiff's share in the business and of the goodwill thereof might be ascertained on the footing of a continuing business, in accordance with the 10th and 11th of the articles of the 24th of July 1846, and be paid to the plaintiff, who did not admit that the partnership terminated on the 1st of September 1853 by effluxion of time, but insisted that it extended to the 1st of September 1860.

The facts of the case will sufficiently appear in the judgment.

Mr. R. Palmer and Mr. Burdon, for the plaintiff, insisted that by the articles he was entitled to receive the market value of his share, or to introduce a new partner into the firm in his place:—

Colyear v. the Countess of Mulgrave,
2 Keen, 81; s. c. 5 Law J. Rep.
(N.S.) Chanc. 335.

Booth v. Parker, 1 Moll. 465.

Whittaker v. Howe, 3 Beav. 383.

Bozon v. Farlow, 1 Mer. 459.

Essex v. Essex, 20 Beav. 442.

*Mr. Lloyd, Mr. Selwyn and Mr. Hislop Clarke, for Mr. Boys.—*The articles of 1846 were wholly inapplicable to the partnership existing after the admission of A. F. Tweedie; the plaintiff, however, had voluntarily quitted the partnership; he could not claim any compensation.

*Mr. Rolit, Mr. Follett and Mr. Rasch, for Mr. Tweedie.—*If the articles of 1846 were of any value, they could only entitle Mr. Austen to such recompense as the residue of the term of his partnership with Mr. Boys was worth. Mr. Tweedie had no

concern with them, and they were not material to his case.—

Colman v. Sarrel, 1 Ves. jun. 50.

Candler v. Candler, Jac. 225.

Dec. 7.—**THE MASTER OF THE ROLLS.**—The question is, whether the plaintiff is entitled to be paid for his share of the goodwill of the business which he carried on with the defendants up to the time of his retirement. In September 1836 Messrs. Forbes, Hale and Boys carried on business in co-partnership. On the 15th of August 1838 the plaintiff was added to the partnership firm, and by the 8th of the articles then entered into, it was stipulated that J. H. Forbes should be at liberty at any future time to introduce the defendant A. F. Tweedie into the business on the following terms, "That Messrs. Boys and Austen hereby severally agree with John Hopton Forbes at any future time to article Alexander Forbes Tweedie, if requested, before he attains twenty-one, and to admit him when out of his articles, if competent and well conducted, to such a share of the business as shall be agreed upon between his guardians and the then continuing or surviving partner or partners, and in case of difference, to such a share as shall be settled by arbitration to be fair, relation being had to the terms upon which the said several partners have been admitted to the business, and the obligations all are under to Richard Walter Forbes, who laid the foundation of the business." On the 1st of September 1839 J. H. Forbes retired, but the continuing partners carried on the business under the style of "Forbes, Hale, Boys & Austen." On the 24th of July 1846 the then partners agreed upon articles of partnership, and they were reduced into writing. They specified the amount of capital, how the expenses and losses were to be borne, how the current profits and surplus were to be divided, and what each partner might draw out, how the accounts were to be kept, that no partner was to carry on any other business, but to devote all his time to the partnership business, how the partnership monies were to be used in the business and for no other purpose, that no partner was to give bail or become surety or bind his partner in any other liability, and that no clerks were to

be taken or dismissed except with the joint consent of all. These point out the mode in which the business was to be carried on. The 10th article provides that "in case of the death of any partner the partnership is to go on till the 1st of September then next following, and the partnership to be then determined as to that partner, and the partnership property, such as the house, books, furniture, &c. to be valued, and the surviving partners or partner to pay off to the representatives of the deceased partner his share of such valuation on such 1st day of September, or else pay interest thereon till paid at the rate of 6l. per cent. The surviving partners are also to pay to such representatives on such 1st of September a sum equal to half what a retiring partner would be entitled to as the value of his share of the business on such 1st day of September, with interest till paid at 5l. per cent., upon the same principle as is laid down in the 11th article. The surviving partners must also open fresh accounts from such 1st day of September succeeding the date of the death, and wind up the partnership business and accounts, and pay over to the representatives of such deceased partner his share of the outstanding profits and assets as quickly as possible without injuring the business or interest of the surviving partners or partner, and all deeds and papers, &c. to belong to the surviving partners or partner, and the style of the firm to remain the same, if desired, notwithstanding the death of any partner or partners." The 11th article gives "power for any partner or partners to retire, and in that case, the continuing partners or partner to pay such retiring partner or partners for his or their interest and share and goodwill in the business the fair marketable value thereof by four equal annual instalments, with interest at 5l. per cent. from the time of such retirement, till paid; but such retiring partner or partners not to practise either directly or indirectly within 100 miles from the General Post Office, and use his best endeavours to promote the interests of the remaining partners." The 12th article provides that John Hopton Forbes in case of dispute on partnership affairs or on this agreement is to decide by arbitration, and that if he shall decline, then it is to be settled by arbitration

with an umpire. The 13th article makes the agreement subject to the 8th article of the deed of the 15th of August 1838, and the 14th article directs that the agreement is to be construed liberally and fairly, as a Court of equity would construe it, should any dispute arise thereon. The parties to these articles did not profess to, and could not, affect J. H. Forbes or his rights under the articles of the 15th of August 1838; he had received no compensation or consideration for his share on retiring from the business, but he expressly kept his right on foot, and accordingly his privilege of introducing A. F. Tweedie remained as if these articles had never been signed. The articles relative to the payment of the share of a dying or retiring partner formed no part of the partnership contract prior to the 24th of July 1846. Mathew Hale died on the 21st of September 1848; the 10th article was put in force, and upon the arbitration of J. H. Forbes a sum was settled and agreed to by the partners, and it was paid to Mrs. Hale the widow.

In September 1849 J. H. Forbes exercised the power of introducing A. F. Tweedie into the partnership, by sending a memorandum in writing to the plaintiff and Daniel Boys. As originally drawn, it was as follows:—"September, 1849.—Memorandum of terms proposed as regards Mr. Tweedie with reference to the articles between Messrs. Hale & Co. and Mr. Forbes in relation to Mr. Tweedie. Mr. Tweedie to return to Ely Place on the 1st of November 1849. To be allowed in the nature of salary at the rate of 500*l.* per annum until the 1st of September 1850. On that day his name to be introduced into the firm after Mr. Austen's. From the 1st of September 1850 Mr. Tweedie to take one-fifth of profit and loss of the business until the 1st of September 1853, from which date he is to share equally with the other partners. On the 1st of September 1850 it will be necessary to open a new account and new books, and Mr. Tweedie must bring in his proportion of capital to the new firm. That the partnership shall continue for ten years from 1850; that from the 1st of November 1849, and during the partnership Mr. Tweedie to submit to the direction and judgment of Mr. Boys as to the particular department of business he

is to attend to, and in all matters of the conduct of business or otherwise relating to the partnership concerns." This clause was afterwards added in the middle of the articles after the words "other partners": "In case of the death or retirement before the 1st of September 1853 of either of the senior partners his two-fifths to be divided into thirds, of which the surviving senior partner is to take two-thirds, and Mr. Tweedie one-third." This was signed by Messrs. Boys and Tweedie, *simpliciter*; it was also signed by the plaintiff, but with this qualification: "So far as Mr. Tweedie's share and position are fixed by this memorandum, I hereby agree thereto, but as between Mr. Boys and myself on the express understanding that this memorandum is not to annul or prejudice the existing articles of partnership between Mr. Boys and me of the 24th of July 1846, the stipulations of which (except so far as this memorandum affects Mr. Tweedie's interests) are (as between Mr. Boys and me) still to remain in force, and I will sign any further document for carrying these terms into effect."

The plaintiff and the two defendants from that time carried on business without any further attempt to define or settle their rights and interests until the 29th of August 1853, two days before the expiration of the partnership term settled by the articles of the 24th of July 1846, when the plaintiff gave a notice to dissolve the partnership on the following day, and it accordingly took place on the 30th of August 1853, twenty-four hours before it would have expired by effluxion of time, unless it was extended by the memorandum of September 1849; and the question now to be determined is, whether Mr. Austen is entitled to be paid on his retirement, under the 11th clause of the articles of the 24th of July 1846, for the goodwill of the business, and if so how much, and whether both the defendants are liable to make such payment to him?

First, then, how does the matter stand as regards A. F. Tweedie? If two partners take a third, without specifying the terms on which he becomes such partner, he has the same rights, and is subject to the same liabilities as the original two. The terms and conditions of the partnership which bind them bind him, unless a new contract

be made between them ; so also if the conditions of his becoming a partner are partially set forth, to the extent that they are specified or involved by necessary inference therein, he will be bound by the terms of the partnership contract affecting the two original partners with whom he associates himself. But A. F. Tweedie's admission as a partner is made under peculiar and unusual circumstances ; it is not the ordinary case of two partners admitting a third on such terms and conditions as they and the new partner introduced may agree upon, but it is the case of two partners contracting for value with a stranger to admit a specified third person to be partner with them on such terms, and subject to such conditions as they and this stranger (for such J. H. Forbes became when he ceased to be a partner) may settle between them, subject to arbitration in case of difference. At the time this contract was entered into, the partnership as then carried on by Hale, Boys & Austen, did not contain any clause relative to the purchase of the share of a dying or retiring partner. The covenant was to admit A. F. Tweedie into the partnership as it then stood on terms to be agreed upon. It was not in the power of the continuing partners to enter into such additional stipulations and rules of partnership as should make the admission of A. F. Tweedie into the business either impossible or injurious to him. They could not thereby invalidate the articles they had entered into with J. H. Forbes ; such stipulation would not bind him or A. F. Tweedie unless they had agreed to it.

At the same time Messrs. Forbes and Tweedie might have adopted any stipulations and conditions in the existing partnership, and might have consented that A. F. Tweedie should be bound by them. The evidence shews that J. H. Forbes was aware of the stipulation for the purchase of the share of the goodwill of a deceased or retiring partner which had been entered into by Messrs. Hale, Boys and Austen. It is also clear that A. F. Tweedie did not know of it. J. H. Forbes says, in substance, that it was not present to his mind when he wrote and signed the memorandum of September 1849. A. F. Tweedie cannot be held to have consented to it, he did not know of its existence, and there was

nothing on the face of the document of September 1849 to indicate the existence of that provision. The terms of the memorandum of September 1849 do not bear the construction that such a provision applied to A. F. Tweedie, or that it was intended by Messrs. Forbes, Boys and Austen to have such an application. If it did, the consequences on either side would have been very injurious. On the one hand, the day after entering into this arrangement Messrs. Boys and Austen might both have given notice of retirement, and A. F. Tweedie would have had to pay for the goodwill of the business to both, when upon their retirement the goodwill would probably have been reduced to nothing, as the clients of the firm would probably not have continued their business with a house consisting of one person only, and that person a young man untried, just entering it, and personally unknown to the clients, after both the persons in whom the clients had reposed confidence had retired. The effect would then have been to compel A. F. Tweedie to pay a considerable sum of money to Messrs. Boys and Austen, and to leave himself much where he was before he paid the money, and prevent J. H. Forbes from obtaining the benefit of the covenant. On the other hand, if A. F. Tweedie gave notice the day after his admission, he might under pretence of being admitted as a partner and affording his services and assistance to the carrying on of the business have obtained a considerable sum of money from Messrs. Boys and Austen, and all parties would have remained much as they were before ; for the covenant by A. F. Tweedie not to practise would have been of little or no value to Messrs. Boys and Austen. The fair inference to be derived from the memorandum of September 1849 taken altogether is, that it did not, on the assumption that the parties to it were aware of the 10th and 11th clauses of the articles of the 24th of July 1846, contemplate that A. F. Tweedie could be affected by this clause, providing for the payment of the share of a deceased or retiring partner. How then does it stand on the knowledge of the parties themselves ? A. F. Tweedie did not know of it. J. H. Forbes knew of it, but it was not present to his mind, nor did it enter into his suggestion as an ingredient

in the terms on which A. F. Tweedie was to be admitted. D. Boys says he considered that the new arrangement virtually superseded the existing partnership articles, and that it was a new contract or arrangement on the footing of the memorandum of September 1849. F. L. Austen seems to have thought that such would have been the effect of the memorandum taken by itself, and accordingly he expressed his view of the case by the note in writing which he appended to the document of September 1849, and which states his views of the footing on which he signed the document, and on which condition alone he attached his name to it. It is scarcely possible to express the meaning more clearly and distinctly than is done in that note. The plaintiff says that A. F. Tweedie did not object to the memorandum being so qualified. Why should he? His share, his position, his interests (to use the words of the note) were to be fixed by the memorandum of September 1849, and were not to be affected by this note. If Mr. Austen had intended that Mr. Tweedie should be affected by this 11th clause in the partnership articles between D. Boys and himself, he ought to have given him express notice of it, and the terms of his admission ought to have been settled with regard to this provision in the existing articles; and without such notice it would scarcely be possible that A. F. Tweedie could be affected by it. But instead of doing this he signs a note expressly admitting that A. F. Tweedie's share, position and interests are not to be affected by it.

It is impossible for the plaintiff successfully to contend that A. F. Tweedie is bound by these clauses 10. and 11. He is wholly unaffected by them. What, then, is the effect of the transaction as between and as regards the plaintiff and Mr. Boys? It is that the articles of July 1846 must be treated to have been in force after the execution of the memorandum of September 1849. They were in force before the execution of the memorandum. Mr. Austen in signing it says that the articles are to remain in force as between himself and D. Boys, so far as may be possible without affecting A. F. Tweedie's interest. D. Boys dissents from that view, and treats the articles as at an end. But the existing

contract between the parties can only be got rid of by a fresh contract, and only to the extent that the fresh contract controuls the former. If he intended the articles to be wholly superseded it could only be by some express agreement as between himself and the plaintiff, and no such agreement was come to. The existing articles were, therefore, in force after September 1849, as between Messrs. Austen and Boys, and they were only modified so far as was necessary for the purpose of giving A. F. Tweedie his full share and interest in the partnership, according to the memorandum of September 1849, unaffected by such of the provisions of the articles of July 1846 as might otherwise affect him. To this extent there was a plain contract between the three so to modify, or to treat as modified, the articles of July 1846. It is, consequently, important to consider the articles of July 1846 and the memorandum together. By the articles alone a partnership existed between the Messrs. Austen and Boys up to the 1st of September 1853, with a right on the part of either to retire and be paid his share of the goodwill. By the memorandum, in case either retired before the 1st of September 1853 the share of the retiring partner was to be divided, so that A. F. Tweedie was to take one-third of such share of the profits, and the continuing partner two-thirds. After the 1st of September 1853 all were to be equal. If there were three partners A. F. Tweedie was to take one-third of the profits; if only two, he was to take one-half of the profits. If the clause providing for the payment of a retiring partner's share is to have any operation as against Messrs. Austen and Boys, subsequently to the 1st of September 1853, its effect would be to give A. F. Tweedie one-half of the profits arising from a share which had been paid for by his partner. This is manifestly unfair, and could scarcely be intended to be the effect of the transaction. This circumstance is relied on for the purpose of shewing that A. F. Tweedie was to be affected by the articles of July 1846, but that is not my conclusion. On the assumption, therefore, that A. F. Tweedie was not affected by this clause, respecting retirement, and that the clause was to be in full force, as regards the other two, exactly as

if the arrangement of September 1849 had not been entered into, it seems impossible to contend that the clause for retirement was to have any operation after the 1st of September 1853. I do not enter into the question whether, if no arrangement had taken place between Mr. Tweedie and the other partners, the clause relative to retirement could be acted upon by Mr. Austen or by D. Boys up to the last day of August 1853, so as to have the same operation as if the business, of which the goodwill was to be bought, was to be treated as a going business, the perpetual direction of which would remain with the sole continuing partner. I do not, therefore, pursue the argument as to the difficulties which might arise from that construction in case the notice was given by both partners to the other simultaneously, or by one to the other immediately after the receipt of his notice. Nor do I notice the argument of the injustice that might be produced on one who might have to pay the other for the business which neither intended, or was in fact able, to carry on. But admitting all these considerations, and assuming the true effect of the articles of July 1846, taken by themselves, to be that one partner might, on any day before the 1st of September 1853, give the other partner notice of his intention to retire, and thereby become entitled to payment of the share of the goodwill of the business as a perpetuity, still, on that assumption, by the effect of the memorandum of September 1849, and the arrangement then come to, the effect of that clause in the articles of July 1846, was cut and limited to the duration of the term, and if one partner retired prior to that period he was to be paid merely for the value of the goodwill during the period which might elapse from the date of the notice until the expiration of the term of the partnership as it subsisted between them independently of A. F. Tweedie. Messrs. Boys, Austen and Tweedie were partners together until the 1st of September 1853, with a sub-agreement affecting only the two former partners, and so affecting them as not to touch the position or interests of A. F. Tweedie; but after the 1st of September 1853, Messrs. Boys, Austen and Tweedie were to be partners on a footing expressed in the memo-

randum of September 1849, and were unaffected by any articles entered into by Messrs. Boys and Austen alone. Therefore, on and after the 1st of September 1853, Messrs. Austen, Boys and Tweedie were to be partners in equal shares, and if one retired, the other two were to share the profits thus released between them. It is inconsistent with such an arrangement that either Mr. Austen or Mr. Boys should be at liberty to retire and compel the other to buy the share for the benefit of A. F. Tweedie, who was not bound by the clause or liable to contribute to the purchase. It was to this extent a new arrangement. It was a new term, as the memorandum expresses it, from September 1850, which, but for the note of Mr. Austen, would have wholly superseded this clause in the articles of 1846. The plaintiff's note keeps the clause alive as between himself and Mr. Boys, so far as it does not affect Mr. Tweedie, and the only mode of producing that effect and to arrive at the result, which is specified in the plaintiff's note, is to say, that when the plaintiff gave the notice of retirement to Mr. Boys he became entitled to be paid for the goodwill of the term for the day which elapsed after he gave his notice before the arrangement between Mr. Boys and himself was to come to an end. This, no doubt, is to be estimated by the profits actually made. This is clearly next to nothing; but such as it is, it is all that the plaintiff is entitled to. There must be a decree in the terms of the first two paragraphs of the prayer of the bill, with the usual directions for taking the partnership accounts; I will make a declaration accordingly. The bill, however, may be dismissed if it is thought desirable, but this will probably be sufficient, so far as it asks the relief prayed in the third paragraph of the bill, without costs as regards the defendant Mr. Boys; but if the defendant Mr. Tweedie should ask for costs of this part of the bill, he must have them, because the relief appears inconsistent with the note signed by the plaintiff himself; but, if asked for, they must be only such costs as are increased by that relief being asked. The bill in other respects is proper, and the plaintiff is entitled to have the accounts taken in this court between Mr. Boys and

himself. Mr. Boys and the plaintiff have, in a great measure, given rise to this question between themselves by the mutual disinclination which they seem to have felt in September 1849 to come to a determinate arrangement and settlement of the questions between them, and they have allowed them to remain open. I must make a decree in the terms of the first two clauses of the prayer of the bill, and dismiss the bill as to the third clause, and, except as to Mr. Tweedie, give no costs of the suit.

STUART, V.C. }
Nov. 5. } BOWES v. GOSLETT.

Will — Construction — Repugnant Gift over after absolute Gift.

A testator, by his will, bequeathed unto his wife all his leasehold property, wheresoever situate, for her sole use and benefit, except a certain house therein described; and in a subsequent part of his will he directed that as soon after the decease of his wife as might be practicable, all his leasehold property not already disposed of by her (save and except the before-mentioned house) should be sold, and the produce thereof distributed by his executors (of whom the wife was named one) amongst certain persons, in the proportions therein stated:—Held, that, upon the death of the testator, his widow became absolutely entitled under his will to the leasehold property bequeathed to her by such will, and that the direction to sell contained in such will and the expressed disposition of the proceeds of sale were repugnant to the preceding absolute gift to the testator's wife, and void.

John Sharp, the testator in the cause, by his will, dated the 7th of December 1847, gave and bequeathed as follows:—
"I give and bequeath unto my dear wife, Susannah Sharp, all the furniture, linen, plate, china, books, &c., in the house in which I live, together with all monies that may be in my house at the time of my decease; and I further give and bequeath unto my said dear wife all my leasehold property, wheresoever situate, for her sole use and benefit, save and except the house and premises situate and being No. 55,

Lisson Grove North, which I have put into trust for the benefit of my great-nephew, Edward John Sewell, and my niece, Mary Ann Davis, as will be seen by the deed bearing date the 25th day of July 1843, and otherwise as therein expressed; and I also further give and bequeath unto my said dear wife all my monies in the public funds and my shares in the Eagle Assurance Company, and all other property whatsoever and wheresoever of which I may die possessed, or to which at the time of my decease I may have any just or lawful claim, for her own sole and absolute use; and I will and desire that all my just and lawful debts and funeral and testamentary expenses and legacies herein given be paid and discharged as soon after my decease as may be practicable. I give and bequeath unto Mr. William Blackwell Bowes the sum of 50*l*. I hereby will and direct that as soon after the decease of my said dear wife as may be practicable, all my leasehold property not already disposed of by her (save and except the house No. 55, Lisson Grove North, put in trust as before mentioned,) be sold, and from the produce thereof the sum of 200*l*. be paid to and equally divided between my nieces Rachael, Mary Ann and Susannah Emery, or such of them as may be then surviving. And as to the remainder of the said produce, I give one-eighth part thereof to," &c.

The testator gave the remainder of the produce in eight parts to certain persons, and the children and grandchildren of other persons therein named. He then appointed his wife and three others executors of his will, and requested them to accept ten guineas each, in consideration of the trouble they might be put to in the execution of the trusts of his will.

The testator died on the 14th of January 1848.

In 1854 his widow, Susannah Sharp, made a will, by which she bequeathed specifically part of the leasehold property bequeathed by the will of her husband.

The bill was filed, by her executor, claiming (*inter alia*) to have it declared that his testatrix was under the will of her deceased husband absolutely entitled to the leasehold property bequeathed to her by such will, and that the direction to

sell contained in such will, and the expressed disposition of the proceeds of sale, were repugnant to the absolute gift to the testator's wife, and void.

The defendants to the bill were the executors of the testator, John Sharp, and certain of the parties entitled under his will to the proceeds of the sale thereby directed after the death of his wife; the others of such parties being, some of them dead without leaving legal personal representatives, and the others of them entitled under the will of the testatrix, and not making any claim to share in the proceeds of such sale.

Mr. Charles Hall, in support of the bill, cited—

Ross v. Ross, 1 J. & W. 156.

Holmes v. Godson, 25 Law J. Rep. (N.S.) Chanc. 317.

Hughes v. Ellis, 20 Beav. 193.

Doe v. Glover, 1 Com. B. Rep. 448; s. c. 14 Law J. Rep. (N.S.) C.P. 169.

Barton v. Barton, 3 Jur. N.S. 808.

Mr. Dunne, *contrà*. — Admitting the rule as to personal estate to be that where an absolute interest is bequeathed, and a gift over is superadded in the event of the legatee dying without having disposed of the legacy, such gift over is void, there is not the same ground for such a rule where, as in the present case, the legacy consists of leaseholds. A reason in support of the expediency of the rule with regard to personalty, is that in many cases it might be very difficult, and even impossible, to ascertain whether any part of the fund remained undisposed of or not, since, if the legatee of the absolute interest left any personalty, it might be wholly uncertain whether it were a part of the precise fund which was the subject of the condition or not. Such a reason is not applicable where the subject-matter of the bequest, being leasehold property, may always be identified.—

Watkins v. Williams, 3 Mac. & G. 622.

Constable v. Bull, 3 De Gex & S. 411.

Borton v. Borton, 16 Sim. 552; s. c. 18 Law J. Rep. (N.S.) Chanc. 219.

STUART, V.C. (without hearing a reply)

said that the plaintiff was entitled to the declaration asked by the bill. The direction by the testator to his executors to sell, after the decease of his wife, the leaseholds "not already disposed of by her," implied that an absolute power of disposition had been previously given to her over the whole.

STUART, V.C.
Jan. 30.

THE GOVERNORS OF THE
GRAY-COAT HOSPITAL v.
THE WESTMINSTER IMPROVEMENT COMMISSIONERS AND OTHERS.

Practice — Substituted Service — Judgment Creditor — Attorney on Record.

To a vendor's bill to enforce a lien upon the purchased estates in respect of unpaid purchase-money, by means of a sale of those estates, certain judgment-creditors of the insolvent purchasers were made parties in respect of their interests in those estates as such creditors. Two of these judgment creditors being out of the jurisdiction, substituted service of a printed copy of the bill upon their respective attornies in the actions in which the judgments had been recovered was ordered to be good service on them respectively, such attornies being still the attornies named on the records of the judgments, but declining respectively, for want of instructions, to accept service of the bill for their respective clients.

The defendants, the Westminster Improvement Commissioners, had contracted with the plaintiffs for the purchase of certain real estates, and had been let into possession of the purchased premises under their contract, but as they had paid only part of the purchase-money no conveyance of the land had been executed to them.

At the date of the contract the Commissioners were largely indebted upon numerous judgments recovered against them. They subsequently became insolvent and unable to pay the balance of the purchase-money due to the plaintiffs under the above-mentioned contract; and the bill in this suit was thereupon filed, praying that the defendants, the Commissioners, might be decreed specifically to perform the contract, or else that the plaintiffs

might be declared to have a lien on the premises contracted to be purchased from them by the Commissioners for the unpaid purchase-money, and that such premises might be sold, and the amount due to the plaintiffs paid out of the produce of the sale.

To this suit the judgment creditors of the Commissioners were made parties by supplemental bill, an objection having been taken by a purchaser under the decree in the original suit that the judgment creditors ought to concur in the sale, and the necessity of such alteration of the record having been ruled by the Lords Justices, upon an appeal to them upon that objection (1).

Mr. G. W. Collins now moved, on behalf of the plaintiffs, that service of a printed copy of the supplemental bill on John Griffiths Reynell, solicitor, of No. 8, Staple Inn, in the county of Middlesex, might be deemed good service on Charles Hunter, one of the defendants, and that a like service of another printed copy of the said bill on the said John Griffiths Reynell might be deemed good service on Vincent Frederick Kennett, another of the defendants, and that like service of another printed copy of the said bill on Messrs. Norris & Son, solicitors, of No. 2, Bedford Row, in the county of Middlesex, might be deemed good service upon Edward Oxenford, another of the defendants. In support of the application an affidavit of the solicitor of the plaintiffs was read, from which it appeared that the defendants, Hunter and Oxenford, were judgment creditors of the Commissioners, and out of the jurisdiction, and that the respective solicitors, upon whom substituted service was sought to be effected for them respectively, had acted for them as their respective attorneys in the actions resulting in the recovery of their respective judgments, and still remained such attorneys on the respective records of such judgments, but that, not having received instructions, they declined to appear, and refused to accept service in the present suit for their respective clients at law. As to Kennett, the second defen-

dant named in the notice of motion, the evidence shewed that he also was a judgment creditor of the Commissioners, and that the solicitor upon whom substituted service was sought to be effected had been his attorney in the action in which his judgment had been recovered, and still remained as his attorney upon the record of such judgment; that such solicitor was in correspondence, with reference to the present suit, with Kennett, who did not appear to be out of the jurisdiction, but declined to accept service for him unless duly authorized; and that the plaintiffs were unable to discover the residence of Kennett. The judgments of the defendants sought to be served were recovered early in 1855.

The following authorities were referred to in support of the application:—

15 & 16 *Vict. c. 86. s. 5.*

Cooper v. Wood, 5 *Beav.* 391.

Hornby v. Holmes, 4 *Hare*, 306.

Woodall v. Walker, 3 *Hare*, 339.

Murray v. Vipart, 1 *Ph.* 521; *s. c. nom. Murray v. Vibart*, 14 *Law J. Rep. (N.S.) Chanc.* 217.

Hobhouse v. Courtney, 12 *Sim.* 140; *s. c.* 10 *Law J. Rep. (N.S.) Chanc.* 377.

Bones v. Angier, 23 *Law Times*, 252.

STUART, V.C. made the order asked as to the defendants Hunter and Oxenford, but not as to the defendant Kennett, with regard to whom he required further evidence of the steps taken to serve him, and a further application to be made to J. G. Reynell, his attorney.

LORDS JUSTICES. }
Feb. 12, 18. }

HANNAM v. SIMMS.

*Will—Construction—Substituted Gift—
“Now living.”*

A testator gave his residuary real and personal estate to his wife for life, and afterwards to T. H. H. for life, and after the death of the survivor he gave the same to and amongst his brothers and sisters (whom he named), and the brothers and sisters of his wife (whom he also named), and the children of her deceased brother and

(1) *The Governors of the Gray-Coat Hospital v. the Westminster Improvement Commissioners*, 26 *Law J. Rep. (N.S.) Chanc.* 843.

sister (who were also named). The testator provided that if any of his brothers and sisters, or the brothers and sisters of his wife then living, should happen to die in the lifetime of his wife and of T. H. H. or of the survivor of them, without leaving issue, the share of him or her so dying should be divided amongst the survivors; but if any of them, his brothers and sisters, or the brothers and sisters of his wife, should so die leaving issue, the share or shares of him or her so dying should be divided among such issue. At the date of the will W. H. one of the testator's brothers (named in the will) was dead, (although the testator was ignorant of the fact), leaving children:—Held (reversing a decision of one of the Vice Chancellors), that the children of W. H. were entitled to their father's share, and that the words "now living" only applied to the brothers and sisters of the testator's wife.

This was an appeal from a decision of Vice Chancellor Stuart on the construction of a will.

The testator, Thomas Hannam, by his will, dated the 11th of January 1832, after making divers devises and bequests, gave, devised and bequeathed the residue of his real and personal estate unto his wife for life, with remainder to Thomas Hannam Hannam for life, and after the decease of the survivor of them, he devised and bequeathed the same as follows:—

Unto and amongst my brothers and sisters, Martha, the wife of Richard Sly, Elizabeth Stidstow, John Hannam, George Hannam, James Hannam, William Hannam, Ann, the wife of Christopher Pitcher, and Mary Robins, and the brothers and sisters of my wife, namely, James Longden, Sarah Jones, Hester Longden, Patience Sumption, Ann Longden, Ruth Longden, and the child and children of her deceased brother and sister William Longden and Mary Halliday, in manner following, that is to say, one-sixteenth part or share each to my said brothers and sisters and the brothers and sisters of my said wife now living, their respective heirs, executors, administrators and assigns, according to the nature and quality of the said hereditaments and premises respectively, and to the child and children of the said William Longden, deceased, who shall be living at the time of

the decease of the said Thomas Hannam Hannam, one other sixteenth part or share of the said hereditaments and premises equally to be divided among them, share and share alike, as tenants in common and not as joint tenants, their respective heirs, executors, administrators and assigns; and if but one such child, then to such one or only child, his or her heirs, executors, administrators and assigns; and one other sixteenth part or share of the said hereditaments and premises to the child and children of the said Mary Halliday, deceased, who should be living at the time of the decease of the said Thomas Hannam Hannam, to be equally divided between them if more than one, share and share alike, as tenants in common and not as joint tenants, their respective heirs, executors, administrators and assigns. And my will further is, that in case any or either of my said brothers and sisters, or the brothers and sisters of my said wife now living, shall happen to die in the lifetime of my said wife and Thomas Hannam Hannam, or in the lifetime of the survivor of them, without leaving lawful issue living at the time of his or her death, or respective deaths, then the share or shares hereby given or intended to or for such of them so dying, shall go to and be equally divided between or amongst the survivor or survivors, or others, or other of them my said brothers and sisters of my said wife, share and share alike, as tenants in common and not as joint tenants, their respective heirs, executors, administrators and assigns. But in case any or either of them, my said brothers and sisters, and the brothers and sisters of my said wife so dying, shall leave a child or children, then the share or shares of him, her or them so dying, leaving a child or children shall go to and be equally divided between or amongst all and every the child or children of him, her or them so dying, that shall be living at the death of the survivor of them, my said wife and the said Thomas Hannam Hannam, if more than one, share and share alike, as tenants in common and not as joint tenants, their respective heirs, executors, administrators and assigns.

When the will was made William Hannam, a brother of the testator, named in

the will, was dead, a fact of which the testator was not aware.

William Hannam left two children, who claimed to be entitled between them to their father's share; but their claim being disputed, they filed the present bill.

The ground of their contention was, that the words "now living" applied only to the brothers and sisters of the testator's wife.

Vice Chancellor Stuart was of opinion that those words applied as well to the brothers and sisters of the testator himself as to the brothers and sisters of his wife, and decided that the gift to William Hannam had lapsed by his death in the testator's lifetime, and therefore that his children were excluded.

From this decision the plaintiffs appealed.

The case was argued at considerable length. For the appellants it was insisted that the words "now living" were restricted to the brothers and sisters of the wife, and that the rule was applicable that where a gift is substituted for another gift, which may fail in different ways, and only one manner of failure is mentioned, the substituted gift takes effect, in whatsoever manner the former gift may fail. In support of this argument, the following cases were cited:—

- Slatham v. Bell*, Cowp. 40.
Jones v. Westcombe, 1 Prec. in Chanc. 316; s. c. 1 Eq. Cas. Abr. 245.
Davis v. Norton, 2 P. Wms. 390.
Doe v. Brabant, 3 Bro. C.C. 393.
Avelyn v. Ward, 1 Ves. sen. 420.
Meadows v. Parry, 1 Ves. & B. 124.
Murray v. Jones, 2 Ibid. 313.
Doe v. Scott, 3 M. & S. 300.
Mackinnon v. Sewell, 5 Sim. 78; s. c. 2 Myl. & K. 202; 3 Law J. Rep. (n.s.) Chanc. 161.
Tytherleigh v. Harbin, 6 Ibid. 329.
Waugh v. Waugh, 2 M. & K. 41.
Iace v. King, 16 Beav. 46.
Manning v. Chambers, 1 De Gex & Sm. 282; s. c. 16 Law J. Rep. (n.s.) Chanc. 145.
Key v. Key, 4 De Gex, M. & G. 73; s. c. 22 Law J. Rep. (n.s.) Chanc. 641.
Re Sheppard's Trusts, 1 K. & J. 269.

On behalf of the defendants, on the other hand, it was contended that the words "now living" were applicable to the brothers and sisters of the testator as well as to the brothers and sisters of his wife, wherefore the children of William Hannam were excluded:—

- Christopherson v. Naylor*, 1 Mer. 320.
Thornhill v. Thornhill, 4 Madd. 377.
Butter v. Ommaney, 4 Russ. 70; s. c. 6 Law J. Rep. (n.s.) Chanc. 54.
Underwood v. Wing, 4 De Gex, M. & G. 633; s. c. 24 Law J. Rep. (n.s.) Chanc. 293; affirming 23 Law J. Rep. (n.s.) Chanc. 982; 19 Beav. 459.
Re Thompson's Trusts, 5 Ibid. 280.

Mr. Malins and *Mr. Bird* were for the plaintiffs, the appellants.

Mr. Hobhouse, for the defendants, who represented the heir-at-law.

Mr. Bird was heard in reply.

Feb. 18.—LORD JUSTICE KNIGHT BRUCE said, that it was agreed between the parties in this case that the testator's brother, William Hannam, had died before the making of the will; and, further, that his son and daughter, the plaintiffs, had been born before the testator's death. The testator must be taken to have made his will either in ignorance or forgetfulness of his brother William's death, and in the belief that he was still living. His Honour, the Vice Chancellor, in dealing with the case as to this share of the residuary estate, had been influenced, as it was stated by the counsel on both sides, by the words of the will "now living." His Lordship thought that he need not express any opinion as to the materiality of those words "now living," supposing them to have applied to his own brothers and sisters, because, upon a consideration of the whole context, he must conclude that the testator meant them to refer only to the brothers and sisters of his wife, and not to his own brothers and sisters; and therefore those two words were not of weight. The only question therefore was, whether, as there were children of the testator's brother now living, the limitation to his children depended on any other circumstance than the event of his death during

the lifetime of the tenants for life, or the survivor of them; and his Lordship conceived that it did not, but that the children of William Hannam living at the death of the testator, were entitled to take as if their parent had died in the interval between the death of the testator and the death of the survivor of the tenants for life. This conclusion was agreeable to the precedents, so far, indeed, as any precedent could be useful in determining the meaning of such an instrument. Some of the cases were directly applicable, as, for instance, *Key v. Key*, *Re Thompson's Trusts*, and *Re Sheppard's Trusts*, which, in his judgment, were all correctly decided, although he thought there was more difficulty in the case of *Re Thompson's Trusts* than had appeared to him to exist at the time when it was decided. Still that case was different from the present, inasmuch as the testator in that instance was aware of his child's death at the time when he made his will. In the present case, to hold that William Hannam's children took no interest in the residue, would be to depart from the intention of the testator.

LORD JUSTICE TURNER added (after referring to the words used in the will), that what might have been the effect of the clause if the words "now living" had applied to the brothers and sisters of the testator himself, it was not now necessary to determine; for he was clearly of opinion that those two words applied only to the brothers and sisters of the testator's wife, of whom he mentioned six as living, and two as dead at that time. That being so, the case was reduced to a simple devise to A. for life, with remainder to B, with a devise over in case B. should die in A.'s lifetime, and in that case the devise over would take effect if B. should die in the lifetime of the testator. Upon this point it was only necessary to refer to the cases of *Willing v. Baine* (1), *Walker v. Main* (2), and the observations of Sir William Grant, in *Humberstone v. Stanton* (3). The decree must, therefore, be varied; and the costs of the appeal of all parties must come out of the estate.

(1) 3 P. Wms. 113.

(2) 1 J. & W. 1.

(3) 1 Ves. & B. 385.

WOOD, V.C. }
Jan. 22, 26. }

READE v. BENTLEY.

Copyright—Author and Publisher—Agreement, Construction of—Right to terminate—"Edition."

An agreement between an author and publisher that the latter should publish at his own expense and risk a work of the former, and after deducting from the produce of the sale the expenses, including a commission of 10l. per cent. on the gross amount of the sale, the profits remaining of every edition that should be published of the work should be divided equally between the author and the publisher:—Held, that this was not an irrevocable licence to publish, but a joint adventure, which the author might put an end to at any time after the publication of the first or any subsequent edition.

An edition consists of so many copies as are issued to the public at a time; and where a work is stereotyped, every fresh issue is a new edition.

The plaintiff was the author of two works of fiction, called respectively 'Peg Woffington,' and 'Christie Johnstone,' and in November 1852 he entered into the following agreement with the defendant, a publisher:—

"Memorandum of agreement made this 3rd day of November 1852, between Charles Reade, Esq., of 10, Great Russell Street, Covent Garden, on the one part, and Richard Bentley, of New Burlington Street, publisher, on the other part. It is agreed that the said Richard Bentley shall publish at his own expense and risk a work at present entitled 'Peg Woffington,' and after deducting from the produce of the sale thereof the charges for printing, paper, advertisements, embellishments, if any, and other incidental expenses, including the allowance of 10l. per cent. on the gross amount of the sale for commission and risk of bad debts, the profits remaining of every edition that shall be printed of the work are to be divided into two equal parts, one moiety to be paid to the said Charles Reade, Esq., and the other moiety to belong to the said Richard Bentley. The books sold to be accounted for at the trade sale price, reckoning twenty-five copies as twenty-

four, unless it be thought advisable to dispose of any copies, or of the remainder at a lower price, which is left to the judgment and discretion of the said Richard Bentley. In witness whereof the said parties have hereunto set their hands this day. It is understood between the aforesaid parties that twelve copies of the said work are to be presented free of charge to the said Charles Reade, Esq.

(Signed interchangeably)

"Charles Reade.

"Richard Bentley."

"Nov. 13th, 1852."

In pursuance of this agreement the defendant published an edition of 'Peg Woffington,' at the price to the public of 10s. 6d. per copy, being the price verbally agreed upon before the execution of the agreement.

In February 1857 the defendant published a second edition at the price to the public of 3s. 6d. per copy, being the price fixed upon by the defendant against the consent of the plaintiff, and contrary, as he alleged, to the spirit of the agreement.

In June 1853 another agreement was entered into between the plaintiff and the defendant relative to the publication of 'Christie Johnstone,' and was in precisely similar terms to the agreement respecting 'Peg Woffington.' Three editions of this work were published at 10s. 6d. per copy, with the consent of the plaintiff, and a fourth at 3s. 6d. against his consent. On the 1st of October 1857 the defendant wrote a letter to a mutual friend, in which he stated that he contemplated bringing out 'Peg Woffington' and 'Christie Johnstone' at 2s. each, and made some proposals with reference to the publication of some other works of the plaintiff. The plaintiff, however, objected to the publication of new editions at reduced prices, considering that at the reduced prices the editions could not realize more than the expenses of publication and 10% per cent. on the amount of sale, and filed the present bill, alleging that the defendant had not yet incurred any expense in respect of the threatened publication, and praying that the joint adventure or partnership subsisting between them under the agreements might be dissolved and accounts taken; that the plaintiff might be declared to be

the absolute owner and proprietor of the copyrights of the two works, and that the defendant might be restrained by injunction from further printing or publishing or advertising for sale any reprint or new editions thereof without the written consent of the plaintiff.

The plaintiff conducted his case in person.

Mr. W. M. James and *Mr. Whitbread*, for the defendant, contended that the agreement amounted to a licence to publish, which was irrevocable. They referred to—

Stevens v. Benning, 1 K. & J. 168;
s. c. 6 De Gex, M. & G. 223; 24
Law J. Rep. (N.S.) Chanc. 153.
Sweet v. Cator, 11 Sim. 572.

The plaintiff was heard, in reply.

Jan. 26.—WOOD, V.C. — In this case the plaintiff, Mr. Charles Reade, the author of two works called 'Peg Woffington' and 'Christie Johnstone,' has filed a bill for the purpose of having it declared that he is entitled to withdraw those two works from the effect of an agreement, dated the 3rd of November 1852, as regards the one work, and in June 1853, as regards the other, and which was entered into between him and the defendant with reference to the publication of the works, as to which, he says, up to the present time, there having been two editions of one work printed, and four editions of the other; and that he is now entitled to say that no further editions ought to be printed, and that the arrangement and adventure which was entered into between him and the defendant ought to be brought to a close. I have before me the author of two very meritorious works, and a publisher of the highest character, fully competent to do them justice, and the plain matter of law which I have to determine is, what is the effect of these two agreements (which I understand are *verbatim* the same, one only being set out in the bill) as affecting the rights of the two parties. Now Mr. Reade, the author, has stated, and most justly stated, that he, in handing over any interest whatever in these works, has parted, to the extent that

he has parted with it, with a right of the highest value, which has been recognized not only by Courts of law from the very earliest period, but by repeated acts of the legislature, and he is not to be considered in any degree less entitled to the protection of the law than the publisher who advances his capital. It is scarcely necessary for me to say that such being the position of the two parties, the simple thing I have to determine is, what is the effect of the agreement they have come to. The memorandum set out in the bill relates to 'Peg Woffington;' it is very short, but, as I had on a former occasion (1) reason to observe, it is one that certainly occasions extreme difficulty, as it appears to me, in arriving at what was the clear intention of the parties at the time. It is dated the 3rd of November 1852, between Charles Reade, Esq. of the one part, and Richard Bentley of the other part. "It is agreed, that the said Richard Bentley shall publish, at his own expense and risk, a work at present entitled 'Peg Woffington,' and after deducting from the produce of the sale thereof the charges for printing, paper, advertisements, embellishments, if any, and other incidental expenses, including the allowance of 10*l.* per cent. on the gross amount of the sale for commission and risk of bad debts, the profits remaining of every edition that shall be printed of the work are to be divided into two equal parts, one moiety to be paid to the said C. Reade, and the other moiety to belong to the said R. Bentley." That, I think I may say, is the whole agreement which it is necessary for me to read on the present occasion; the rest relates only to the books that are to be accounted for, giving leave to Mr. Bentley to fix a certain lower price, a matter which I had to deal with on a former occasion in the suit between these parties, with an understanding that Mr. Reade should have a certain number of copies. The part I read *in extenso* is in reality the whole agreement. Agreements between authors and publishers assume considerable variety of form, and there are one or two forms which happily are sufficiently clear and explicit upon which there can be no doubt: first,

(1) *Reade v. Bentley*, 3 K. & J. 271.

the assignment of the copyright which everybody understands, and which leaves no hesitation or uncertainty between the author and publisher; and there is another course which was taken in *Sweet v. Cator*, the assignment of the editions, a matter, of course, equally plain, and in which the rights are equally defined, although it was necessary, in that particular case, to give full effect to these rights by saying that when an author sells an edition, he is not to publish that work himself again in competition with the edition he has so sold, and that a fair and full opportunity is to be given to the publisher of realizing all the money he has parted with. The present case and the case of *Stevens v. Benning* (though in that case there was rather more precision and particularity than in the present) are cases of an intermediate character. In this case the author does not sell, or purport to sell, has not, in effect, sold or parted with any interest whatever in the copyright, as such, by virtue of this agreement. It was contended very strongly, in *Stevens v. Benning*, that he had done so. I thought he had not, and that view was affirmed by the Lords Justices. In *Stevens v. Benning* the agreement was very similar in many respects to this, inasmuch as the publisher was to publish the whole work at his own risk and at his own cost, but there were other provisions considerably more definite than in this case. It pointed to a series of editions to be published by the same publisher on behalf of the author, and the author himself stipulated, as part of the contract, that he would assist the publication of every future edition. Now in this case the agreement is simply that the publisher shall publish the work at his own expense and risk, and then, after deducting all the expenses which are here specifically referred to, the profits remaining of every edition that shall be printed of the work, are to be divided into two equal parts and divided between the author and the publisher in moieties. Now what the exact character of that contract is, is the question here. There are several ways in which it has been viewed in this case and in other cases. It has been partly contended for by the plaintiff, that this is a simple agency. A simple agency clearly

it cannot be: it is something beyond that: the whole risk is taken by the publisher, which the common agent does not do. He takes the whole risk upon himself of bringing out the work, and then the two parties themselves divide the profit. A mere agent might be paid by a share in the profits, but a mere agent never embarks in the risk of the undertaking. Then it is said that it has been viewed at times, or it is contended that it may be viewed (it being clearly decided that it is not an assignment of copyright) partly as a joint adventure, and partly, as has been contended here for the defendant, as a licence to publish, which, the defendant contends, is, from the nature of the case and the terms of the agreement, irrevocable. Now, in *Stevens v. Benning*, both myself and Lord Justice Knight Bruce considered that it must be regarded, to a certain extent, as a joint adventure. His Lordship says, "The only question, I repeat, with which we are dealing, is one of granting or not granting an interlocutory injunction, and for that purpose it must be observed that such interest, if any, in the copyright of Mr. Forsyth's work on Composition with Creditors, as the other parties to the agreement acquired under it, they acquired, I apprehend, not exclusively of Mr. Forsyth, but by way of joint adventure with him, or of partnership, in respect and for the objects of which he undertook the fulfilment, by himself personally, of certain duties to them, and they undertook the fulfilment, by themselves personally, of certain duties to him." The circumstance that there is a community of licence is not, I apprehend, either by our law, nor was it, in fact, by the civil law, as referred to and cited by Mr. Collyer in his work, absolutely necessary to constitute a partnership: one partner might contract with the other that he would be liable to the whole world in general, that he would take the losses upon himself. Now, Lord Justice Turner looked upon it in the double light of a licence and a partnership, and, not perhaps speaking so decidedly as to partnership, he says, "Next, if there was a partnership, then, if the agreement does not affect the copyright, the partnership was not in the copyright, but in the copies printed under the licence contained in the agreement."

NEW SERIES, XXVII.—CHANC.

Viewing it, therefore, as a licence involved in the terms of the agreement for the publication of the work, and then a joint adventure in the work so parted with to him who is thus licensed and authorized to print it, the question will be, whether or not this licence was revocable. When the former case was before me, which was determined upon a wholly different point, viz. that after the present plaintiff had allowed the defendant to enter into liabilities with respect to an edition, he could not possibly be arrested in the course of disposing of that edition, I hoped, after that, that there might have been a feeling which would have induced the parties to make some common arrangement for preventing any such dispute as that which has now arisen; but I felt then as I feel now, that if the question should arise, there was much to be said on both sides of the question. The plaintiff says—"the contract between us is this: You are to publish; your duty is fulfilled when you have published any one of the editions. I cannot interfere with the publication of that edition, of course; neither can I interfere with the publication of any other edition which, until I have exercised my volition of determining the arrangement between us, you may have commenced, and incurred expense in carrying forward; but with regard to any subsequent edition, unless I am entitled to determine it, the consequence will be that I shall not be able, during the whole of your lifetime, or so long, at least, as you say you are ready and willing to publish continued editions of this work, to assert any right whatever of publishing it." In fact, it would amount, combining the fact of this species of licence with the doctrine in *Sweet v. Cator*, to a parting with the copyright during all such time as the publisher may live, and be willing to continue the publication. I apprehend, according to *Stevens v. Benning*, there may be a personal contract that neither Mr. Bentley's executors, nor any future partner, nor any assignees, shall claim any benefit from this form of contract; but still, as long as he says, I am willing to go on publishing, in that view of the contract, the plaintiff would have parted with the whole of his interest in the copyright to the extent that I have here

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described; and, at the same time, he would not be able to compel Mr. Bentley to publish any second edition. He has no means beyond the contract of forcing him to do more than he has contracted to do, to publish a single edition, and when once he has published that, I apprehend he has fulfilled that contract, and Mr. Reade can insist on no more. He would be placed in this position: he would be unable to exercise his rights as an author during such time as Mr. Bentley may say, 'I am desirous and willing to continue to publish your work in the manner here described, according to the original contract.' But, at the same time, Mr. Bentley is in the condition of being able to say, at any time he thinks fit, 'I am not willing to continue the publication, and I shall cease to publish': a situation of course of considerable hardship to the author, and which ought to be well made out in contracts if such is to be the effect of them.

Another thing which arises is this:—Mr. Bentley claimed, in the former contest, the right of fixing the price of the work, and I held that, although the agreement was itself silent as to that, yet, looking to the fact of his being the person who was to be at the expense and the risk, he was the proper person to fix the price, and by parity of reasoning he was the proper person to fix the time and mode of publishing the edition. This state of things may very well happen, that an edition may be sold out, or nearly sold out; and in his view of publishing, he may say, 'I do not think there ought to be a second, third, or fourth edition of this work. I think we have exhausted the profits and all benefit under our mutual contract; at all events, I do not think the present is the right time for publishing.' If he had said, I will not publish, then it might be conceded by the defendant that the contract would be at an end. He would express his determination not to continue the publication, and Mr. Reade would be entitled to be released. This case may occur, that the publisher may not only say definitely, I will not publish a further edition; but he may say, this is not the right time and season to publish, and the author may think it is; and in the mean time, as I have held, Mr. Bentley would be entitled to fix

the price: if I hold that this agreement runs through every edition, I think I must hold, upon the same principle, that he is the person to determine, on the contest between the two, what would be the right season and mode of publishing. The author would be reduced to this:—he might be hung up for months, or even years, with this agreement over him; the publisher saying—'I do not resign it, I do not give up the right I have of publishing this edition; but I am the person to judge what is the right time,'—I assume, of course, there is no fraud—and I think it is not the right time now; but we must wait one, two, or three years, until the proper season arrives for the revival of the public interest in this work.' It seems to be a situation of considerable difficulty and hardship, and one in which I conceive the author ought not to be put, unless the agreement is very express and clear with reference to it. There is this, however, to be said: the publisher says, by his counsel, 'If I am to stay my hand in publishing three, four, or five editions, the same argument would, of course, apply to the second edition; and where is the right of the plaintiff to commence? If you cannot fix upon any particular time when his right is to commence, of course the inference must be that it can only be determinable by our joint resolution to put an end to the agreement, or by exercising my will (for certainly he is not bound to continue it) of putting an end to the arrangement.'

Then, with regard to the second edition in particular, although the observation might be possibly urged with reference to all the editions, the publisher may say, 'I have expended my capital in bringing out this work; I have given you the benefit of my talents as a publisher (a matter by no means to be overlooked in a case of this description); I have given you all the advantage of my capital, with the expectation that I have a work which will very likely run through two or three editions; I have, therefore, spared no expense in bringing out the first edition, because I know I shall be recouped the expense of the first in the second, third, and fourth editions, which may bring me home.'

In this particular case Mr. Bentley has pressed it more strongly. That which might have been put as an illustration, if the fact had not existed, is urged as an existing fact. He says, 'I shew here that the course I have taken has been one contemplating the perpetuating of editions, inasmuch as I have stereotyped the work, and incurred great expense in doing it; and that stereotyping looks in itself towards the publication of subsequent editions; and, therefore, to say that the plaintiff can, at his own instance, stop this agreement when one edition has been published, is saying that I may be deprived of all the profits by some unreasonable step which he may be disposed to take.' I ought to observe, as to the stereotype, that I do not concur in the plaintiff's view that any fraud or impropriety has been committed by stereotyping the work, if that is found to be one of the best modes of publishing it, because the plaintiff is entirely mistaken in supposing that a man who holds stereotype plates has acquired, as he terms it, a controul over the work. A Court of law has sufficient power to give damages to the author, whether it be a stereotype or moveable type, if any injury is done; and this Court has equal power of restraining the use of stereotype copies, as it has to restrain the use of moveable type. This has made it necessary for me to see whether, in truth, on the agreement, there is or is not any definite period pointed out at which the arrangement is to come to an end,—what one may consider the ordinary and reasonable termination under the wording of the agreement,—or whether the agreement is such as carries you through edition after edition, and subjects the plaintiff to the disadvantages to which I have already alluded.

Now, on looking through the agreement carefully, I confess it does seem to me that the period of editions is pointed out rather as the period for having the periodical accounts and statements as to risk and profit between the two parties. I must consider what the term "edition" means. Mr. James has suggested that the defendant having once stereotyped the work, the technicality of an edition is at an end, and that, in fact, in publishing new "thou-

sands," as they are sometimes termed, you cannot merely term them editions. I apprehend the meaning of the word "editions" is the putting forth the work before the public at successive periods, and whether that is done by moveable type or by stereotype does not seem to me to make any substantial difference. The edition is prepared in this way: when you have moveable type, the type having been broken up, the new edition is prepared by again setting the type, by again printing the paper, by again advertising, and by again taking all the necessary steps to obtain a circulation and publication of the work, there having been a contemplated break, which no doubt is more complete in that case, because until the type is set up, the thing cannot be done; but I do not apprehend in reality that there is any substantial difference in the sending forth to the world certain advertisements and taking certain means for publishing the work, and again printing on paper a new set, a new thousand, a new two thousand or a new three thousand of the copies, between doing that by stereotype and by the ordinary means of moveable type. The "edition" means, whenever you have in your storehouse a certain quantity of copies, you issue them to the public, and there are various modes of doing this recognized by the trade. The new edition is put forth to the trade in the first instance on certain terms, and they take the first thousand or the second thousand, and so on. They are informed what number of copies are ready for disposal, and according to the number they take, they are allowed a certain discount. That is done periodically, and I apprehend if a person chooses to print 20,000 and keeps them by him in his house, thinking it expedient to put forth to the public only a limited number of the copies, keeping all the rest under lock and key, the next issue would be an edition in every sense of the word, and those who have framed this agreement seem to have so considered it, because they say, "after deducting the charges for printing, paper, advertisements, embellishments (if any) and other incidental expenses, including the allowance of 10 $\frac{1}{2}$ per cent. on the gross amount of the sale

for commission and risk of bad debts, the profits remaining of every edition that shall be printed of the work are to be divided into two equal parts, one moiety to be paid to the said Charles Reade and the other moiety to belong to the said Richard Bentley." And therefore it speaks of the profits of every edition as being a separate period of time for taking the accounts. I do not think it would be necessary to hold on account of that, that if there had been a loss on the edition and the adventure went on, the loss on the one would have to be set off against the profits on the other. I apprehend there is a period, and a marked period, when the adjustment of accounts shall take place. I do not mean that that is the only time for accounting; but Mr. James said that the accounts were sent in yearly. That might very well be, the books for a certain time being unsold; it might have taken three or four years to distribute the work and sell it, and therefore it would be very bad if some sort of account were not entered into between the publisher and author during that period. But it looks to me as if there were a contemplation of a period when you can suggest a termination for the settlement and winding up of the accounts. If that is fairly open here, I confess it appears to me on the balance, of the difficulties on either side, that the difficulty in holding against the author that he has so seriously parted with his copyright, does preponderate. It is not the question of the onus being against the grantor, as it were, on the construction of his own agreement, but the onus is thrown upon those who contend that this is a licence, which upon the face of it does not appear to me to be a licence. It is certainly not an assignment of the copyright. It does not appear to be anything more than a joint adventure, and if it is a licence at all, it would be only a licence necessary for carrying on the joint adventure, and nothing more than an implied licence for that purpose. I think the onus is thrown upon the defendant, who insists upon that construction, of shewing it to be the necessary construction of the agreement; and the construction which would appear to leave the author fast bound and the publisher entirely loose as to everything after

the first edition, is not the reasonable construction which the Court ought to come to in considering agreements of this character.

Again, I must sincerely say that I very much regret to see contracts framed with such uncertainty, where it would have been so easy to have made them certain. But giving it the best attention that I have been able to do, I can only come to the conclusion that, with regard to this contract, as to which there is now not any new expense incurred—that, as I said before, is the great test—since the publication of the second edition of 'Peg Woffington,' and no new expense having been incurred since the publication of the fourth edition of 'Christie Johnstone,' there has been a stop; and at that pause it appears to me that the parties contemplated the question of profit was to be considered, and the division of profit was to take place. I have therefore come to the conclusion, that the plaintiff is entitled to have a declaration that he is at liberty to determine the arrangement entered into between him and the defendant on the 3rd of November 1852, with respect to the publication of 'Peg Woffington,' and the agreement of June 1853 in respect of the publication of 'Christie Johnstone,' as from the 5th of October 1857, the date of his notice; and that the defendant is not entitled—no injunction will be necessary—under the said agreements respectively to publish any further edition of the said works: an account to be taken of the dealings and transactions between the plaintiff and the defendant in respect of the publication of the above-named works under the agreements respectively; and the plaintiff is not to be at liberty to interfere with the sale of the several copies of the said works respectively published prior to the 5th of October 1857. Reserve further consideration, and liberty for both parties to apply. I shall give no costs up to the hearing, because I think both parties are equally in fault in having entered into an agreement so difficult to construe.

LORDS JUSTICES.

Feb. 13.

RUDLAND v. CROZIER.

Will—Construction—Bequest of Income to Trustees for Lunatic possessed of absolute Property—Which Fund primarily liable for Maintenance?

A lady was absolutely entitled to property of which her brother was a trustee. She became of unsound mind, but was not found so by inquisition. The brother by his will bequeathed property to trustees upon trusts for investment, and directed them to pay half the income of the residue to the lady's husband for his life; and after his decease to pay such half of the income to the lady for her life, or to apply the same, or so much thereof as might be necessary, for her support and maintenance; and if there should be any surplus, the same was to be accumulated and paid as in his will mentioned. After the death of the testator the lady was found lunatic by inquisition. The Master in Lunacy reported on the property and income of the lunatic, and the Court ordered a sum to be paid for her maintenance greater in amount than her life income under the will, and greater also in amount than the interest of her absolute property. A bill was filed, by the committee of the lunatic's estate, to have it determined which was the primary fund for her maintenance:—Held, that the life income given by the testator must be first applied, and the remainder only of the maintenance must be made up out of the income of the property to which she was absolutely entitled.

This cause was originally set down for hearing before the Master of the Rolls on a motion for a decree, but as the point in dispute involved a question in lunacy, his Honour considered it better to have the case heard before the Lords Justices, if they would give permission. The cause accordingly was now heard.

The bill was filed, in the name and on behalf of Mrs. Frances Rudland, widow, a lunatic, by Capt. Harrison, the committee of her estate, with the approbation of the Master in Lunacy, against Mr. Richard Crozier and Mr. Wilkinson Matthews, the trustees of the will of Mr. Thomas Shepherd, deceased, praying a declaration of

the Court as to which of two funds was primarily liable to be applied for the maintenance of the lunatic. The facts were these:—The lunatic was entitled absolutely to property of which her brother, Mr. Thomas Shepherd, was a trustee. For some time before that gentleman made his will, the lady had been of weak mind, but was not found lunatic by inquisition. In this state of things, he, on the 26th of March 1842, executed his will, by which he made some pecuniary and other bequests, and gave the residue of his personal estate to R. Crozier and W. Matthews, their executors, administrators and assigns, upon trust for conversion and investment. He then directed that the dividends, income and annual produce thereof should be applied and paid as follows: one half thereof to Jones Rudland, the husband of his, the testator's, sister, during the joint lives of himself and wife; and if she should survive, the trustees were directed "to pay the half part of the said annual produce to the said Frances Rudland for her life, or to apply the same, or so much thereof as may be necessary, for her support and maintenance, in such manner as they (the trustees) shall deem most for her comfort and advantage." The testator then directed that if there should be any surplus of such half part of the annual produce, the same should be accumulated, and the accumulations were to be for the benefit of such persons as under the trusts, bequests and directions of his will might be entitled. And he gave the other moiety of his residuary personal estate in a particular manner, and directed that, subject to the trusts in his will declared, "the said several monies, stocks, funds and securities, and the annual income and produce thereof, shall be held in trust for such of the children (with certain exceptions named) of my cousins, Henry Shepherd Pearson and Hannah Frances Crozier, as shall be living at my decease, equally, share and share alike." The testator died on the 28th of March 1846; his will was proved, and the trustees converted and invested his residuary personal estate, and paid half the income of the same unto Mr. Jones Rudland until his death, on the 3rd of September 1856.

Mrs. Rudland, the plaintiff, was found a lunatic on the 23rd of December 1856, and Capt. Harrison was appointed committee of her estate. By the report of a Master in Lunacy, dated the 28th of May 1857, he found that the lunatic was entitled to a life interest in one moiety of the residuary personal estate of T. Shepherd, producing the annual sum of 674*l.*, and that she was absolutely entitled in possession to other property, producing an annual income of 438*l.* The sum considered by the Master as fit and proper to be allowed for the maintenance of the lunatic was 750*l.*; and disputes arising as to which fund should be applied in the first instance, the Master sanctioned a bill being filed to take the opinion of the Court upon the point.

Mr. Selwyn, Mr. Toller and Mr. W. R. A. Boyle, for the plaintiff, argued that she was entitled to have the whole income derived from the half of the residue under the brother's will first applied, precisely in the same manner as she would have been entitled had she not been a lunatic, and in the same manner as if being under incapacity, that incapacity had been infancy instead of lunacy. They cited—

Ravenhill v. Dansey, 2 P. Wms. 179.

Rawlins v. Goldfrap, 5 Ves. 440.

Foljambe v. Willoughby, 2 Sim. & S. 167.

Chambers on Infancy, p. 350, where all the authorities on the point are collected.

In a very late case, *Re Sanderson's Will* (1), Vice Chancellor Wood held, that if certain trustees had allowed a lunatic to be maintained out of his own property, he being entitled as here to an income out of a testator's estate, the representatives of the lunatic would have been entitled to be recouped to the extent of such maintenance.

Mr. Edmond Turner, for *Mr. Crozier*, one of the trustees, contended that by the words of the will there was a discretion in the

trustees, whether to apply all or any part of the income to the maintenance of the lunatic, a discretion which the testator well knew might be exercised in abstaining from the application of the half of the income of the residue; for he was aware that his sister had property of her own, and he must have considered that property primarily liable, or he would not have carefully provided for the case of a surplus. If the trustees exercised an honest discretion, the Court would not interfere with it. All the surrounding circumstances taken into account were sufficient to shew that the intention of the testator must have been to provide a fund only in aid of his sister's own property, for her support and maintenance. He cited—

Hammond v. Neame, 1 Swanst. 35.

Cowman v. Harrison, 10 Hare, 234;
s. c. 22 Law J. Rep. (N.S.) Chanc. 993.

Jones v. Greatwood, 16 Beav. 527.

Mr. Lloyd and Mr. Hislop Clarke, for some of the residuary legatees, said that the question was one of mere construction, and that upon the true construction of the will it was clear that the testator only intended to supply so much out of his own estate as would be necessary to make up such a sum as would be needed, or, as he expressed himself, "as will be necessary for her support and maintenance," he having in the first instance given her a life interest, and then immediately cut it down by the use of the words, "or to apply the same or so much thereof," followed by the words already quoted.

Mr. Follett and Mr. Charles Hall, for the trustee, *Mr. Matthews*, and for another residuary legatee.

Mr. Cairns and Mr. Rawlinson, for other parties.

Mr. Selwyn was not called on to reply.

LORD JUSTICE KNIGHT BRUCE.—As I understand, it is agreed by all parties before the Court that there exist but two sources of income from which a fund is available for the maintenance of the plaintiff: one, the income of one moiety of her brother's residuary personal estate under his will; the other, the income of pro-

(1) 3 Kay & J. 497; s. c. 26 Law J. Rep. (N.S.) Chanc. 804.

perty to which she is absolutely entitled. It is also agreed, and an order has accordingly been made by this Court, in its jurisdiction in Lunacy, that the sum proper to be applied for the maintenance of the plaintiff, having regard to her circumstances, position and condition in life, is a sum exceeding in amount the income to which she is entitled under her brother's will. In such a state of circumstances it appears to me to be a mere matter of course that the whole income to which she is entitled, or which is capable of being appropriated for her benefit under that will, must be so applied, and a declaration to that effect must be made.

LORD JUSTICE TURNER.—I entirely concur in the opinion expressed by my learned Brother. It has been argued that a discretion is given to the trustees by the will of Thomas Shepherd, but that discretion is only as to the mode of the application of the income, not as to the income itself, the whole of which is bequeathed for the benefit of the plaintiff. Then, it has been said, that the surrounding circumstances are to be taken into account; but these circumstances do not appear to me to assist the arguments of the defendants, and do not demonstrate any intention of the testator. The question is reduced, then, to the true meaning of the words of the will, which words, I think, are sufficient to determine the question, and to give her the whole income of the moiety of the residue. The words are, "to pay the half part of the said annual produce to the said Frances Rudland for her life, or to apply the same, or so much as may be necessary, for her support and maintenance." How are the trustees to measure this? The words themselves, as I have said, are sufficient to determine the question. This is rendered still more clear when we consider that that income is given to her for her life only, and even clearer when we remember that her brother was trustee of his sister's absolute property, and must, therefore, have well known what the amount of her independent income was.

STUART, V.C. }
Feb. 27. } HUTTON v. SEALY.

Mortgage—Power of Sale—Foreclosure.

*By indenture, dated the 27th of October 1851, J. R. conveyed freeholds to and to the use of W. T. B. and C. A. M, their heirs and assigns for ever, by way of mortgage, for securing the repayment of 3,000*l.* and interest, and the said indenture contained a power to the mortgagees, after six months' notice, to sell the mortgaged premises, and to hold the monies arising thereby upon the trusts therein mentioned for better securing the repayment of the mortgage monies. J. R. died on the 1st of April 1856, having devised and bequeathed all his real and personal property for the benefit, as to the real estate, of his wife for life; and, after her decease, upon trust, as to both the real and personal estate, for the benefit of his twelve nephews and nieces. The mortgagees, on the 18th of October 1856, in conformity with the terms of the power, gave notice of their intention to exercise the power of sale at the expiration of six months, if their debt were not previously paid. On the 10th of December 1857, the mortgagees, instead of selling under the power pursuant to their notice, filed their bill against the widow of the mortgagor and his devisees in trust, praying an account of the mortgage debt, and that the mortgaged premises might be sold under the direction of the Court, and the sum found due to the plaintiffs in respect of their mortgage debt paid out of the proceeds of sale, together with the costs of suit; and it was decreed accordingly.*

By indenture, dated the 27th of October 1851, James Robertson directed, limited and appointed, and also granted, bargained, sold, released and confirmed certain freehold lands and tenements in Wiltshire unto and to the use of W. T. Barlow and C. A. Moore, their heirs and assigns for ever, by way of mortgage, for securing the repayment of 3,000*l.* (therein acknowledged to have been advanced to the said James Robertson by the said W. T. Barlow and C. A. Moore out of certain monies then belonging to them on a joint account) and interest as therein mentioned, and subject to a proviso for redemption thereof, at a day therein mentioned;

and in the same indenture of mortgage was contained a power to sell and dispose of the said hereditaments, and to hold the monies arising thereby upon the trusts therein mentioned for better securing the repayment of the said mortgage monies, but the said power of sale was to be exercised, after default in payment of the said sum of 3,000*l.* and interest, or any part thereof, at the time and in manner thereinbefore appointed for payment thereof in the said proviso for redemption; and also after giving six calendar months' notice in writing as therein mentioned to pay off the said sum of 3,000*l.* and interest.

In March 1855, the mortgaged premises, subject to the equity of redemption therein, became vested in the plaintiffs, and the money secured thereby also became vested in them by assignment upon a joint account.

James Robertson, the mortgagor, died on the 1st of April 1856, having, by his will, dated the 29th of March 1856, devised and bequeathed to Thomas Robertson and James Sealy all his real and personal estates, to hold the same unto and to the use of the said T. Robertson and J. Sealy, their heirs, executors, administrators and assigns, according to the nature and qualities thereof respectively, upon trust as to the real estates to permit and suffer his wife Mary Ann Robertson to use and occupy the same, or to let and set the same and receive and take the rents and profits thereof for her own use and benefit during her natural life, she keeping the premises in repair and the buildings thereof insured from loss or damage by fire; and immediately after her decease upon trust that they, the said T. Robertson and J. Sealy, or other the trustees or trustee for the time being of his said will, should absolutely sell and dispose of all and singular his said real estate as therein mentioned, and hold the monies thereby arising, together with the clear residue of his (the testator's) personal estate, upon certain trusts for the benefit of his twelve nephews and nieces therein named. On the 18th of December 1856, the plaintiffs caused T. Robertson and J. Sealy to be served with a notice addressed to them to pay off and discharge the said principal sum of 3,000*l.* and inter-

est as required by the power of sale in the said mortgage deed contained, and that after the expiration of the term of six calendar months from the service thereof the plaintiffs would proceed to absolutely sell and dispose of the said mortgaged hereditaments and premises, and pay and apply and dispose of the money thereby arising pursuant to the trusts in the said indenture of mortgage contained in respect thereof.

This notice was also served upon the testator's widow, the said Mary Ann Robertson.

The bill, which was filed on the 10th of December 1857, after stating as above, and that the mortgage money still remained unpaid, prayed that an account might be taken of what was due to the plaintiffs for principal, interest and costs upon their said mortgage security of the 27th of October 1851; and that the mortgaged premises might be forthwith sold under the direction of the Court, and out of the proceeds to arise thereby, that the sum found due to the plaintiffs might be paid to them, together with the costs of the suit.

To this bill the executors and the widow of the testator, James Robertson, were named as defendants.

The cause was brought on for hearing upon motion for decree.

Mr. Malins and *Mr. Haig*, for the plaintiffs.

Mr. Bacon and *Mr. W. W. Cooper*, for the defendants, the trustees and executors of the mortgagor, objected that an account was here unnecessary, and that the plaintiffs, by exercising the power of sale given to them in the mortgage deed, could have obtained all the relief which could be given to them in the suit. The only case in which the Court would decree a sale *simpliciter*, was that of a foreclosure suit, and that it had only recently been enabled to do, by the statute 15 & 16 Vict. c. 86. s. 48. Prior to that statute such a thing was never done where, as in the present case, the defendants, the mortgagors, were adults. Here the bill did not pray for foreclosure. They cited—

Christophers v. Sparke, 2 J. & W. 223.
Davis v. Dowding, 2 Keen, 245; s. c.
7 Law J. Rep. (N.S.) Chanc. 169.

Kerrick v. Saffery, 7 Sim. 817; s. c.
4 Law J. Rep. (N.S.) Chanc. 162.

Mr. Bevir appeared for *Mrs. Robertson*.

STUART, V.C. said—The deed of mortgage in this case directed that the proceeds of sale should be held on certain trusts, and where a trust was to be executed the trustee was entitled to apply for the direction and indemnity of this Court. Where, moreover, the matter involved the taking of an account, the Court would ascertain, as between the persons interested, what was due to each, and decree accordingly. The fact that the bill did not pray foreclosure was not a sufficient reason for refusing to apply these principles. The ordinary rule in this country, a purely technical one, which prior to the statute 15 & 16 Vict. c. 86. prevented the Court from directing a sale in ordinary foreclosure suits, was always looked upon as a narrow one, and as most inconvenient and unjust to mortgagees. No such rule had prevailed in Ireland, and it had not been acted on in England where there was an infant defendant having an interest in the equity of redemption. The enactment of the 48th section of the statute 15 & 16 Vict. c. 86. had been passed to alter a state of the law considered most unjust and oppressive to mortgagees as regarded their rights in a suit for foreclosure. A decree was then made in the terms of the prayer of the bill, reasonable time being allowed for redemption.

WOOD, V.C. }
Jan. 19, 29. } LAWRIE v. BANKES.

Advancement—Failure of Object.

In the event of the object failing for which money has been advanced by trustees under a power of advancement, the money belongs to the person for whose benefit it was advanced, and cannot be recalled into the original fund. Therefore, where, under such a power, the trustees purchased a commission in the army, and the person for whom the commission was purchased sold out shortly after joining his regiment, there being no fraud:—Held, that he, and not the trustees, was entitled to the purchase-money.

NEW SERIES, XXVII.—CHANC.

In October 1853, the trustees of the will of the late Lord Eldon, in exercise of a power of advancement contained in the will, laid out 840*l.* in the purchase of a cornetcy in the Fourth Dragoon Guards for the defendant Bankes, then an infant, who was accordingly gazetted, and joined his regiment in December, but immediately obtained leave of absence, on the expiration of which, in January 1854, being unable to obtain further leave, he sold out, and the purchase-money was paid to the plaintiff, the agent of the regiment. This money was claimed by Bankes, and also by the trustees of the will, and Bankes commenced an action against the plaintiff for the recovery thereof. The agents of the regiment in Ireland also claimed 150*l.* of the fund for regimental stoppages. The plaintiff therefore filed a bill of interpleader against the several claimants; and under an order made in the cause, he paid the money into court.

Several petitions were presented by the persons claiming to be entitled for the payment of the money out of court.

On the 12th of December, the Court made an order, on the petition of the Irish army agents, for payment to them of the 150*l.* claimed for regimental stoppages.

The question now came on for argument upon the petition of the defendant Bankes, who claimed the residue of the fund.

Mr. Cairns and *Mr. H. Stevens*, for the petitioner.—The power of advancement having been exercised and the money appropriated, the trustees have no further power over it; the whole benefit from that time belongs to Bankes. They cited *Leche v. Lord Kilmorey* (1).

Mr. Rolt and *Mr. R. R. Hawkins*, for the trustees of the will.—The advancement was made for a special purpose, which failed, the petitioner never having done any duty with his regiment.

Mr. Willcock and *Mr. Bromhead*, for the Irish army agents.

Mr. Cairns, in reply.

Jan. 29.—WOOD, V.C.—The short question in this case is, whether the trustees having exercised a power of advance-

ment can, under the circumstances, recall any portion of the money so advanced. The petitioner was a minor, and was very much indebted at the time the commission was purchased; but no charge of fraud can be sustained, as it appears the trustees were aware of his embarrassments at the time they advanced the money. The petitioner joined his regiment, and remained in it two months, and he only sold out when he found he was unable to arrange matters with his creditors. I have looked into the authorities as to the right to have money returned which has been advanced for a purpose which has failed, but I find no case like the present. In the latest case, that of *Hirst v. Tolson* (2), the late Vice Chancellor of England decided that the mother of an articled clerk was, on the death of the attorney before the expiration of the articles, entitled to a return of a portion of the premium paid by her, but that is not quite this case. Here the commission was actually purchased, and the petitioner actually joined his regiment. I cannot hold that the commission was not purchased for this petitioner's benefit, and though unfortunately the whole benefit was lost, it would be too much to say, after the purchase has been actually made, that the commission did not become his property. The petitioner, therefore, is entitled to the balance in court.

but on the expiration of that time another bill of sale of the same furniture was executed in similar terms and was not registered. A third, a fourth, and a fifth bill of sale were in the same manner executed and not registered, and ultimately a sixth was executed on the 5th of August 1856 and was registered within the prescribed time, but none of the other bills of sale were cancelled. A. B. was adjudicated bankrupt in December 1856, the act of bankruptcy being committed in July previously by being denied to his creditors. Assignees were appointed, who filed a bill against C. D. praying an injunction to prevent him from removing the furniture, and a declaration that the bills of sale were fraudulent and void, and that they might be delivered up to be cancelled:—Held, (affirming a decision of one of the Vice Chancellors), that neither of the bills of sale, nor the registration of the last, constituted "a dealing" within the meaning of the 133rd section of the Bankrupt Law Consolidation Act, 1849, (12 & 13 Vict. c. 106.); and that, notwithstanding the registration of the last bill of sale the furniture remained in the order and disposition of the bankrupt.

Per Lord Justice Turner—*The statute 17 & 18 Vict. c. 36. in no degree affects the doctrine of reputed ownership.*

This was an appeal from a decision of Vice Chancellor Stuart. The case made upon the bill and defence set up by the answer, may be gathered from the following extracts from those documents. The evidence was conflicting, but it established to the satisfaction of the Court that an act of bankruptcy was committed by Mr. James Glover, on the 20th of July 1856, by denying himself to his creditors.

The plaintiffs were Mr. Stansfield and another, the assignees in bankruptcy of Mr. Glover, who, in and before April 1856, carried on the business of a licensed victualler at the Blue Posts Tavern in the Haymarket; and the suit was instituted against Mr. Thomas Riches Cubitt and Robert Watson, for the purpose of setting aside certain bills of sale of furniture in the Blue Posts as fraudulent and void against the plaintiffs.

The bill alleged that, in the month of April 1856, being the time of the execution

Ramsden & Lupton 9 L.R. 25. 27.

LORDS JUSTICES. }
Feb. 13, 16. } STANSFIELD v. CUBITT.

Bills of Sale Act—Registration—Act of Bankruptcy—Fraud—Order and Disposition.

A. B., a trader, on the 19th of April 1856, executed to C. D. a bill of sale of furniture on the premises where he, A. B., carried on business, the consideration being stated as for goods sold, money lent, and money for which C. D. had become responsible for A. B. At the request of A. B. the bill of sale was not registered within the twenty-one days required by the statute 17 & 18 Vict. c. 36,

(2) 2 Mac. & G. 134; s.c. 18 Law J. Rep. (N.S.) Chanc. 308.

of the first of the bills of sale, the bankrupt was indebted to various persons in large amounts, and was in fact then in a state of insolvency, under which circumstances the defendant, Thomas Riches Cubitt, and Robert Watson procured the bankrupt to execute a bill of sale, dated the 19th of April 1856, made between James Glover of the one part, and the defendant Cubitt of the other part, whereby, after reciting that the bankrupt was then indebted to Cubitt in the sum of 364*l.* 10*s.* for goods sold and money lent, and for certain other monies for which the defendant had made himself responsible, it was witnessed that the bankrupt did assign to the defendant all the goods and chattels specified in the schedule to the bill of sale, then being in and upon the premises, known as "The Blue Posts Tavern," to hold the same to the said defendant Cubitt, his heirs, executors, administrators and assigns, with a proviso for avoidance of the bill of sale on payment of the above sum with interest, and containing a power of sale. This bill of sale was attested by Mr. Watson, and it remained in his possession. The whole of the sum of 364*l.* 10*s.* was not in fact due to the defendant Cubitt, but only 164*l.* 10*s.*; and 200*l.*, the residue of the sum secured, was claimed to be due to Watson, and for this amount the defendant had become security to him. Watson was a solicitor, who, as the bill alleged, had lent to the bankrupt several small sums of money, and was a creditor for certain further sums for bills of costs alleged to be due to him. At the time when the bill of sale of the 19th of April 1856 was executed, five bills of exchange, each for the sum of 40*l.*, were drawn by the bankrupt on and accepted by the defendant Cubitt, and handed over to Watson.

This bill of sale was not registered pursuant to section 1. of the act 17 & 18 Vict. c. 36, which requires registration within twenty-one days from the execution, and the bill alleged that it was a part of the agreement between the parties that it should be a secret bill of sale; and in order to avoid compliance with the statute, it was agreed that the bill of sale should be renewed or re-executed from time to time, or that a new bill of sale should be given so as to give opportunity for the registra-

tion of such new or re-executed bill of sale within the time limited by the statute, in case Glover should become bankrupt.

A few days after twenty-one days from the execution of this, the first of the bills of sale, had elapsed, a second, in all respects similar to the first, and dated the 15th of May 1856, was executed between the parties; and this was followed on the 5th of June by a third, on the 24th of June by a fourth, on the 15th of July by a fifth, and on the 5th of August by a sixth, each bill of sale being dated within twenty-one days of the preceding one; and the execution of all of them was attested by Watson, in whose possession they all remained. The bill dated the 5th of August was alone registered, and it resembled in all respects the previous bills, excepting that it contained a recital that the amount secured was only a sum of 239*l.* 8*s.* 6*d.*, a payment having been made to the defendant Cubitt on account of the sum of 164*l.* 10*s.* due to him. The bill further alleged that of this 239*l.* 8*s.* 6*d.* only about 39*l.* 8*s.* 6*d.* was due for actual cash advanced to the bankrupt, and that the remaining 200*l.* was in respect of a debt either actually antecedently due, or alleged or pretended so to be. The bill also alleged that James Glover committed an act of bankruptcy, by denying himself to his creditors, on the 20th of July 1856; and that on the 20th of August he assigned the lease of the Blue Posts Tavern, and the fixtures upon the premises, to one Joseph Greenland, as from the 11th of August, on which day J. Greenland was let into possession. On the 19th of December 1856, Glover was adjudicated a bankrupt, and Watson proved under the bankruptcy against his estate for the sum of 200*l.* with an arrear of interest for the same, but a dispute arising, he, in January 1857, surrendered, or agreed to surrender to the assignees all his interest or right, whether legal or equitable, under the bills of sale, and all securities which he then had or held for or in respect of the debt of 200*l.* Upon this his name, as a defendant to the bill, was struck out by amendment.

The bill further alleged that the bill of sale of the 5th of August 1856 was a fraud

upon the statute, having been executed after the act of bankruptcy, and that the previous bills of sale were void for want of registration thereunder, so that the furniture and effects did not pass to the defendant Cubitt, and that in effect nothing had passed to him; further, that the execution of the bill of sale of the 19th of April was in the way of a fraudulent preference of Cubitt over other creditors; and lastly, that as to the sum of 200*l.* with interest, the defendant Cubitt under the bills of sale had been only a trustee for Watson, and that as Watson had surrendered or disclaimed all right, title and interest under the bills of sale, the defendant could not claim any benefit under the same. It was then prayed that the defendant Cubitt might be restrained by injunction from removing any of the furniture or effects mentioned in the schedule to the bills of sale from the Blue Posts Tavern; that all the bills of sale might be declared by the Court to be fraudulent and void as against the plaintiffs; or that it might be declared that the defendant Cubitt had not any interest under the bills of sale, and that the same might be decreed to be delivered up to be cancelled.

Cubitt, in his answer, denied to the best of his knowledge and belief that Glover was in a state of insolvency when the first bill of sale was executed in April 1856, although he believed that Glover was indebted to some persons, though to an inconsiderable amount. He alleged that Watson had lent him (the defendant) 200*l.* which he was to advance to J. Glover, and for that sum he (Cubitt) had given to Watson his personal security; that he had accordingly advanced that amount to Glover, and in addition further monies of his own, which had made up a total of 364*l.* 10*s.* for which the first bill of sale had been given. The defendant said, that the bills of sale had not been registered, at Glover's own repeated request, lest they should prejudice him in his business and credit. He further alleged, that the whole of the sum of 239*l.* 8*s.* 6*d.*, for which the last of the bills of sale had been given, was due to himself, and that no part of it was due to Watson or any other person, and that Glover had received the

whole of the 200*l.* from him (the defendant) through Watson, except a small sum of 15*l.* or thereabouts. The defendant at the time when the bills of sale were given, was informed that no act of bankruptcy had ever been committed by Glover, and he then believed such to be the case; he acknowledged that Glover had since been adjudicated bankrupt, but he was informed that the adjudication was erroneous, and it was his intention to dispute it. Finally, the defendant submitted and insisted that none of the bills of sale were even void as against the plaintiffs excepting in so far as the last bill of sale superseded and got rid of the effect of the other five.

Vice Chancellor Stuart held, that the bills of sale were fraudulent and void; and hence this appeal (1).

(1) The judgment of the Vice Chancellor pronounced on the 21st of December 1857 was to the following effect:—This title, set up by Cubitt under a bill of sale, dated the 5th of August, which followed four or five other bills of sale, cannot be supported. The first objection taken to the title is, that the bill of sale conveyed nothing; that it assigned nothing; and that it had not the effect of a new transaction. It was a mere continuation of transactions arising out of four or five preceding bills of sale, which were unquestionably void under the Fraudulent Bills of Sale Act for want of registration. It has been said that the bill of sale of the 5th of August was a new transaction, and that the Court will presume a cancellation of the previous bills of sale, and treat the bill of sale dated the 5th of August as the only one which conferred a title upon Cubitt. It is beyond all dispute that, up to the execution of the bill of sale of the 5th of August, as between Cubitt and Glover, the bankrupt, the bill of sale of the 19th of April was effective; unless, indeed, upon the presumption of successive cancellations, in order to revest the interest of Glover the bankrupt, and in order that that interest might pass by each successive bill of sale. This is a case in which the doctrine of presumption is eminently not applicable. The Court never presumes anything in favour of fraudulent and irregular transactions, and to make a presumption of so extraordinary and unusual a kind, in order to support a title which originated in a fraudulent bill of sale as against the title of the plaintiffs, would be to contradict all the principles upon which the law of presumption is founded. Therefore, it seems to me impossible to separate the bill of sale of the 5th of August from the original bill of sale of the 19th of April. Nothing can be presumed in favour of Cubitt in respect to any one of them. That must be left to the natural operation of the first, which was an assignment to Cubitt, according to the operation of the bill of sale, of all those chattels which were comprised in the

Mr. W. D. Lewis (with *Mr. Malins*), for the assignees, in support of the decree of the Court below, insisted that the first five bills of sale were wholly void for want of registration; that they were a fraud upon the statute 17 & 18 Vict. c. 36, and were intended so to be; that the bankrupt had committed an act of bankruptcy in July 1856, upon which he had been properly adjudicated bankrupt; and that as the sixth bill of sale was dated in August in that year, the goods and furniture, the subject-matter of the bills of sale, were in the order and disposition of the bankrupt at the time of his bankruptcy; and that, moreover, he had been guilty of fraudulent preference. Another point made was, that as the defendant Cubitt was a trustee for Watson as to the greater part of the debt, and as Watson had disclaimed or abandoned all interest under the bills of sale, Cubitt had, in fact, no title whatever as to such part. He cited and relied upon—

bill of sale, and to keep them vested in him, and vested in such a way and by a title which originated in a fraud upon the creditors and a fraud upon the assignees of the bankrupt, within the meaning of the Bankrupt Law Consolidation Act, 1849. But if there were any doubt on this part of the case, there is really no plausible ground for an answer to the second objection to Cubitt's title. On the 19th of July an act of bankruptcy by Glover is proved. Cubitt claims under a bill of sale of the 6th of August 1856; and although he says that the 125th section of the Bankrupt Act, 1849, makes, as against the assignees of a bankrupt, a good title to all the chattels in the order and disposition of the bankrupt, yet it has been gravely argued at the bar, and evidence has been read to shew that these chattels comprised in the bill of sale were not in the order and disposition of the bankrupt, but in the order and disposition of Cubitt, who claims under the bill of sale. The whole of the evidence contradicts that view. The whole evidence shews that the object of these secret and unregistered bills of sale was not to injure the credit of the bankrupt, but to leave him in possession, with the advantage of being the apparent owner of the goods. The position of Glover on the 19th of July shews, I think, that the title of the assignees must prevail against that which is attempted to be asserted under the bill of sale of the 6th of August. Upon both these grounds I think that the plaintiffs have established their case. A case more unsatisfactory as to the establishment of the relation of debtor and creditor subsisting between Cubitt and Glover, as a *bond fide* transaction, can scarcely be imagined. It is extremely difficult to see how any title at all can be established by Cubitt. The decree must therefore be in favour of the plaintiffs.

Sections 125. and 133. of the Statute 12 & 13 Vict. c. 106. (2).

Section 1. of the Statute 17 & 18 Vict. c. 36. (3).

(2) The 125th and 133rd sections of the act are, so far as necessary to be stated, as follows: Section 125. "That if any bankrupt at the time he becomes bankrupt shall, by the consent and permission of the true owner thereof, have in his possession, order or disposition, any goods or chattels whereof he was reputed owner, or whereof he had taken upon him the sale, alteration or disposition as owner, the Court shall have power to order the same to be sold and disposed of for the benefit of the creditors under the bankruptcy." Section 133. "That all payments really and *bond fide* made by any bankrupt, or by any person on his behalf, before the date of the fiat or the filing of a petition for adjudication of bankruptcy to any creditor of such bankrupt, and all payments really and *bond fide* made to any bankrupt before the date of the fiat or the filing of such petition, and all conveyances by any bankrupt *bond fide* made and executed before the date of the fiat or the filing of such petition, and all contracts, dealings and transactions by and with any bankrupt really and *bond fide* made and entered into before the date of the fiat or the filing of such petition, and all executions, &c., shall be deemed to be valid, notwithstanding any prior act of bankruptcy by such bankrupt committed, provided the person so dealing with, or paying to, or being paid by such bankrupt, or at whose suit, &c., had not at the time of such payment, conveyance, contract, dealing or transaction, notice of any prior act of bankruptcy by him committed."

(3) The first section of this act is as follows: "Every bill of sale of personal chattels made after the passing of this act, either absolutely or conditionally, or subject or not subject to any trusts, and whereby the grantee or holder shall have power, either with or without notice, and either immediately after the making of such bill of sale or at any future time, to seize or take possession of any property and effects comprised in or made subject to such bill of sale, and every schedule or inventory which shall be thereto annexed or therein referred to, or a true copy thereof, and of every attestation of the execution thereof, shall, together with an affidavit of the time of such bill of sale being made or given, and a description of the residence and occupation of the person making or giving the same; or in case the same shall be made or given by any person under or in the execution of any process, then a description of the residence and occupation of the person against whom such process shall have issued, and of every attesting witness to such bill of sale, be filed with the officer acting as clerk of the dockets and judgments in the Court of Queen's Bench, within twenty-one days after the making or giving such bill of sale (in like manner as a warrant of attorney in any personal action given by a trader is now by law required to be filed), otherwise such bill of sale shall, as against all assignees of the estate and effects of the person whose goods, or any of them, are comprised in such bill of sale, under the laws relating to bankruptcy

Muckleston v. Brown, 6 Ves. 52, 69,
and 9 Ves. 518, n.

Stickland v. Aldridge, 9 Ibid. 516.

Hatton v. English, 26 Law J. Rep.
(N.S.) Q.B. 161.

Mr. Elmsley and Mr. Terrell, for the defendant Cubitt, argued, that no fraud had been committed, or even intended, in the transactions in question; that each bill of sale must be taken to have been complete in itself; that the old doctrine of reputed ownership did not affect the question in dispute, because, under the Bills of Sale Act, all property comprised in bills of sale, when registered, would not be considered as within the order and disposition of the bankrupt. It was denied that Glover committed an act of bankruptcy in July, but even if he had, no adjudication was pronounced until December, nor was even a petition for that purpose presented until then, and there was a total absence of evidence that Cubitt had any notice of such act of bankruptcy. If this were so, and it was confidently submitted that it was, then the 133rd section of the Bankrupt Law Consolidation Act, 1849, protected the subject-matter under contest, for the bill of sale of August was a *bond fide* dealing or transaction with the goods and furniture. They cited and relied upon—

Fawcett v. Fearn, 6 Q.B. Rep. 20;
s.c. 13 Law J. Rep. (N.S.) Q.B. 300.

or insolvency, or under any assignment for the benefit of the creditors of such person, and as against all sheriffs' officers and other persons seizing any property or effects comprised in such bill of sale in the execution of any process of any court of law or equity authorizing the seizure of the goods of the person by whom or of whose goods such bill of sale shall have been made, and against every person on whose behalf such process shall have been issued, be null and void to all intents and purposes whatsoever, so far as regards the property in or right to the possession of any personal chattels comprised in such bill of sale, which, at or after the time of such bankruptcy or of filing the insolvent's petition in such insolvency, or of the execution by the debtor of such assignment for the benefit of his creditors, or of executing such process (as the case may be), and after the expiration of the said period of twenty-one days, shall be in the possession or apparent possession of the person making such bill of sale, or of any person against whom the process shall have issued under or in the execution of which such bill of sale shall have been made, or given as the case may be."

Ex parte Barclay, 5 De Gex, M. &
G. 403; s.c. *nom. Ex parte Gawan*,
25 Law J. Rep. (N.S.) Bankr. 1.
Devas v. Venables, 3 Bing. N.C. 400.
Van Casteel v. Booker, 2 Exch. Rep.
691; s.c. 18 Law J. Rep. (N.S.)
Exch. 9.

LORD JUSTICE KNIGHT BRUCE, without calling for a reply, said that it was quite clear, upon the evidence, that the bankrupt Glover had committed, in the course of the month of July 1856, one or more acts of bankruptcy capable of supporting an adjudication against him. It was also equally clear that, throughout the same month of July, and during at least the first nine or ten days of August, the goods in question in the suit were throughout in the order and disposition and in the reputed ownership of the bankrupt, especially as no interest in the houses in which the goods were (some of which at least were probably tenants' fixtures) was comprised in the bills of sale, or any of them. Nor, as the Lord Justice felt, could it be denied that, if the defendant had any title, it was under the bill of sale of the 5th of August 1856, and under that bill alone. It had also clearly appeared that in April 1856, previously to the date of the first of the bills of sale, and from that time to the date of the bankruptcy, Glover had been in pecuniary difficulties and in embarrassed circumstances, and that this fact was well known to the defendant. It was under such a state of circumstances as this that the series of bills, which preceded the bill of sale of August, had been given. That bill was executed on the 5th of that month; on the 11th possession of the house was given up to Greenland; on the 20th the lease to him was executed; and on the 23rd the bill of sale was registered. Nor was there any other valuable consideration for the bill of sale of August, than for the former bills. Considering, therefore, the connexion which had existed between the bankrupt and Watson, and adopting, so far as it was applicable to the present case, the language used by Lord Chief Justice Tindal, in *Devas v. Venables*, His Lordship was of opinion that neither the bill of sale itself, nor the registration, was a contract or dealing such as was contemplated by the

133rd section of the Bankrupt Law Consolidation Act. According to his judgment the decree was perfectly correct.

LORD JUSTICE TURNER entirely concurred in the observations and the conclusion of Lord Justice Knight Bruce. It was only necessary for him to add that, in his opinion, the Bill of Sales Registration Act had in no degree affected the doctrine of reputed ownership.

LORDS JUSTICES. }
 Feb. 16. } DOUGLAS v. ARCHBUTT.

Trustee — Auctioneer — Professional Charges.

A. by deed assigned to B. timber and stock in trade upon trust to sell and apply the money arising from the sale in paying the expenses of preparing for, making and completing such sale or sales, "including the usual auctioneer's commission and otherwise incidental to the aforesaid trusts." B. was an auctioneer, and had been employed as such by A:—Held, affirming a decision of the Master of the Rolls, that the words appeared to have been inserted to provide for B. being employed in the sale, and that B. was entitled to charge his commission.

This appeal from an order of the Master of the Rolls raised a question relating to professional charges made by a trustee in the execution of a trust.

By an indenture, dated the 14th of November 1854, and made between the defendant, Mr. Archbutt, a timber-merchant, of the one part, and the plaintiff, Mr. Douglas, upholder, of the other part, the defendant assigned all his timber and stock in trade in and about his timber-yard and workshops to the plaintiff, upon trust to sell the same in manner therein mentioned, and to "apply the monies to arise from such sale or sales, in the first place, in payment of the costs, charges and expenses of the said indenture, and of preparing for, making and completing such sales, including the usual auctioneer's commission and otherwise incidental to the aforesaid trusts"; and also in effecting or keeping up any

insurance of the said hereditaments and premises, and to apply the residue in manner therein mentioned. The plaintiff was an auctioneer and estate agent, and had constant dealings with the defendant in that capacity. He undertook the sale of the property, and put it up for sale by public auction. Part only, however, was sold in that manner, and the rest by private contract. By a decree made by the Master of the Rolls, it was ordered that the accounts between the plaintiff and the defendant should be taken, and that the plaintiff should be allowed the usual charges for commission as auctioneer. The defendant contended, that the plaintiff being a trustee under the indenture of the 14th of November 1854, was not entitled to make professional charges in the administration of the trust, and appealed from the decree.

Mr. Roundell Palmer and Mr. H. F. Bristowe, for the plaintiff, supported the decree of the Court below, and contended that the peculiar words adopted in the creation of the present trust, coupled with the fact that the defendant well knew that the plaintiff was a man engaged in this particular business, by reason that he had been employed by the defendant as such, were sufficient to take the case out of the ordinary and undoubted rule that a trustee could not be permitted, in this court, to make professional charges for business transacted in the administration of the trust committed to his charge.

Mr. Selwyn, Mr. Lovell and Mr. Dauney, for the appellant, the defendant, insisted that the words referred to did not take the case out of the ordinary rule of prohibition in such cases, and cited—

Moore v. Frowd, 3 Myl. & Cr. 45; s. c. 6 Law J. Rep. (N.S.) Chanc. 372.

Mathison v. Clarke, 3 Drew. 3; s. c. 24 Law J. Rep. (N.S.) Chanc. 202.

Broughton v. Broughton, 5 De Gex, M. & G. 160; s. c. 25 Law J. Rep. (N.S.) Chanc. 250.

Cradock v. Piper, 1 Mac. & Gor. 664; s. c. 1 Hall & Tw. 617; 19 Law J. Rep. (N.S.) Chanc. 107.

Robinson v. Pett, 3 P. Wms. 249.

LORD JUSTICE TURNER said, that the

only substantial question in the case was, whether the plaintiff was entitled to charge his commission as auctioneer. The fact that the plaintiff was an auctioneer was known to the defendant at the time of the execution of the deed, and the deed contained the following words:—"To apply the monies to arise from such sale or sales, in the first place, in payment of the costs, charges and expenses of these presents, and of preparing for, making and completing such sales, including the usual auctioneer's commission." If these words had not been inserted, it would have been competent to the plaintiff to employ an auctioneer, and to charge for any commission which he might pay him; and for what purpose could these particular words have been inserted, except to provide for the case of the plaintiff acting himself as auctioneer? The intention, therefore, of the parties to the deed at the time was patent, and it was clear that the words were inserted with that object. If the plaintiff had made any charges which were not properly auctioneer's commission, that would be set right in the Judge's chambers.

LORD JUSTICE KNIGHT BRUCE was of the same opinion, and said that the appeal would be dismissed, with costs.

M.R. }
Nov. 3. } MACNOLTY v. FITZHERBERT.

Tenant for Life—Farm Buildings—Repairs.

An agreement for letting a farm having been sanctioned by the Court, the tenant for life was allowed the expense of permanent repairs done to the house and buildings out of a sum of stock settled upon the same trusts.

Charles Smythe, by his will, devised a freehold farmhouse, buildings, lands and premises, and also a sum of money in the funds, to the petitioner for life, with remainder to her children.

A suit was instituted for the administration of the testator's estate, and, under the sanction of the Court, an agreement was entered into for letting the farm with

the house and buildings, and the latter, which were dilapidated, were to be put into repair by the receiver.

The repairs were accordingly done at a cost of 550*l.*, but 220*l.* of this sum were laid out in permanent repairs.

The tenant for life now asked that the 220*l.* might be paid out of the testator's stock, as both the farm and the money in the funds were subject to the same trusts.

Mr. R. W. E. Forster, for the petitioner.

THE MASTER OF THE ROLLS.—The tenant for life of an estate is bound to keep it in repair. The order asked is most unusual. It is, therefore, not without hesitation that I direct the costs incurred by the permanent repairs to be paid out of the testator's money invested in the funds.

FULL COURT }
OF }
APPEAL }
Feb. 25. }

TURNER v. TURNER.

Practice—Settled Estates Act, Section 38.—Commissioner.

The Commissioner for taking the consent of a married woman under the 19 & 20 Vict. c. 120. s. 38. must be a solicitor of this court.

In this case (reported *ante*, page 232),—

The LORD CHANCELLOR said that, having consulted with the Lords Justices, he considered that the order for a commission which he had directed to be issued to Mr. Stuart, an advocate and solicitor practising at Quebec, to take the consent of a married woman resident there, ought not to be drawn up, as, under the terms of the 38th section of the Settled Estates Act, the Commissioner should be an officer of this court.

The LORDS JUSTICES concurred.

WOOD, V.C. }
 Jan. 21, 22; } EARL TALBOT v. HOPE SCOTT.
 Feb. 1. }

*Jurisdiction—Waste—Receiver pending
 Litigation—Demurrer—Plea.*

It is a well-settled rule that the Court will not interfere to appoint a receiver at the instance of a person alleging a mere legal title in himself against other persons who are in possession of the estate.

Whether the Court will in such a case interfere to prevent destructive waste—quære.

The case of *Courthope v. Mapplesden* (1), in which the Court granted an injunction against a trespasser cutting timber by collusion with the tenant, is the strongest case in which it has interfered to restrain waste: there is no case in which it has interfered to restrain the acts of a mere trespasser; but if the acts complained of are such flagrant acts of malicious waste as to indicate fraud—semble, that would be a case for interference.

To a bill stating that by a private act of parliament certain real estates were settled inalienably upon the Earldom of S, and that proceedings were pending in the House of Lords to establish the plaintiff's claim to the earldom, and that the defendants were in possession under an alleged title derived from a former Earl, and praying that pending those proceedings before the House of Lords a receiver might be appointed, and the defendants restrained from committing waste, the defendants demurred. Demurrer allowed, there being no allegation that any proceedings were pending for the recovery of the estates.

The bill charged that many of the tenants of divers parts of the settled estates had, by reason of the conflicting claims, refused to pay their rents to either the plaintiff or the defendants, and by reason thereof such rents were in danger of being lost:—Held, that this was not sufficient to support a prayer for a receiver, there being no allegation that proceedings had been taken against the tenants.

The bill also stated that the defendants were trustees of other parts of the estates for the benefit of such person as should be Earl

of S, and that the claim to the Earldom was in litigation, and prayed for a receiver. *Plea, that the plaintiff was not Earl of S:—Held, good.*

Plea not overruled by a voluntary answer in support.

The bill in this case was filed by Earl Talbot, claiming also to be Earl of Shrewsbury, and claiming also as a consequence thereof, to be entitled to certain estates, which, by a private act of parliament (6 Geo. 1. c. xxix.), were settled inalienably upon the Earldom of Shrewsbury.

The bill proceeded (after stating the act) to state that by other acts (43 Geo. 3. c. xl. and 6 & 7 Vict. c. xxviii.) certain portions of the said estates were vested in trustees, freed from the uses, &c. of the former act, upon trust to sell the same and to apply the purchase-mones in the purchase of other lands to be settled to the same uses.

The defendants, James Robert Hope Scott and Edward Bellasis, were the present trustees of the acts, and the hereditaments had been conveyed to and were vested in them upon the trusts thereof.

Divers of the lands and hereditaments so authorized to be sold had been sold, and the residue thereof remained unsold, and were vested in the defendants Scott and Bellasis; and other lands had been purchased with the produce of the lands sold and settled as directed by the acts.

The bill then set out at length the pedigree under which, on the death of Bertram Arthur, seventeenth and late Earl of Shrewsbury, without issue male, on the 10th of August 1856, the plaintiff claimed to be Earl of Shrewsbury; and stated that on the 20th of February 1857 he presented his petition to the Queen, who referred it to the House of Lords, and they, on the 11th of May following, referred the same to a committee of privileges.

The committee of privileges met on the 13th of July and continued to sit at intervals till the 14th of August, and counsel were heard in support of the plaintiff's claim, and also in opposition thereto, on the part of the Duke of Norfolk, acting as guardian to his infant son, Lord Edmund Bernard Fitzalan Howard, in whose favour the late Earl had devised the estates an-

(1) 10 Ves. 290.

nexed to the title by the first-mentioned act, the defendants Scott and Bellasis being the devisees in trust for him; the Duke of Norfolk's counsel being allowed to be heard in opposition to the claim, on the ground that the decision of the committee would also decide the right to the estates annexed to the earldom by the act.

The plaintiff's claim to the earldom depended upon the establishment of three propositions in the pedigree, one of which, the Attorney General, appearing for the Crown, said in his reply, he considered it conclusively proved that there was no reason to doubt, and as to another that he was perfectly satisfied that it was established. The committee adjourned on the 14th of August, and the claim of the plaintiff was still pending.

The bill then stated, that by virtue of the acts of parliament above set forth, the plaintiff became, on the death of Earl Bertram, entitled to the settled estates as inseparably annexed to the earldom, including therein the hereditaments settled by the first-mentioned act, excepting such hereditaments as by the other two acts were vested in trustees, but including all hereditaments purchased or taken in exchange under those acts, and was also entitled to the rents, issues and profits of the hereditaments vested in the trustees for sale and not yet sold, and the profits of such purchase-money as was not yet invested in the purchase of other land. That upon the decease of Earl Bertram, the defendants Scott and Bellasis, on behalf of themselves and Lord Edmund Howard, claimed to be entitled to all the settled estates and monies by virtue of certain disentailing deeds executed by Earl Bertram, and his will, by which he affected to dispose thereof to the use of the defendants Scott and Bellasis for a term of 1,000 years, and subject thereto to the use of Lord Edmund Howard for life, with remainders over.

The 37th paragraph stated, that, on the death of Earl Bertram, the defendants Hope Scott and Bellasis, by favour of some of the tenants of the said settled estates, entered into the receipt of the rents and profits of the greater part of the said settled estates, and they notified to all the tenants that they were entitled to receive

all the rents of all the said settled estates, and the plaintiff by his agents notified to all the said tenants that he was entitled to receive all the rents of all the said settled estates; but the plaintiff is not and has not been in possession of any of the rents of the said estates or any part thereof, none of the tenants having consented to acknowledge the title of the plaintiff or to pay him rent.

38. By reason of such entry and claim by the last-named defendants, the plaintiff has been prevented from receiving the rents of the said settled estates, and they, the same defendants, have received a large portion thereof, and they, the same defendants, are in receipt of rents amounting to upwards of 25,000*l.* per annum, and they have received rents to the amount of 25,000*l.* and upwards in the whole.

39. Many of the tenants of divers parts of the said settled estates have by reason of such conflicting claims refused to pay their rents to either the plaintiff or the defendants, and by reason thereof rents to a large amount, and exceeding 5,000*l.* per annum are in jeopardy and in danger of being lost. Some of the said tenants who so refuse to pay their rents are very poor.

The bill further alleged, that the defendants had not paid the outgoing of the hereditaments of which they were in receipt of the rents; that the trustees of the jointure of Mrs. Hibbert, the mother of Earl Bertram, had distrained upon the tenants, and the defendants harassed the tenants with distresses and threats of distress; that they had levied a distress for rent on Joseph Mealor, one of the tenants, who had thereupon filed a bill of interpleader, to which the defendants had pleaded a plea, which was allowed (2), with liberty to amend; that the bill was accordingly amended, and upon motion the money was ordered to be paid into court; that the plaintiff offered the defendants Hope Scott and Bellasis to join with them in appointing a receiver or in an amicable application to the Court for that purpose pending the decision of the questions in dispute, but they would not agree to any arrangement other than that they should

(2) *Mealor v. Earl Talbot*, *supra*, 165.

be appointed receivers till all questions should be settled by the ultimate Court of Appeal; that they had cut down considerable quantities of timber on the said estates, and some of it was of an ornamental character, and some of it was not ripe for cutting, and they had sold the same and received the proceeds, and they threatened and intended to cut more timber growing on the said estates, to the great injury and detriment thereof, and were now cutting down timber growing on part of the settled estates at Alton, in the county of Stafford; that ever since the reference to the committee of privileges the plaintiff had been diligent in laying before the committee the evidence of his claim, and he was willing to undertake to use all diligence in prosecuting his said claim before the said committee, and, on establishing it, to proceed forthwith by ejectment to recover possession of the said settled estates.

The bill then prayed that, pending the plaintiff's proceedings to establish his claim to the Earldom of Shrewsbury, and his proceeding by ejectment as aforesaid, a receiver might be appointed of the rents, issues and profits accrued due since the decease of Earl Bertram, and not yet received, or thereafter to accrue due in respect of the settled estates; that an account might be taken of the rents, &c. received by the defendants Scott and Bellasis, and that they might pay the same into court; that an account might be taken of the timber cut down by the last-named defendants, and the proceeds paid into court; and that, pending the proceedings aforesaid, the same defendants might be restrained by injunction from cutting timber or committing waste or receiving any of the rents, &c. or interfering with the tenants.

To this bill, so far as it sought relief in respect of the estates settled by the 6 Geo. 1. c. xxix, the defendant Scott demurred for want of equity; and so far as it related to the estates purchased under the other acts of parliament, pleaded that certain of the statements in the bill as to the plaintiff's pedigree were not true; that the plaintiff was not entitled to the title, dignity and peerage of Earl of Shrewsbury; that he was not entitled as tenant in tail, and was not the heir male of the

body of John Talbot, the first Earl of Shrewsbury; and he put in an answer in support of this plea. The defendant Bellasis put in a similar plea and answer to the whole bill.

Mr. James, Mr. Fleming and Mr. C. Hall, for the defendant Scott.

Mr. James, Mr. Cairns and Mr. C. Hall, for the defendant Bellasis.

They referred to

Crow v. Tyrrell, 3 Madd. 179.

Smith v. Collyer, 8 Ves. 89.

Lloyd v. Passingham, 16 Ves. 59.

Davenport v. Davenport, 7 Hare, 217;
s. c. 18 Law J. Rep. (N.S.) Chanc. 163.

Lady Shaftesbury v. Arrowsmith, 4 Ves. 66.

Jones v. Jones, 3 Mer. 161.

Armitage v. Wadsworth, 1 Madd. 189.

The King v. the Earl of Banbury,
Skinner, 517.

Baynes v. Belson, Sir T. Raym. 247.

Mr. Rolt and Mr. Shapter, for the plaintiff, cited

Mordaunt v. Hooper, Amb. 311.

Lord Fingal v. Blake, 2 Moll. 50.

Lloyd v. Lord Trimleston, Ibid. 81.

Bainbrigge v. Baddeley, 13 Beav. 355;
reversed on appeal, 3 Mac. & Gor. 413.

Middleton v. Sherburne, 4 You. & C. 358;
s. c. 10 Law J. Rep. (N.S.) Ex. Eq. 75.

Haigh v. Jaggar, 2 Coll. 231.

Dean v. Allen, 20 Beav. 1.

Ford v. Peering, 1 Ves. jun. 72.

Mr. Wickens, for the two daughters and co-heiresses of the sixteenth earl.

WOOD, V.C.—I think this demurrer and plea must be allowed. I have not had an opportunity of looking into all those authorities which were cited yesterday, but one I have referred to, in the 2nd volume of *Collyer*, where there is a most valuable repertory of all the authorities on the subject. That was a case which came before Knight Bruce, V.C., and in which he expressed a very strong opinion that the arm of this Court was strong enough to reach cases of clear and destructive waste, even where the party, who was out

of possession, was seeking to restrain those acts of waste, and the parties in possession denied the title of the plaintiff. I conceive that in the result the authorities lead to that conclusion, though there has been some difficulty in arriving at it, and it has been arrived at only by degrees; and to establish such a conclusion, it was necessary to hold that several of the previous cases which had been decided would not now be decided as they actually were. That was fairly the result of the authorities in the case of *Haigh v. Jaggard*, and the Vice Chancellor says:—"I am not, however, convinced that where a man is in possession, however full and complete, of an estate by a title simply and merely adverse to that of another by whom the estate is, whether at law or in equity, claimed against him, without any privity between them, such a state of things, if the party in possession by his answer, whether truly or untruly, swears his title to be just and valid, or that of his adversary to be unjust and invalid, does of necessity prevent a Court of equity from interfering (before any judgment at law or decree in equity) to restrain the party in possession from stripping the estate of its timber, pulling down the mansion-house upon it, or other such acts." To that he confines his observations; and then he proceeds to state that one of the most remarkable cases was that of *Smith v. Collyer*, and that he is "not perfectly satisfied that, in the same circumstances, the Court would not now grant an injunction." Then he says, "The plaintiffs there seemed to have been in possession substantially and infants." Then he proceeds to review a number of authorities; and to that list I have been indebted to a great extent in informing myself upon the subject.

As regards the demurrer, it relates solely to the settled estates, which by an act of parliament passed in the reign of George the First, are now the property of such person, if any such there be, as shall eventually establish himself to be the Earl of Shrewsbury, and to be in lineal descent from the first earl. That person is averred by the plaintiff to be himself; and at the same time he states, on the face of his bill, that his title is in question; that pro-

ceedings have been taken to establish his title before the House of Lords, and that he has arrived very nearly at a satisfactory establishment of his title, there being only three points which appear to be in any way hostile to the conclusion which he has sought to persuade the House to arrive at; and with regard to those points, some members of that august body have expressed their opinion that they will be decided in favour of the plaintiff. No doubt could exist, unless some doubt could be cast upon one of these three propositions, viz. "that John of Salwarpe was legitimate; that William of Whittington was the father of William, Bishop of Salisbury; and that Charles, first Baron Talbot, was the son of the said Bishop of Salisbury." Those are the three points. Then it states, that the Attorney General stated that he considered it was conclusively proved that there was no reason to doubt the legitimacy of John of Salwarpe. That was the first question, and that he was satisfied of the legitimacy of Charles Baron Talbot—that is the third point—and of the plaintiff's descent from the said Baron Talbot. He does not state anything as to whether or not William of Whittington was the father of William Bishop of Salisbury. I find nothing stated with reference to that.

That is the condition in which the plaintiff represents his title to be—of course averring that he is entitled—and all that is at present pending is the absolute decision of the House upon that question of his claim to the earldom. In that state of things, he says, I find certain of the defendants, Mr. Hope Scott and Mr. Serjeant Bellasis, in possession of my property, under the following circumstances. An act of parliament expressly prohibits any alienation by the several tenants who shall come into possession of the property (there is in the original act an exception in favour of any Protestant earl, which is afterwards repealed by the subsequent act), nevertheless, the last earl took upon himself to execute certain instruments purporting to be disentailing deeds, and to execute a will; and the bill states that "immediately on the decease of the last earl, the defendants, on behalf of themselves, and the defendant, Lord Edmund Bernard Fitz-

alan Howard," who claims to be interested under the will, "claimed, and they still claim, to be entitled to all the said settled estates or monies by virtue of the two deeds that were executed by the said Bertram Arthur, Earl of Shrewsbury, herein-after set forth." It not only states that they rest upon that claim, but it states, further, in a subsequent passage, that their *cestui que trust*, Lord Edmund Fitzalan Howard, claimed, and they rested his claim to be heard upon the peerage question, before the House of Lords, upon the ground that the question raised as to the peerage would, in effect, decide the question relating to the property. That is said to be the footing on which he presented himself to that House; and it is alleged that on that footing he was allowed to be heard. So that there is a claim, a colour of claim, in this bill; it is represented that that is the footing on which he has been introduced; and one cannot look upon this as a mere shadowy or groundless assertion of title by a total stranger.

The bill further states (par. 37) that the two gentlemen in question, professing to act as trustees under that will, upon the death of the last Earl, "by favour of some of the tenants of the said settled estates, entered into the receipt of the rents and profits of the greater part of the said settled estates, and they notified to all the tenants of all the said settled estates that they the said last-named defendants were entitled to receive all the rents." I notice this because it may be important to notice it. It is not a statement that they entered into territorial occupation of those lands by favour of the tenants, but that they simply entered into the receipt of the rents and profits, and became possessed of the estate, no doubt, by the favour of the tenants, and that they received the rents and profits of those particular estates.

I ought, perhaps, now to mention, as these are not general charges as to the whole property, that there is a further and different part of the bill to which the plea applies. There are certain estates bought under certain acts of parliament, and which are, on the face of the bill, vested in these same two defendants, in trust for whoever may turn out to be entitled to the earldom, those estates being in a differ-

ent position from those settled estates in which the legal interest solely is in question. A plea is put in to that portion of the bill, that the plaintiff is not the Earl of Shrewsbury, and is not a descendant of the first Earl. The charge, therefore, as to entering into possession of the rents, is confined apparently to the settled estates; by favour of some of the tenants of some of the settled estates they entered into the receipt of the rents and profits of those settled estates.

Then the charge as to timber avers generally that "the last-named defendants have cut down considerable quantities of timber on the said estates, and some of it is of an ornamental character," not thereby alleging that it is timber planted or left standing for ornament, and not leading to any conclusion of equitable waste—"that some of the timber was not ripe for cutting, and they have sold the same and received the proceeds thereof; and they threaten and intend to cut more timber growing on the said estates, to the great injury and detriment thereof; and they are now cutting down timber growing on part of the said settled estates at Alton, in the county of Stafford."

Then the bill prays that a proper person may be appointed as a receiver of the rents of both the settled estates and the unsettled estates; and that the deeds and documents may be secured pending the suit; and that an account may be taken under the direction of the Court; and that the rents and profits received may be paid into court, to be secured for the benefit of the plaintiff, or of the person or persons who shall be found entitled to the same; and that an account may be taken of the timber cut down by the defendants, and that the same shall be secured to the person or persons who may be found to be entitled to the same; that the defendants may be restrained by injunction from cutting any timber or trees being or growing on the said hereditaments, and from committing any waste on the said hereditaments, and from receiving any of the rents of the said hereditaments, or from interfering with any of the tenants of the said hereditaments.

With regard to the first part of the relief which the bill prays for, viz., the receiver, and which is really the substantial part of

the case, I apprehend, as to the settled estates, that it is too clear for any contention in the present day, that this Court will not interfere, at the instance of any person alleging a mere legal title in himself against other persons who are in possession of the estates, to grant him a receiver and put them out of possession. Upon that point I have not heard a single authority cited, or anything approaching to an authority, except it be the case before Sir Anthony Hart, to which I shall presently refer. True, there are some observations which seem to have a leaning that way, but there is no decision which in the least bears out any such proposition. It is manifest that in *Lord Fingal v. Blake*, a receiver was granted by consent. That was the first case cited; and in the subsequent case of *Lloyd v. Lord Trimleston*, there are some observations bearing upon the subject; but with that exception, to which I shall refer presently, I have not found a trace in any one of the numerous decisions which there have been on this subject, that may be said to afford any colour of ground for saying that the Court will interfere. That there may be some possible case in which this Court will interfere, with reference to absolute destructive waste, and where the value of the property will be destroyed, if no steps are taken, I can understand; but I have found nothing that bears any resemblance to the doctrine contended for, that this Court will interfere, at the instance of a person alleging a mere legal title, against another person who is in possession, to deprive him of that possession; and I conceive the ground of that rule of the Court to be extremely sound. It is certainly a rule that has been acted upon so long that, though I have known many cases to have occurred, and everybody must be aware of instances, and very numerous ones, which have occurred, where ejectment has been brought for very valuable property upon a merely legal title, yet I think I may say that nobody for the last twenty years, if not for longer, has ever dreamed of approaching this court, however heavy the litigation might be between the parties, for the purpose of obtaining a receiver, until he had established his right at law to the possession of the estates.

The general ground of the rule I conceive to be this: that the Court cannot interfere with a legal title of any description, unless there is some equity by which you can affect the conscience of the defendant against whom you proceed; that when there is an entire want of privity between you and the defendant, and the defendant is simply a wrong-doer at law, this Court does not take upon itself to interpose, unless in certain very exceptional cases, one of which is the case of a mere trespasser who comes upon that property as to which he recognizes your right to possession, and invades that property either by mining in one case, or by cutting down timber in another, without a colour or shadow or pretence of title, and the property may be destroyed before you have the means of arresting his course of operations at law. That was not established as the doctrine of the Court until after a considerable struggle, if one may call it so, in the mind of Lord Thurlow, who, I believe, is to be considered as having established the doctrine, and after he himself had several times refused to act, though at last he came to the conclusion that it was a case in which the action of the Court might be safely invoked. With regard to the mere enjoyment of the ordinary rents and profits, this Court has never conceived itself to have a right to interfere with that title which the law confers upon every person who, in this country, is in possession of property (unless it is a possession that has been illegally taken), and which is a right to the property recognized in every person who is the terre-tenant; a right which may be traced, no doubt, to the feudal doctrines of our law, by which the lord, on the one hand, had a right to require that he should always know his tenant (and possession was the best means of his acquiring that knowledge), and, on the other hand, he who was tenant and owed his duty to the lord—and very onerous those duties were when the feudal law was in its full vigour—had a right to all the benefit of the property in respect of which he was so bound to perform all those duties. The law has always treated that possession as so sacred, that it is well known to many of us from the cases to be found in the books and

otherwise, that there are numerous estates held in this kingdom without the least pretence of any other title, and where it is perfectly well known that the individual had originally entered upon a devise from a mere tenant for life. The Court recognizes the person in possession as the owner until some other person, by a stronger title, has cast him out from that possession. It has invariably recognized that possession, and unless you find something in the shape of fraud, which was the case in *Huguenin v. Baseley* (3), something by which you can fasten upon the conscience of the person so in possession, the Court invariably refuses to interfere. In no case do I find actual interference, although there are observations, which certainly have a bearing upon it, made by a very eminent Judge of long experience in the practice and principles of this Court in the case of *Lord Fingal v. Blake* and the following case of *Lloyd v. Lord Trimleston*. The case of *Lord Fingal v. Blake*, in reality, was this:—first, there was an application made before action brought and refused. Then, after action brought, some discussion took place, and at last there was an arrangement by consent and a receiver was appointed, and all the subsequent proceedings took place after that consent had been given. Then a further application was made after the result of the trial and the several other proceedings had in the cause. That was the position in which the matter stood. Sir Anthony Hart, the Lord Chancellor of Ireland, said, upon the last application that came before him, "What I propose to do is only a temporary interference as to the possession of the estate; and I think it is in conformity with the principles of this Court to direct not only an account of the rents received by the heir, and of the produce of the timber cut down by him, but also to direct a receiver to take the possession. The stress of the argument has gone upon the supposed imperfection of Lord Fingal's title, as beneficially entitled to take in the contingency of the failure of the precedent estate. But I put Lord Fingal's beneficial title out of the question. The argument by Mr. Holmes has

put it most strongly that there is no devise of the real estate; that there is a pure intestacy as to the seisin of the real estate, and that the effect of the devise extends only to an equitable obligation on the legal estate in the hands of the heir. If this were so, if there was no devise away from the heir, if the inheritance were now devolved upon the defendant, the heir-at-law, I certainly should ponder long before taking it away from him. But I am of opinion the real estate is devised away from the heir. It is admitted, on all hands, this will is sufficient in form, if sufficiently expressed; and I cannot see how it can be doubted that the whole real estate has been given to the trustees, although there may be indeed a question whether the estate so given to the trustees is temporary or perpetual." Then he goes at great length through the language of the will, which I need not advert to, and after that he says, "The consequence of this is, that, inverting the argument used, the heir was a wrong-doer from the beginning; and he is not to put the devisees to recover the estate by ejectment, while the Court has the controul to direct the possession." Further on he says, "If indeed the heir took by descent, the Court would look at his rights with great deliberation, and not without apprehension would it dispossess him of the legal possession; but here the heir has no legal possession, but his title is only worked out by shewing either that the trustees took only a chattel interest, of which the purposes have been answered, or that there is no valid subsisting devise to them whatsoever. The former can only be shewn to the Court by the Master's finding, and in the mean time the Court must take care of the issues and profits of the land." Then he goes on to say, "if the limitations were palpably too remote or clearly uncertain," then that he should not be disposed to interfere. All that is in favour of non-interference in case of any legal possession or right in the heir. I do not find anything in truth in that portion of the case, to support the plaintiff's view. In *Lloyd v. Lord Trimleston*, there was an expression which went more to one of the particular charges in this bill. In that case there was a suit instituted to have a will esta-

blished. Upon the death of Lord Trimleston in 1813, Lady Trimleston continued in possession of the mansion-house, and obtained possession of lands from the tenants; and the heir-at-law, being unable to change the possession, prevailed upon the trustees under a deed of 1810, to use their legal estate for that purpose, and they accordingly brought their ejectment, and in 1820 Lady Trimleston was evicted, and Lord Trimleston, or his son, the Hon. Thomas Barnewell, was let into possession of the mansion-house at a nominal rent. Lady Trimleston claimed to hold under a devise of the mansion-house from her husband for life, with remainder over to others; and what the Lord Chancellor says there, is, "The substantial injury would be, if there was danger that the fund might be lost" (there was a motion there for a receiver) "by the insolvency of the trustees. If there is no want of substance in the trustees to make good what they have received, or without wilful default might have received, and may hereafter receive since they entered into the possession, no ultimate injury will be done. The result of the proceedings at law touching the will is, that at present a verdict stands against the will. Then Lord Trimleston, being the heir-at-law, and the only verdict existing being against the will, has, I think, a title to be in possession." As far, therefore, as that case goes, it is one of the clearest cases imaginable. The heir had availed himself of an outstanding interest in trustees, and a verdict had been obtained against the plaintiff. The attempt was to oust the heir of the possession that he had so got by a person as against whom at present the title had been determined. Then the Lord Chancellor says, and a great deal of stress was laid upon the observation in this case, "The possession which was acquired by the devisee had not the quality of an authorized possession. On the death of the ancestor, the heir has title to enter and retain possession until the Court interposes. If it be said, that the devisee, being let into possession by the favour of the occupiers, acquires any right, that would be to adjust the possession according to the will and pleasure of mere casual persons who happened to be the occupy-

ing tenants at the death of the testator. But my opinion of the law is this, that the heir has, upon the instant of the death of his ancestor in possession, a right to enter and to turn out by the shoulders any other person, except only the widow, who has a right to stay until her dower is assigned to her." Now I have a little difficulty, I candidly confess, in comprehending this observation. If it is meant to apply it to anything more than a fraudulent occupation or possession; if it applies to a mere case of a devisee on the one side and the heir on the other, the devisee being more fortunate in getting the tenant to attorn to him than the heir is, I cannot understand it; for it does not seem to be law to say, that the devisee being let into possession by favour of the tenants, does not acquire any right; for unquestionably he does acquire a very solid right. If the devisee obtains possession of the estate by the tenants attorning to him, he holds the estate till somebody can shew that he has a better right to the possession. It seems to me, that the observations of the Lord Chancellor must apply to some case either of fraudulent or forcible possession which the law will not recognize; because he speaks of the heir having a right to come in and turn the other out by the shoulders. In truth, the devisee had not the legal estate, and the persons who had the legal estate had acted in favour of the heir, who afterwards obtained the verdict of the jury, and the Lord Chancellor thought justly and properly, it was not a case in which he could interfere. When Sir Anthony Hart spoke of the heir's right to come in and turn out by the shoulders any other person in possession, he did not mean, and, as will be seen by the subsequent observation, he could not have meant, such a possession as would put the heir to legal process for the recovery of his right of possession; he could not have meant such a possession as is mentioned in this bill; a possession by persons claiming a right, who, by favour of the tenants attorning to them, get them to pay the rents and profits, and thus obtain a possession, which I apprehend any one would find it extremely difficult to dispute except by ejectment. I know of no process by which, in such a case, a person could be turned out by the shoul-

ders. I do not see that the observations of Sir Anthony Hart go that length; nor is there anything in the allegations in this bill that one can deal with as charging a fraudulent collusion. It states simply that the defendants claim to enter by virtue of this right, and that they notify to all the tenants that they are entitled to receive all the rents of all the settled estates; that is to say, by virtue of their alleged right they notify to all the tenants that they are entitled to receive all the rents, and some of the tenants adopt that view, and attorn to them. I must say, that I cannot read that passage as amounting to any case of fraud which would justify the Court in interfering; and it seems to me, that there is not one authority in the books for the appointment of a receiver on an application by a person out of possession against a person in possession, the person out of possession simply alleging a legal title. There is no authority, nor can any shadow of a dictum be found to support such a view. Although the authorities have been very numerous, yet they have been much less numerous of late years, because attempts of this kind have been much less frequent.

With regard to the large amount of the stake, I apprehend that that makes no difference at all in the principle upon which the case is to be decided. The question to be decided here is to be decided upon the same principle as if, instead of 25,000*l.* a year, it were only 200*l.* or 300*l.* With regard to irremediable injury, and the consequences that may ensue unless there be interference, I am by no means clear that the wisdom of the law would not be shewn in refusing to interfere, independently of those principles upon which I think the doctrine of the Court is founded. If you say that there is some irremediable injury in your losing the rents and profits, I think that there is the same injury done in a vast number of cases from interfering with the rents and profits, as to which there is a person having legal possession, and the deprivation of which causes irreparable injury to him. All his arrangements in bringing up his family would be interfered with, and you might be inflicting just as much injury on the one hand by granting a re-

ceiver, as on the other by withholding it; and in such a case, where there is a balance of convenience and inconvenience, which I am not authorized to enter into, I cannot find any semblance of authority, or any rational ground upon principle for saying, that where A. is in possession of the rents and profits, claiming to be the holder of a simple legal title, and another person claims to hold by a similar legal title, A. could be ousted in this court until that legal title be finally determined at law.

The next point, before coming to the question of waste, is one upon which some reliance was placed. I refer to the charge in this bill, that there are rents to the extent of 5,000*l.* a year, arising from certain estates, the tenants of which have not attorned to either one or the other of the claimants, and the answer to that part of the case is this:—You are again standing on your legal title. You do not tell the Court that you have taken any proceedings against those tenants, and I cannot at present assume that those tenants will not pay you if you take those proceedings. I am certain that if you took such proceedings you would either recover the rent, or the tenant would file his bill of interpleader. That brings me to this remark of Mr. Rolfe's, that this is only in truth a consolidation of several bills of interpleader, and if the Court interferes by interpleader, it is clear that the same interference ought to take place at the instance of one of the litigant parties. The principle is as different as can be conceived. The Court acts upon interpleader, because a person who is perfectly innocent, and who cares nothing about the dispute between two claimants, is, upon the death of his landlord, left in uncertainty as to who is his landlord. He is willing to recognize fully the title of the landlord whenever he is found; but he says, "A. says he is my landlord's legal representative, and the person entitled to sue in respect of the interest created by my landlord's demise; B. says the same thing. Here are two persons claiming—I know nothing of the one or the other—I only desire to be discharged." That the tenant is to be indemnified and saved harmless for that, is manifest equity; but it does not seem to me that that substantiates the equity of

one person who is out of possession in putting the other, who has been more fortunate in obtaining possession (for he is there, and has obtained the legal right which possession gives), out of possession by the appointment of a receiver. With regard to that charge in the bill, it does not appear to me that there is any necessity for the rents being lost, or for the interposition of a receiver of this Court to prevent that necessity. They will be recovered either by the plaintiff bringing his action against the tenant for the rent, and the tenant paying it; or, if the tenant does not pay him when he has brought that action, the tenant will take care for his own sake to pay the rent here. One of two things he must do: he must pay it in either case, and the plaintiff has his full and effectual remedy.

The question about the timber is really the only point that occasions any difficulty, or could occasion any hesitation in a bill of this description. With regard to the timber, the authority certainly is exceedingly great against granting any relief even in the case of waste, strongly alleged, on the part of a person in possession claiming under a legal title. At the same time there are authorities looking the other way, and there is not only upon this point the observation of Sir A. Hart, to whom, as I have said, every deference is to be paid in regard to his knowledge of both the principles and practice of the Court; but also there are the authorities to be found collected in a short statement in the judgment of Knight Bruce, V.C., in the case of *Haigh v. Jaggard*, and which, no doubt, were the very authorities present to the mind of Sir A. Hart, besides many other cases which he had become acquainted with in his long experience, and which might not have found their way into the books. In looking through those authorities it is easy to see that there has been some fluctuation, as to whether in a plain and manifest case this relief should be given, and at last it was decided that it should be given in a case where A. being in possession of a close, his possession being undisputed, a mere trespasser comes upon that close, either under ground to take his mines, or above ground, by collusion with the tenant—and he could not enter except by collusion with

the tenant—and removes a part of the substance of the inheritance, be it timber or be it mineral. At first, Lord Thurlow refused relief, but he afterwards thought differently, and Lord Eldon refers to that in numerous cases, which I need not go through for that purpose. As I said, Lord Thurlow afterwards changed his mind and considered that relief ought to be given, and perhaps the best instance of that is, that case in which both processes took place in Lord Thurlow's mind, namely, an inclination in the first instance strongly in favour of the legal title, and a change afterwards to an opinion that there might be equitable circumstances which you could fasten upon the conscience of the defendant, and which would entitle you to interfere. That is the case of *Hamilton v. Worsfold*, cited in a note to *Cowthorpe v. Mapplesden* (4), and is shortly stated by Sir Samuel Romilly, as follows:—"The bill stated that the plaintiff was seised in fee; that his title had but recently accrued, and the tenants had not yet paid him any rent; that the defendant Worsfold pretended to have some claim to the estate and had given notice to the tenants to pay their rent to him; that he had entered upon the estate with the permission of the other defendants, the tenants;"—so that there is a difference between that case and this, this case alleging simply the receipt of the rents and profits by favour of the tenants, not an entry upon the material property, which I apprehend is meant there;—"and had cut timber and threatened to cut more. The bill, therefore, prayed that Worsfold might be restrained from committing waste, and that the tenant might be restrained from permitting it." It is clear that the nature of the bill was this. It was not simply a charge that the defendant had got the rents and profits from the tenants, but there was an actual charge of collusion between the tenants and the wrongdoer, by which the wrongdoer was admitted into possession through the tenants, and committed this waste, and the tenants were made co-defendants. And the Lord Chancellor at first, on a motion for an injunction, had some difficulty about granting it, Worsfold being a mere tres-

passer; but at length his Lordship granted the injunction against both *Worsefold* and the tenants. *Courthope v. Mapplesden* was a case where the plaintiff charged the defendant, by collusion with the tenant, with entering and committing waste, and Lord Eldon said, "I have no difficulty in granting the injunction in this case, but I will not be bound as to what is to be done upon a mere trespass; though it is strange that there cannot be an injunction in that case to prevent irreparable mischief; the rather as there is a writ at common law," which is referred to by Knight Bruce, V.C., and which is now abolished, "to prevent the further commission of waste during the trial; whereas, if the Court will not interfere against a trespasser, he may go on by repeated acts of damage perfectly irreparable. But the ground in this case is, that the trespass partakes of the nature of waste more than in general cases, the tenant colluding; and if the tenant's act is waste, the act of the other must have so much of the quality of the tenant's act as to make it the object of an injunction." That is the case among those which can be found in the books which has gone the furthest as to the interference of the Court, but it does not happen there, as far as I can see, that the tenant was made a co-defendant, so that it goes one step further than the case of *Hamilton v. Worsefold*; but the charge was the same, that it was by collusion with the tenant; and Lord Eldon, carefully guarding himself against a mere trespass, says, "the tenant colluding; and if the tenant's act is waste, the act of the other must have so much of the quality of the tenant's act as to make it the object of an injunction." To that extent the Court seems to have proceeded, and certainly, as far as the authority there goes, no further. Then, there are numerous instances in which Lord Eldon threw out, as he did here, the difficulty about mere trespass, and perhaps the strongest case of that kind was *Smith v. Collyer*, referred to by Knight Bruce, V.C., in *Haigh v. Jagger*; and this is what the Vice Chancellor says of it:—"I am not perfectly satisfied that in the same circumstances (as far as they are to be collected from the report) this Court would not now grant an injunction. The plaintiffs seem

to have been in possession substantially, and infants." That was the case of an outstanding mortgage, which mortgage I presume, from the view which the Vice Chancellor takes, he conceived to be held for the infants, and therefore the possession of the mortgagee was substantially a possession in the infants; and the defendant, who was himself a wrongdoer in that case, had no legal interest that could be properly interfered with. That only shews how strong the view of the Vice Chancellor was as to the necessity for this Court taking care not to interfere against the mere acts of a wrongdoer, where there was no such specialty, as in those cases I have been referring to, which could justify such interference.

Now, again, in *Norway v. Rowe* (5) Lord Eldon alludes to the same sort of distinction. He says (p. 154) "I recollect hearing, from either Lord Thurlow or Lord Bathurst, that if the bill contained a passage, which is frequently inserted now, that the defendant pretends the plaintiff is not entitled to the estate, he stated himself out of court. There was another case, where the defendant to a bill to restrain waste stated, that he was in possession of the estate by a title of his own, admitting that he was let into possession by the plaintiff's tenant without his knowledge; the Court said, that being a breach of the tenant's duty to his landlord, the defendant's title was for this purpose to be taken as no better than the tenant's; and though, if the defendant had obtained possession, without participating in that breach of the tenant's duty, the Court would not have interfered, they would not permit him to avail himself of a possession so obtained; and upon that ground he was restrained." These are clear cases in which, there being a landlord and tenant, the landlord being the person who has made an actual demise, and the tenant in clear breach of his duty to that landlord, to whom he owes allegiance, having admitted a stranger, the Court says that the stranger's act is to be the act of the tenant, or, as Lord Eldon says, is to have the quality of the tenant's act. The case of *Hamilton v. Worsefold* is stronger than

any other, as there the plaintiff stated that he was not yet in possession, the tenants had not yet paid him any rent, and his title had only recently accrued. That case is more like this than the case of a mere demise by a living landlord, from whom the tenant took his demise, and as against whom it was a flagrant breach of the tenant's duty to admit anybody into the possession.

These being the only authorities I can find, except the case of *Haigh v. Jaggard*, which is rather a summary of those authorities, for saying that the Court will, in such irreparable cases, interfere, I come to the case of *Haigh v. Jaggard* itself, in which the Vice Chancellor simply says that he is not convinced that where a man is in possession, however full and complete, and swears that his adversary's title is naught, that "does of necessity prevent a Court of equity from interfering, before any judgment at law or decree in equity, to restrain the party in possession from stripping the estate of its timber, pulling down the mansion-house upon it, or other such acts." I apprehend, therefore, that the most that this observation of the Vice Chancellor goes to, as deduced from the authorities, is, that he was not satisfied: there may or may not be such flagrant acts of what the Court calls malicious waste in some instances; acts done which no man as mere owner of the property would do, but indicating on the face of it fraud in this respect. A man says, "I know I am in adverse possession, but I claim to be in possession; I know there are people litigating with me, and claiming the estate, who are likely to succeed, and I will take care when they come they shall find the estate a desert. I will cut down every tree on the estate, and I will pull down the mansion-house." I am not prepared, more than the Vice Chancellor was, to say that in such a case as that there would not be fraud, and that if you get fraud, the Court will not be strong enough to interfere and prevent such an act from taking place. He then says, "In the case of *Jones v. Jones* (6), before Sir William Grant, whose language, at page 178 of the report, is well worthy of observation," and which

I will come to presently, "the plaintiff was out of possession, and there does not appear to have been a distinct allegation of the commission or threat of any waste or destruction." It does now appear by the report of *Davenport v. Davenport*, that there was a very strong, clear, distinct, and positive allegation of a waste of that description. Then, he says, "such a case as *Mortimer v. Cottrell* (7), would, I venture to think, probably not receive at the present day the decision which it received in 1789." Then he refers to several other cases, all of which I have looked at, one or two of which are only the common cases to restrain the working of mines; but the other cases which I have referred to, all have a bearing upon the subject which the Vice Chancellor was discussing. He refers also to *Vice v. Thomas* (8) in the Stannaries Court, where a demurrer was allowed to a petition—that was the form of the proceeding in the court—before the present Prince Consort, assisted by Lord Brougham and Baron Parke. The demurrer was allowed on the ground of the remedy being at law; but the Vice Chancellor remarks upon that, that the petition only asked for a decree for an account, and so far it would be important as bearing upon the first branch of this case, viz., the receivership; but it would not have a bearing as to the question of waste, because I do not observe that in that case any injunction was asked for. I have looked at the full report of the case by Mr. Smirke, and I find that there was no such injunction asked for; but all that was asked for was an account of the minerals sold.

Now, having regard to the authority of Knight Bruce, V.C., I will look to the case of *Jones v. Jones*, and see what the effect of that case must be upon the present application of Lord Talbot. *Jones v. Jones* came before Sir William Grant, who unquestionably must be taken to have been perfectly well acquainted with all the authorities before Lord Thurlow, and the authorities before Lord Eldon; and the observations which had been made both by Lord Thurlow and Lord Eldon, upon this particular class of cases. The bill there

(7) 2 Cox, 205.

(8) 4 You. & C. 538.

(6) 3 Mer. 161.

stated that William Jones was, at the time of his death, seised of large estates; that he died in January 1814, leaving the plaintiff his heir-at-law, who, at his death, became entitled to all his real estate. It then stated fraud in the obtaining of a will, and that the will had never been proved; but that the devisees had entered into the possession of the estates thereby given to them, and the trustees and executors had proceeded to act under the trusts thereby reposed in them; that the plaintiff intended to bring an action; that he could not proceed on account of outstanding terms; that he could not hope for a fair trial within the county; and he prayed that full discovery might be made, and asked to restrain the setting up of the outstanding terms, and to restrain them from selling or disposing of the estates, and from committing any spoil, waste or destruction thereon. One obviously sees how imperfectly the bill is reported, because the report does not mention waste at all. It turns out upon examination to have been so according to the note to the case of *Davenport v. Davenport*, where it is stated that clearly waste was referred to and relief asked for in respect of very positive and distinct averments of waste which were there stated. The defendants demurred, because, although the plaintiff asked to restrain them from setting up outstanding terms, he did not aver that there were any, so that he left the case open to demurrer. Sir William Grant said—"If this had been a bill merely for a discovery, there are several parts of it to which an answer must undoubtedly have been given," and he states what parts those are. "But he concludes with praying relief upon the same objects with regard to which he had before stated that he only wanted a discovery in aid of an action. For he prays that this Court will declare that the pretended will was not the true will of the late William Jones, and that the same may be delivered up to be cancelled; and, as consequential on that relief, he prays an account of rents and profits of the real estate, an account of the personal estate, of debts and funeral expenses, an inquiry as to next-of-kin, and a distribution of the clear surplus. It is impossible that, at this time of day, it

can be made a serious question, whether it be in this court that the validity of a will, either of real or personal estate, is to be determined." Therefore, he says, as to that part, there can be no relief. Then, referring to the alternative prayer that the Court would direct an issue, he says, "Now, although there may have been instances of issues directed on the bill of an heir-at-law, where no opposition has been made to that mode of proceeding, yet I apprehend that he cannot insist on any such direction. He may bring his ejectment, and if there be any impediments to the proper trial of the merits, he may come here to have them removed. But he has no right to have an issue substituted in the place of an ejectment." Then he says, "As to the title-deeds, the bill merely states the fact that the defendants have the possession of them, but not that they are in any way necessary to enable the plaintiff to recover at law. He stands solely on his title as heir, and does not shew how the required production could be of the least service to him. As Lord Rosslyn says in *Lady Shaftesbury v. Arrowsmith*, 'the title of the heir is a plain one, and it is a legal title; all the family deeds together would not make his title better or worse.'" Then he says that the plaintiff comes to restrain the defendants from setting up outstanding terms; but he proceeds to say that there is no statement that there are any such. "Then," he says, "there is a prayer 'that in the mean time' (that is, I suppose, till the trial of such issue or action) 'the defendants may be restrained from committing any spoil, waste or destruction on the said William Jones's real estates, and from selling (9) or disposing of or charging and encumbering the same; and that a receiver may be appointed.'" No case was cited in which the Court has interfered at the suit of heir or devisee to restrain waste, spoil or destruction,"—and this Knight Bruce, V.C., says he thinks is deserving of special attention—"by either, while they are litigating their adverse rights in a court of law. One should think the case of the devisee a stronger one than that of the heir, because till the

(9) The word in the report is *setting*.

will is set aside, the *prima facie* title is in the devise." He, therefore, differs a little from Sir A. Hart in *Lloyd v. Lord Trimleston*. "Yet in *Smith v. Collyer* an injunction was refused when applied for by the devisee against the heir. I own I cannot see a very good reason why the Court, which interferes for the preservation of personal property pending a suit in the ecclesiastical court, should not interpose to preserve real property pending a suit concerning the validity of the devise. But, as a condition of such interference, the Court would certainly expect it to be shewn that the party applying was proceeding with all due expedition to bring the question to a decision." The point to which I apprehend Knight Bruce, V.C., directs attention is this: that Sir William Grant does not abnegate the right of the Court to interfere in a case like this. He says, he cannot see why the Court could not interfere; and then he proceeds rather to throw it upon a special point which he selects in the bill. That great Judge was very little in the habit of seizing upon any special circumstance in a case to differ it from other cases, but whether it was from feeling unwilling to lay down a principle of such large application as that no interference could under any circumstances take place, or from feeling pressed by the previous authorities, especially *Smith v. Collyer*, he states that it never has been done, and he says he does not see on principle there is any good reason why, when you have interfered to protect personal property, pending proceedings in the ecclesiastical court, you should not interpose to preserve real property. "But," he says, "as a condition of such interference, the Court would certainly expect it to be shewn that the party applying was proceeding with all due expedition." Therefore, in that case you may say, although there was there a very strong allegation of waste of the most malicious description, that of pulling down the property in question, he does not interfere, and he gives his reason at the same time, laying it down that, in his experience, he had never known any instance of the Court interfering for such a reason as that. One may venture to observe, that though the reason may not be satisfactory to our

minds, now that we have emancipated both our lands and minds in a great measure from many conclusions drawn from the feudal law, yet a number of its consequences still necessarily remain which could only be altered by the legislature. Among those, I apprehend, is the great respect which people hold towards the terre-tenant of an estate, and this Court has refused, except upon the strongest grounds, viz., of fraud and irreparable mischief, such as in the case of mines and the like, to interfere against the alleged title of the person actually in possession of the property itself. In such extreme cases as I have referred to it has interfered, but it has evidently shewn throughout a much greater and deeper respect for the rights of persons in possession of real estate in consequence of the state of our law, which recognizes a wide distinction between real and personal estate, with reference to the rights of the terre-tenant, than have been evinced with reference to interference for the purpose of the preservation of merely the personal estate. Of course, always as to rents and profits there is an obvious distinction: in preserving the personal estate, it is the whole, but the rents and profits are merely the produce *de anno in annum*, which does not require that summary interference as to waste. That is a case to a certain extent affecting the corpus, and with regard to mines, much more seriously affecting the corpus. Upon that Wigram, V.C., in *Davenport v. Davenport*, was pressed with a very able argument, and with all that had been said upon the subject. I do not find the case in *Molloy* cited before him, but in the face of this decision of Sir W. Grant, concurring with the observation there made of there being no good reason why the Court should not interfere with reference to real and personal estate, and concurring with the observations of Knight Bruce, V.C., in *Haigh v. Jagger*, he refuses his interference. No doubt the case there was one of great suspicion, it being a mere fishing bill, the plaintiff having been nineteen years out of possession, and there being many other circumstances unfavourable to his case.

The result of the authorities is this, that there is no case whatever of such interference ever having been exercised.

In the first instance, the Judges declined to say, and I respectfully beg to follow them in declining to say, that there may not be a case made out, even with reference to real estate, which would be acknowledged by everybody to be a case for interference, or that there may not be a possible case made out, in which parties being in litigation on merely a legal title, there may be such an utter destruction, such stripping of timber, as Vice Chancellor Knight Bruce mentioned, or pulling down the capital messuage, or other circumstance as might justify an interference. The *dicta* only go to such cases as those, and in those *dicta* I entirely acquiesce, and if such a case should hereafter arise, I do not for one moment attempt to hold out that so salutary a jurisdiction may not be exercised for the prevention of such malicious acts, spoil, trespass and injury during the time when the rights of the parties are in actual litigation; but I must say it will require a clear case of that description to be made out, looking at the authorities and what has taken place, before the Court can be called upon so to interfere. Upon the face of this bill, all I find is, first, the case as to the rents and profits, which I have dealt with; secondly, with regard to the alleged loss of rents and profits by the tenants not paying either party, which I have also dealt with; thirdly, the allegation as to the timber, no specific allegation being charged, but a mere general allegation that they have cut down a considerable quantity of timber, that some of it was of an ornamental character, and some was not ripe for cutting; that they had sold the timber growing on the estate and received the produce thereof. There is nothing like that stripping the estate of the timber, nothing like that destruction of the property which is required before the Court can interfere in such a case as this; and as to the title of the plaintiff, it is in a much less favourable position in many respects. I do not say it is, like the case of *Davenport v. Davenport*, a mere fishing bill, but it is a much less favourable case than *Jones v. Jones*, the title there alleged being that of mere heirship and a will obtained by fraud. In this case the plaintiff

is obliged to state, and he states his case perfectly fairly and honestly on the face of the bill, that, in order to make out his title to this property he has to go through a pedigree and exhaust the issue of numerous persons descended from an ancestor who died so long ago as the fifteenth century, and that that matter is actually pending for adjudication before a certain branch of the legislature, who have as yet come to no determination upon it, and who have not, as it appears to me, expressed, although I do not think it would make any material distinction, an opinion favourable to him except upon two of those obstacles which he found in his way; and in such a case as this, where other persons are claiming under a title, who have come into possession, and who are enjoying that right which the law confers upon those who can obtain the attornment of the tenants, I think I should be going very far beyond anything which the Court has hitherto sanctioned, and I should be actually opposing the case of *Jones v. Jones*, if I held that relief could now be given to the plaintiff in this cause.

There is one observation to be made upon that ground upon which Sir W. Grant seems to prefer resting the case ultimately in *Jones v. Jones*, viz. the time which elapsed before proceedings were taken. It is quite true that in this case Lord Talbot has taken a wise and, no doubt, a most beneficial course. At the same time, if he wants such a remedy as this,—if he wants, with a high hand, to stay the receipt of the rents and profits and the enjoyment of the estate by those upon whom the law confers the enjoyment till they are displaced,—I am by no means so clear that his best and most prudent course would not be to proceed, if he is prepared to prove his pedigree, and it is not contended by counsel, and I apprehend that it could not be successfully contended, that it was out of his power to proceed, to recover this estate by law. In such a case he would prove the patent of the original earl; he would next prove his descent; and he would next prove that he is the person entitled as earl; and, I apprehend, that it is no answer to that case to say that the House of Lords has not yet admitted him to a seat in that House. I do

not express the slightest opinion whatever upon the result of the proceedings before the House of Lords; but the question I have to consider is, whether he could not have taken proceedings at law, and, if he required this summary remedy, whether he could not satisfy this Court that there was a suit pending at law between him and the defendants in possession, which would try the right as between him and them. There is certainly no averment in the bill; it is contrary to the fact, and therefore could not be stated, that any proceeding whatever in a court of law is pending as to these estates. He is now attempting to establish his right to a seat in the House of Lords, and he says that that will be a step towards establishing his right in the ejectment. An analogous case struck my mind, which I believe not only might arise but has arisen in some cases. Take the case of a devise to an executor simply, not named, and another instrument naming the executor, and litigation in the ecclesiastical court to find out who is the executor: I apprehend, in that case, you would be obliged to go to the ecclesiastical court to make yourself out an executor, and yet you are executor before probate, and therefore you could bring your action; and I apprehend, if it was thought necessary to have an arrangement made pending the litigation in the ecclesiastical court as to who was or was not executor, this Court would require to be satisfied that there was a *bonâ fide* litigation between you and the parties claiming the real estate, which was a litigation to establish your right in a court of law to that property which you seek to have protected during that litigation. I think if it stood on that narrower ground, which I do not rest it on because the broader grounds are sufficient to rest it upon, there would be considerable difficulty in supporting this bill against the demurrer.

There is another and singular evidence of weakness in the prayer, which prays that the estates may be held until the plaintiff or the persons entitled may possess the property. That is a singular instance of weakness in stating the title.

Now, the plea is to that portion of the bill which seeks for a receiver in respect

of certain estates vested in the defendants as trustees for whoever may turn out to be entitled under the original act. The plaintiff asks to have certain accounts of rents and profits and other relief of that description, on the ground that he is the heir; he could not maintain his bill on the ground that he or some other person is the heir. The defendant pleads that he is not entitled. Mr. Rolt says, No, that is not our equity; it is that the thing is in contest: our equity is, I aver that I am heir. I apprehend that nobody can come here and say, I raise this contest as *amicus Curie*, I aver that I am heir; somebody else says that I am not, and whilst the thing is in contest I want to have this property preserved; and, therefore, to say that I am not heir is only again repeating what I have said in the bill. I have said in the bill, that my equity is founded upon there being that contest between us as to whether you or I am the person entitled to the property. If it rests upon that, then all the previous arguments applied to the demurrer apply to this. If you profess to rest simply upon this, that during this contest the Court, simply on the ground of this contest, will take possession of the property, irrespective of the right which you may ultimately maintain, I apprehend that that alone will not do, if the defendant, by way of defence to the whole litigation, says, I am prepared to prove in the progress of this cause that you have not the slightest interest in the question at issue, and you are not in a condition to maintain the bill. A negative plea of no heir is admitted to be a good plea in all cases. I apprehend that the reason it is not usually pleaded that you are not next of kin, when you apply for a receiver *pendente lite* in the Ecclesiastical Court, is that, with regard to the question of receivership, the thing would be wholly inoperative. It appears to me that on replying to the plea the suit is not out of court; the suit is in litigation; the Court is master of all the facts, and knows that there is a question to be tried, and grants a receiver if it thinks it right under all the circumstances of the case. It seems to me that in law this a good plea to the bill. I cannot conceive any more complete defence to any bill than to say, you,

the person suing me, are an entire stranger and have no interest whatever in the matter. You may reply to that, I shall prove the contrary. There is then a contest, and an interlocutory application may be made during that contest. The plea is clearly good; and with regard to its being overruled by this voluntary answer, I do not think I can hold that; though if the answer were to discover anything which the defendant refuses to discover, that would overrule the plea. That is the only objection urged to the form. I am bound to say that I have not looked carefully into the form myself, but I have taken for granted that the counsel here have so investigated it, and that is the only objection made. I must allow both the demurrer and the plea; but I give leave to amend as to the plea.

Mr. Rolt.—We do not require that. We will take issue on the plea.

Feb. 1.—The plaintiff having replied to the plea,—

Mr. Rolt and *Mr. Shapter* now moved for a receiver.

Mr. James, Mr. Cairns and *Mr. C. Hall* opposed the motion.

Mr. Rolt replied.

Wood, V.C.—This is not the ordinary case, which *Mr. James* has represented it to be, of a trustee, who being in possession of a trust estate, happens to have cast upon him the beneficial interest. It is the case of two persons who, being trustees, choose to accept another trust, which puts them in direct conflict with the persons who ultimately may be entitled. Having entered as trustees under the act of parliament, they choose also to say that they have accepted another trust, which, in a great measure, incapacitates them from discharging properly the trust reposed in them by the act. If Lord Talbot had brought the title to the earldom much nearer to a conclusion than he has at present done, I should have had very little hesitation in interfering by appointing a receiver at once; but the difficulty of the case is this, and he himself states his difficulties very fairly and properly in his bill, that there are some three points remaining to be established before he

arrives at the first step towards making out his title, and which it is necessary that he should establish. It appears to me that if the rents are not in any danger, and if these gentlemen are actually accumulating the rents, no difficulty can arise from their continuing to receive them, if any obstacle on the part of the Earl, who makes this motion, is removed. I think the right course will be for the Court to content itself with an undertaking until the hearing, on the part of Messrs. Hope Scott and Bellasis, that they will not in any way dispose of the net rents of any portion of the estates comprised in the Estate Acts (43 Geo. 3. c. xl. and 6 & 7 Vict. c. xxviii.) after payment thereof of the expense of management and of any charges affecting the same, created prior to the decease of the late Earl, without the leave of the Court, otherwise than by investing the same in their joint names and accumulating the dividends. Then the plaintiff must give a similar undertaking as to the rents received, or to be received, by him. Then an inquiry at chambers whether any, and which, of the estates comprised in the said recited act are now in the possession of the tenants, who are not now paying rent either to the plaintiff or to the defendants, *Mr. Hope Scott* and *Mr. Serjeant Bellasis*; and that a receiver be appointed of such estates, if any, with liberty to the last-named defendants to propose themselves.

Earl. Earl 5029 Ch 699
 FULL COURT
 OF
 APPEAL. } VANSITTART v. VANSITTART.
 March 10, 11.

Baron and Feme—Specific Performance
—Delegation of Parental Authority—Public Policy.

A wife sued her husband in the ecclesiastical court for a divorce, on the ground of adultery and cruelty. A compromise of the suit was negotiated, and an agreement was signed by them as instructions for a deed of separation. The agreement contained stipulations as to the maintenance, custody and education of the children, and as to the property, present and future, of the husband and wife. Among the stipulations as to the

children it was provided that the wife was to have the custody of two of them, and that in the event of the death of either or both, the husband was to be at liberty to place one or both of the surviving children in their stead under her charge; and that none of the children should be sent to any school in B, but that neither of the children left in the husband's care should be sent to any school without the written consent of both father and mother. A bill was filed, by the wife, for the specific performance of the agreement, and the execution by the husband of a deed of separation in accordance therewith; and to this bill a demurrer by the husband was allowed, on the ground of the provisions as to the children being contrary to public policy.

The demurrer in this case (reported *ante*, page 222) came on for argument upon an appeal, by the plaintiff, from the decision of Wood, V.C.

The bill was for the specific performance of an agreement for separation, involving stipulations as to the custody, &c. of the children, and the husband demurred, on the following grounds:—First, that no trustee had executed the agreement; secondly, that the custody of the children being given up by the father was contrary to public policy; and, thirdly, that the Court could not execute such an agreement.

The Vice Chancellor allowed the demurrer.

Mr. Rolt and *Mr. Bilton*, in support of the appeal.—Upon the first point, *Bateman v. the Countess of Ross* (1) and *Wilson v. Wilson* (2) shew that a wife is competent in a suit in the ecclesiastical court to put an end to the suit without the intervention of a trustee. Besides, the trustee joins in this bill, and there is no necessity for his covenant—*Augier v. Augier* (3), *Clough v. Lambert* (4). If it were necessary that the trustee should be an original contracting party, when in theory the husband and wife, though suing each other, were

one person, *Mr. Busk* has substantially been such party. There was, however, no necessity for a trustee to be a party, as there was sufficient consideration in the suit being put an end to, and also in the wife providing that there should be a trustee, and in that trustee coming in and adopting the agreement. Upon the second point, as to public policy. The law recognizes the right of a wife in a case of adultery and cruelty; and it must be admitted here, on this demurrer, that the husband has been guilty of adultery and cruelty. On a separation in such a case the law recognizes such an arrangement. If it were otherwise, there would be left no room for the accommodation of their differences, which would be opposed to the wisdom and object of the law. In this case, the arrangements as to the property are those ordinarily adopted. Then there was a scheme for the management of the children, and after all that can be said, it is not repugnant to the public policy that a mother should have the care of two of her children. The plaintiffs do not seek a decree to restrain the husband from exercising his legal rights over his children, but that he should bind himself to two things: first, that the wife should be permitted to live separately; and, secondly, that the care of the children should be as provided by the agreement. The plaintiffs ask only for the execution by the husband of a deed to that effect. The plaintiff, *Mrs. Vansittart*, is obliged to ask for the execution of the whole agreement, but she would be willing to leave open the question as to the children. What she asks must be shewn to be against the law, or the defendant's objection comes to nothing.—They referred also to—

St. John v. St. John, 11 Ves. 525.

Westmeath v. Westmeath, Jac. 126, 142.

Elworthy v. Bird, 2 Sim. & Stu. 272;

s. c. 3 Law J. Rep. Chanc. 190.

Re Lord Westmeath's children, Jac.

251, n. (c).

Hindley v. the Marquis of Westmeath,

6 B. & C. 200; s. c. 5 Law J. Rep.

K.B. 115.

Joddrell v. Joddrell, 9 Beav. 45;

s. c. 15 Law J. Rep. (N.S.) Chanc.

17.

(1) 1 Dow, P.C. 235.

(2) 1 H.L. Cas. 538; s. c. 5 Ibid. 40; 23 Law J. Rep. (N.S.) Chanc. 697.

(3) Prec. Chanc. 497.

(4) 10 Sim. 174.

Webster v. Webster, 4 De Gex, M. & G. 437; s. c. 22 Law J. Rep. (N.S.) Chanc. 337.

LORD JUSTICE TURNER inquired whether there was any case where the Court had executed an agreement of this kind as to children.

Mr. Roll replied that there was none. *Hope v. Hope* (5) had no bearing on this case. There there was a provision which was repugnant to all notions of justice.

LORD JUSTICE TURNER.—Can a husband contract to waive his obligation as to his children?

Mr. Roll.—There is nothing in his execution of this deed to prevent his making any application with regard to them to the Court.

The LORD CHANCELLOR (without calling on the *Solicitor General* and *Mr. Dart*, who appeared for the respondent) said—The Court in this case does not think it necessary to trouble counsel on the other side, as they are all perfectly clear that the decision of the Vice Chancellor must be affirmed.

This is a bill filed for the specific performance of an agreement for a deed of separation between husband and wife. The bill was filed in 1857, and upon argument the Vice Chancellor allowed the demurrer, and the case comes before us upon appeal from that decision. From the statements in the bill, which must be taken on this demurrer to be admitted, but merely for the purposes of this case, it appears that a suit had been instituted, and was pending in the ecclesiastical court against the husband on the ground of cruelty and adultery; that led to a negotiation between the parties for a compromise of the suit, which resulted in the agreement now in question. By that agreement there are various stipulations; in the first place providing for the maintenance, then for the custody and care of the children and their education; and, lastly, with reference to after-acquired property both of the husband and wife. With respect to the stipulations as to the education of the children, I cannot help ob-

serving that it seems to have been considered that some care was required to provide for the species of education which they should have while they remained under the care of Mrs. Vansittart, and therefore there might be some reason to suppose that that which had been suggested to the Court had really occurred; that some care and caution was necessary to provide for the children being educated in the religion professed by the husband. However that may be, there were general stipulations in the agreement, and the question now comes before the Court as to whether this is a fit agreement for the Court to decree specific performance of? Separation deeds are contracts of a very peculiar kind; I should say they were rather tolerated than sanctioned by the law. They may be enforced at law indirectly through the medium of covenants which are entered into between the husband and trustees. They are enforceable in equity with regard to such stipulations as are not contrary to law or in contravention of public policy, upon which the best interests of society may depend. But there is this peculiarity attendant upon contracts of this kind, that the very basis of them, namely, the agreement for separation, is one that cannot be enforced. No Court would restrain a suit by either husband or wife, after the execution either of an agreement or a deed of separation, for restitution of conjugal rights; and if the deed only contained an agreement of that kind, according to what was said by Lord Eldon, I think in the case of *Westmeath v. Westmeath*, the deed would be invalid. Therefore it is, as I have said, a contract of a very peculiar description, the very basis of which does not amount to anything obligatory on the parties, but which is a mere voluntary engagement determinable at their will. Now, that being so, it is necessary in all these cases to look very closely and particularly at the stipulations of the deed or of the agreement. It is a perfectly different question, supposing the deed had been executed, whether the Court would enforce certain stipulations in that deed, which might be in accordance with law. There may be in the deed which has been actually executed, stipulations which are in violation of law

(5) 26 Law J. Rep. (N.S.) Chanc. 417; s. c. 4 De Gex, M. & G. 323; 23 Law J. Rep. (N.S.) Chanc. 682.

or of public policy. I apprehend that they would not invalidate the other parts of the deed or prevent a Court of equity from carrying into effect such portions of the deed as were consistent with law, and consistent with all the considerations on which deeds of this description are allowed to be valid.

There is this distinction between the case to which I have adverted, of a deed actually executed, and that of an application to the Court for the specific performance of an agreement for the execution of such a deed : an agreement of that description is entire, the consideration for it must be taken altogether. Taking this very case, the husband might have been content to enter into an agreement containing all the stipulations which are to be found in this deed, but he might have objected to enter into an agreement which contained only a portion of the stipulations ; and, therefore, when a question arises as to whether a Court of equity will decree a specific performance of an agreement of this description, the whole of it must be taken into consideration and the whole of its provisions must be regarded. You cannot separate one portion of it from the other and say, "We will decree a specific performance of that part." It must be taken in its entirety ; and if there are any provisions which are contrary to law or contrary to public policy, I apprehend that a Court of equity will never enforce the specific performance of an agreement of that kind. It seemed to be conceded in the argument by Mr. Rolt, that that was precisely the state of the law with regard to a deed actually completed and executed ; that that deed would be enforceable in respect of such provisions as were not contrary to law, although it might contain stipulations which were against law or against public policy. We have then only to look to this agreement to see whether it does contain any such stipulations ; and I think upon the present occasion it is quite unnecessary to go further than to that portion of the agreement which relates to the children. There is a provision made, by which, as it appears to me, the husband agrees to divest himself of that authority which belongs to him by nature, and which is enforced by law and by public policy ; to divest him-

self of the controul and authority which he possesses both by nature and by law over his children. And there is, moreover, rather an extraordinary stipulation in this agreement with regard to the children. As the Vice Chancellor says, they seem to be regarded as if they were a burthen upon the parents ; and there is a stipulation, that "in the event of the death of either Alice Rosalie or Cyril Bexley, or both, Mr. Vansittart to be at liberty to place either one or both of the surviving children in their stead under her charge, but no reduction to be made in the allowance to Mrs. Vansittart ;" so that a provision is made here for relieving the father from what appears to have been considered the burthen of maintenance and charge of those children, and to throw it upon the wife at his discretion. Now, it has been said, that there is nothing contrary to public policy in this. The argument is, that a father may, if he pleases, divest himself of the authority which he possesses over his children and may transfer it to another, and that there is nothing against the policy of the law in such a stipulation. If the matter were *res integra*, I certainly should have a very strong opinion that it was contrary to public policy, and to the policy, as I have said, on which the best and dearest interests of society may depend. But this question has been considered, as it appears to me, and decided more than once so completely that it is impossible for us, at least according to my judgment, to come to any other conclusion than that this is a stipulation which will not be enforced by law. I will take the case that has been mentioned in the course of the argument of *St. John v. St. John*, where Lord Eldon says this :— "Then how is it as to the children ? The father has controul over them by the law, as the law imposes upon him, with reference to the public welfare, most important duties as to them. If the husband can contract with his wife, who cannot by law contract with him (and in this instance the contract as to the children is between the husband and wife only), it deserves great consideration before the Court of law should by *habeas corpus* upon a unilateral covenant, as the Scotch call it, take from him the custody and controul of his children thrown upon him by the law, not for his gratifica-

tion, but on account of his duties, and place them against his will in the hands of his wife."

In the case of *Hope v. Hope* it is quite true there was a decided objection to the agreement, on the ground that the parties had made arrangements to facilitate the divorce which was sought for on the part of the wife. But in that case, the question as to the controul and custody of the children was also considered in the judgment of this Court, and Lord Justice Turner, as I observe, expressly adverted to that point, and said, "The first article provided that Mr. Jean Henry Hope should remain under the custody of his mother, and the third, that Mrs. Hope should undertake not to oppose the suit for a divorce instituted by her husband. The first of these two provisions was in direct contravention of the Lord Chancellor and of the settled law and policy of the country. A father had by that law and policy the custody of his children and the controul over them, and that not for his own gratification, but on account of his duties and with reference to the public welfare." Then his Lordship goes on to refer to the case of *St. John v. St. John*, citing the passage I have mentioned.

In this very case the Vice Chancellor also held in the same way as in the former cases, with regard to this stipulation as to the children. He said there were certain stipulations which the Court could not enforce against the wife, even assuming that they were not against public policy. She was to have the custody of some of the children after they were seven years old, and to have a benefit or obligation which she could not have obtained by a divorce. Very particular stipulations were also contained "as to their education, their instruction in the Church Catechism, their having a Protestant tutor or governess; all which could not be enforced against her, if she failed to observe them." Then he goes on to observe that the jurisdiction would be different if the children were wards of Court. That is a very natural observation in the case. Suppose the Court were to direct this deed to be executed. It is contended, on the part of the wife, that the Court might direct the deed to be executed, and then enforce or

not enforce the stipulations of the deed, as it might happen, afterwards. But what would be the object of directing the deed to be executed? It is quite clear, that if the wife were to fail to fulfil those obligations which are said to be imposed upon her under this agreement, namely, of educating the children in the religion which is professed by the husband, there would be no power in this Court to compel the wife to do her duty in that respect; and therefore if the Court were to direct the execution of the deed, it would be doing that which would be perfectly nugatory, because there would be no means whatever of enforcing the stipulations now contained in the agreement, which stipulations may have been the consideration which induced the husband to agree to enter into articles of that description.

Then the question really comes to this:—Where there is an agreement of this description, which it is admitted must be taken in its entirety, which is founded upon a consideration which is entire, and cannot be separated, which, supposing a specific performance were decreed, could not be enforced if embodied in a deed; and where those stipulations are clearly, according to the opinion of the Court, contrary to law or public policy, whether the Court can, or ought to be called upon to decree the specific performance of such an agreement, which would, in fact, be lending itself in some degree to the insertion of stipulations admitted to be illegal into a deed, and also doing a thing which would be perfectly nugatory and impossible to be carried into effect.

Under these circumstances, I confess, it appears to me that the opinion of the Vice Chancellor was well founded, and that the demurrer must be allowed.

LORD JUSTICE KNIGHT BRUCE. — The provisions respecting the children of the defendant are perhaps not the only objections of a fatal kind to the agreement in question; but forming, as they do, an important and inseparable part of the contract, are sufficient to destroy it. Of course, the demurrer must be allowed, and, as I think, with costs, at least in this court.

LORD JUSTICE TURNER. — In deter-

mining the case, I think it entirely unnecessary to look at anything beyond the provisions of this agreement as to the children; and I say nothing, therefore, upon the question which has been argued at the bar of the capacity of the wife to sue, or upon the difficulty of enforcing the particular provisions of this agreement with respect to the children. The father most undoubtedly has not merely rights in respect to the children; but he has also duties to discharge. And the question which I mean to refer to, in the few observations I shall make in the case, is, whether it was competent to the father to fetter and abandon his parental power to the extent which by this agreement he has agreed to do? By this agreement two of the children are to be placed entirely under the custody of the mother, and there is this provision in the agreement, that none of the children shall be sent to any school in Berkshire, or at a less sum than 60*l.* a year for each child; but as to two others of the children, neither of them shall be sent to any school without the written consent of both the father and the mother. Whatever, therefore, may be the father's judgment under any altered circumstances of the children, as to the best mode in which they ought to be educated, according to the provisions of this agreement, he is to be bound not to act upon his best judgment for the benefit of his children, unless his wife consent to the exercise of that judgment; and that is a provision which, in my mind, is repugnant entirely to his parental duty. The argument is this: that you may insert these provisions in this agreement, but that if they are against the parental right, no Court will enforce the execution of them. That may be so; but the question we have to consider in this case is, whether this Court is to be instrumental in putting the parties in a position in which they may act upon that assumption. And I apprehend, that if this Court is satisfied that the provisions of the agreement are not such as ought to be introduced for the purpose of qualifying and fettering the parental power, if they tend to fetter the parental power to an extent which may affect the policy of the law, this Court will not in any way be instrumental in carrying into

effect an agreement under which the parties may act, and which may have that extended operation. It is said, there are cases of separation deeds enforced by this Court. No doubt there are. That point has been decided; and not perhaps entirely set at rest until the decision of the House of Lords in the case of *Wilson v. Wilson*; but, no doubt, we must now take it to be the settled rule of the Court, that the Court will enforce specific performance of agreements for separation, and, of course, the deed, which is to be executed, will contain covenants for that separation, which are necessary. It is said, why then not introduce the same provisions into the deed in the present case, although the Court will not enforce them? The answer to that, right or wrong, is, we are bound by authority on the question of enforcing the execution of a deed of separation. The House of Lords has so determined in the case of *Wilson v. Wilson*, and there has been a large current of authority anterior to that case, although it was not until that case that the question was finally settled whether this Court would enforce specific performance. To that extent, therefore, we are bound by authority. We are now called upon to carry that authority further, and to enforce an agreement which will contain other provisions repugnant to the policy of the law in other respects. I am not prepared to go that length. I am of opinion it would be inexpedient to do so. My opinion, therefore, is, that this demurrer must be allowed.

STUART, V.C. }
Dec. 22. }

DAVIS v. PARRY.

Practice—Production of Documents—Mortgage Deed—Solicitor and Client.

In a suit to set aside a mortgage deed, as having been obtained by the mortgagee under circumstances of pressure and surprise, which alleged circumstances were, however, denied by the answer of the mortgagee, the Court, upon motion, ordered the production of the mortgage deed, it appearing that the mortgagee was a solicitor, and that he had been the mortgagor's only professional adviser in the transaction of the mortgage.

The bill in this case was filed by a mortgagor to set aside his mortgage deed, on the ground that it was obtained from him by the mortgagee under circumstances of pressure and surprise, such mortgages being a solicitor, and having prepared the mortgage deed at the expense of the plaintiff, and been the only professional adviser of the plaintiff in the transaction. The statements of the bill as to the alleged pressure and surprise, were denied in the defendant's answer.

Mr. Greene, for the plaintiff, moved for the production of the mortgage deed, which the defendant admitted by his answer to be in his possession.

Mr. Nalder, for the defendant, relied on the general rule that a mortgagee was not bound to shew or part with his mortgage deed until the mortgage debt was paid off, as a ground for refusing the motion. He cited—

Crisp v. Platel, 8 Beav. 62.

Dendy v. Cross, 11 Ibid. 91.

STUART, V.C. was of opinion that the professional relationship and confidence which had existed between the parties in the transaction of the mortgage, took this case out of the rule relied upon on behalf of the defendant, and he made the usual order for production.

M.R. }
Feb. 19. } HUNT v. NIBLETT.

Practice—Traversing Note—Substituted Service.

An order for substituted service of a traversing note will be drawn up, though it is not shewn that the defendant is within the jurisdiction.

An order had been made to substitute service of a traversing note on the defendant, or certain solicitors who were shewn to be in communication with him. The Registrar objected to draw up the order, alleging that there was no evidence to

shew that the defendant was within the jurisdiction.

Mr. Southgate now stated the objections, and asked that the order might be drawn up: the very object of substituted service was the inability to serve the defendant.

Anderson v. Stather, 16 Law J. Rep. (N.S.) Chanc. 152.

Moss v. Buckley, 2 Ph. 628; s. c. 17 Law J. Rep. (N.S.) Chanc. 414.

The MASTER OF THE ROLLS made the order.

STUART, V.C. }
Feb. 22, 23. } COLLARD v. ROE.

Vendor and Purchaser—Specific Performance—Uses to bar Dower—Concurrence of Dower Trustee.

In a suit by a vendor for the specific performance of a contract to purchase an estate which, by deed, dated in 1841, was limited to the use of the vendor for life, without impeachment of waste; and after the determination of that estate, by any means in his lifetime, to the use of a trustee and his heirs during the life of the vendor, in trust, nevertheless, for the vendor and his assigns; and after the determination of the estate so limited to the trustee and his heirs, to the only use and behoof of the vendor and his heirs and assigns for ever:—Held, upon objection taken by the defendant, that he was entitled to a conveyance of any interest which might have become vested, by forfeiture or otherwise, in the dower trustee.

The bill in this suit prayed that the defendant might be decreed specifically to perform a contract which he had entered into to purchase certain freehold estates from the plaintiff.

At the date of the contract, the estates in question stood limited by an indenture, dated in December, 1841, to the use of the plaintiff and his assigns for and during the term of his natural life, without impeachment of waste; and after the determination of that estate, by any means in his lifetime, to the use of G. J. Pitman

and his heirs during the life of the plaintiff, in trust, nevertheless, for the plaintiff and his assigns; and, after the determination of the estate so limited in use to the said G. J. Pitman and his heirs during the life of the plaintiff, to the only proper use and behoof of the plaintiff, his heirs and assigns for ever, to the intent that the then present or any future wife of the plaintiff should not be entitled to dower out of the same hereditaments.

The purchaser refused to complete the purchase unless the dower trustee, G. J. Pitman, who was in Australia, whither he had gone to reside prior to the date of the contract, concurred in executing the deed of conveyance, and the bill was filed to enforce specific performance without such concurrence. The course pursued by the plaintiff and defendant respectively was in accordance with the opinions of conveyancing counsel taken by them respectively prior to the institution of the suit.

Mr. Malins and Mr. Karslake, for the plaintiff.—The concurrence of the dower trustee is now no longer necessary, notwithstanding the absence from the deed of settlement of the ordinary general power of appointment overriding the life interest. The statute, 8 & 9 Vict. c. 106, by abolishing the tortious effect of a feoffment with livery of seisin by tenant for life, has rendered it impossible for the dower trustee to have acquired any interest by reason of any act of forfeiture committed by the tenant for life; and at the date of the passing of the act that was the only means left, except surrender by the tenant for life, of any interest becoming vested in the trustee. A surrender, however, is not to be presumed, and the bare possibility of such a thing cannot be admitted as a valid objection. Admitting that there is a possibility of an interest in the trustee, it is not of such a character as can form a ground for objecting to the title. It is rather analogous to that of an ordinary trustee to preserve contingent remainders, as to whom it is the invariable practice not to require his concurrence in a conveyance of the inheritance by tenant for life. They cited—

Butterfield v. Heath, 15 Beav. 408; s. c.

22 Law J. Rep. (N.S.) Chanc. 270.

Making v. Hill, 1 Cox, 186.

Hasker v. Sutton, 2 Sim. & S. 513.

Gibson v. Clark, 1 Jac. & W. 159.

Mr. Craig and Mr. Southgate, for the defendant, the purchaser, were not called upon.

STUART, V.C., said the statute 8 & 9 Vict. c. 106. was not passed till 1845, that is, four years after the execution of the deed of settlement, which was dated in 1841. There might, therefore, have been a forfeiture before the act was passed. It could not be held as certain, therefore, that no interest had become vested in the trustee; and of every particle of such interest, whatever it might be, the defendant (the usual general power of appointment in the tenant for life not being in the settlement) had, in strictness, a right to a conveyance from the trustee. This seemed also to be the practice of conveyancers, who, upon the balance of authority in the text-books, appeared to be in the habit, in such a case, of requiring the concurrence of the trustee in the deed of conveyance of the inheritance by the tenant for life — *Lewin on Trustees*, edit. 1857, 586, *Sugd. on Powers*, ch. 1, s. 1, pl. 5, *Chance on Powers*, ss. 1467—1471, *Dart's Ven. and Pur.* 3rd edit. 335. The objection was of a character most frivolous and vexatious; and one with as slight a foundation as any he had ever known to succeed. He yielded to it with the greatest reluctance, but in strict practice he was bound to do so. There must, therefore, be a decree for specific performance, with a declaration that the defendant was entitled to a conveyance of such estate as was vested in Pitman: and in order to give effect to such declaration, there would be an order under the Trustee Act, vesting in the defendant whatever estate in the purchased premises Pitman might have. No costs up to the hearing to be given on either side.

M.R. }
Nov. 14. } KNIGHT v. POCKOCK.

Mortgage—Real Estate—Decree for Sale—Judgment Creditors.

If judgment creditors, not parties to a suit, neglect or refuse, when served with notice, to come in under a decree for the sale of a mortgaged estate,—Held, that they may be brought before the Court by supplemental bill.

Held, also, that in their absence a good title cannot be made to a purchaser.

This case was adjourned from chambers.

The suit was instituted by a mortgagee to obtain a sale of the mortgaged estate, under the power given by the 15 & 16 Vict. c. 86. s. 48.

A decree was accordingly made, and the estate was sold.

There were several creditors, whose judgments were registered under the 1 & 2 Vict. c. 110. s. 13, before the date of the decree. They were not parties to the suit, but they had been served with notice of the decree. They had, however, not come in, and it was objected by the purchaser that a good title could not be made, and that the service of the decree did not bind the judgment creditors.

Mr. R. Palmer and Mr. Westlake, for the vendor.—By the new practice it is not necessary to make the creditors parties to the suit. They had notice of the decree, and must be considered as bound by the proceedings under it.

Mr. Pole, for the purchaser.—The lien of the judgment creditors upon the estate must be removed before a good title can be made; the mere service of a decree upon persons not parties to the suit cannot affect them or bind their interests—*The Governors of the Gray-Coat School v. the Westminster Improvement Commissioners* (1).

THE MASTER OF THE ROLLS.—As the judgment creditors are not parties to the suit they are not bound by the decree. Had they come in when served with notice of the decree they would have been bound,

(1) 26 Law J. Rep. (N.S.) Chanc. 843; see also ante, 52.

as having submitted to it. Such seems to be both the meaning and intention of the act. If the judgment creditors do not come in, the only course left is to bring them before the Court by supplemental bill, and I will give the plaintiff leave to file it; but, probably, they will come in when informed that a supplemental bill will be filed against them in the event of their refusing.

KINDERSLEY, V.C. }
Feb. 1. } ALLEN v. EMBLETON.

Administration of Estate—Liability of Lessees—Income and Corpus.

A testator who had assigned during his life certain leasehold property, bequeathed by his will other leaseholds and the residue of his property to tenants for life, with remainders over. The assignees of the leaseholds became bankrupt, and the executors of the testator took a re-assignment of those leaseholds. Liabilities having arisen under the covenants in the original lease, it was held, that those liabilities must fall upon the corpus, and not upon the income, of the testator's estate.

This case came before the Court upon an adjourned summons. The facts were as follows.—

William Holmer was the original lessee of certain houses, and by his lease he was liable to the ordinary covenants to pay rent and keep the property in repair. In January 1830 W. Holmer assigned this leasehold property to two persons, named Martyr and Jones, who covenanted to indemnify Holmer against any liabilities which might arise under the covenants in the original lease, and they also entered into a bond by way of further security. W. Holmer subsequently made his will, by which he bequeathed certain other leaseholds of which he was possessed and also the residue of his property, between his children in equal shares for life, with remainder to their children respectively. After the death of W. Holmer, Jones, one of the assignees, assigned his interest in this property to Martyr, who became bankrupt, and his assignees repudiated the lease-

holds in question. It then appeared that Jones was unable to meet his liabilities under the covenants in the lease, and an arrangement was entered into with the sanction of the Court by which Jones paid the sum of 100*l.* in discharge of his liabilities, and reassigned his interest in the leaseholds to the executors of the testator who, under any circumstances, would be primarily liable for the performance of the covenants. The original landlord then proceeded to enforce his rights under the lease against Holmer's estate; and a question was raised, whether the liabilities incurred in respect of the covenants in the lease were to fall upon the income or upon the corpus of the testator's property.

Mr. Glasse and *Mr. Bristowe* appeared for one of the tenants for life.

Mr. Swanston and *Mr. Beavan*, for the remaindermen.

The following cases were cited :—

Shore v. Shore, 26 Law J. Rep. (N.S.)
Chanc. 386.

Garratt v. Lancefield, 2 Jur. N.S. 177.

Tracy v. Lady Hereford, 2 Bro. C.C.
128.

Talbot v. Lord Radnor, 3 Myl. & K.
252.

KINDERSLEY, V.C., after stating the facts of the case, said—The testator, William Holmer, after he had assigned these leaseholds to Martyr and Jones, of course considered that he had got rid of the property entirely, with all the liabilities. It is true that he would be primarily liable to the superior landlord, but he would be able to recover against Martyr and Jones. Under these circumstances, he made his will, leaving other leaseholds which belonged to him and the residue of his estate in such a manner that there were tenants for life, with remainders over, and, as I understand it, the bequest was treated as if it were a bequest entitling the tenants for life to retain the leaseholds in specie, so that they would have the advantage of the whole rents which accrued from them. If, then, the leaseholds now in question had remained the property of the testator, they would, like the rest of the leaseholds, have formed part of the residuary estate, and

then the tenants for life would have received the rents of these as well as of the other leaseholds, and in that case the principle of the authorities cited would have applied. They would have no right to say "there is one leasehold which is beneficial, and we will take that, and will reject the others, which are a loss." If I decided anything trenching upon that principle, I should decide wrongly; but I believe that I am not trenching upon the principle established by the decisions, that a tenant for life must take his tenancy with all its liabilities. It appears to me that this case does not come within that principle, because the testator was not the owner of this property at the time of his death. It was no longer his, and did not pass under his will. Now, supposing it was in that position, and no assignment had been made to the executors by the assignee: then suppose the landlord had come upon the executors of Holmer, the testator, and had compelled them to pay for dilapidations, or to perform the covenants as to repairs, who would bear that liability? Surely the corpus of the estate. It would have been a liability which the testator had incurred, and which existed at his death. It is true that the tenant for life would suffer by that liability, because he would have so much less income, but the contention has been that the tenant for life is to pay all these liabilities. The testator never had it in his contemplation to impose all the liabilities upon the tenants for life, supposing himself to be under none. Then, in this state of things it appears to me clear that these payments which have to be made for the purpose of performing the covenants in the lease would not fall upon the tenants for life, but upon the corpus of the residuary estate, and the executors would have a right to come upon Martyr and Jones, and if they were solvent would recover back the whole of what they, the executors, had paid, and then the estate of Holmer would suffer nothing; but Martyr becomes bankrupt, and his assignees avail themselves of their right to repudiate the lease: and Jones says that he cannot pay the whole, but offers them 100*l.*, which, with the sanction of the Court, they accept as a compromise. Considering that

the testator's estate remained liable, it was thought better that the executors should get back the leasehold property; but if the tenant for life had been told that that would throw the burden upon him, he would have argued that the effect of getting it back was not to make it part of the residuary leaseholds, but only to re-coup the testator's estate, as far as it would go, for the loss by the liabilities; if it turned out that the leaseholds became of value, they might be sold and so diminish the loss by what had been paid out of the testator's estate, and if it was sold for more there would be the benefit of the surplus. But that is very different from saying that the tenant for life is entitled to the income, and therefore takes the liabilities. It appears to me, that I am obliged to resort to principle, as I find no case exactly like this, and I am of opinion that the liability must be borne by the corpus of the estate.

WOOD, V.C. { ASTLEY v. THE MANCHESTER,
Feb. 12. { SHEFFIELD AND LINCOLN-
SHIRE RAILWAY COMPANY.

Lands Clauses Consolidation Act, 1845, ss. 127, 128.—Superfluous Lands—Vendor's Right to Re-purchase—Using for Purposes not authorized under compulsory Powers of Purchase.

Where, under the compulsory powers of an act of parliament, land is bona fide purchased for the special purposes authorized by the act, and the special purposes afterwards fail, the vendor's right of re-purchase is entirely dependent upon the 127th and 128th sections of the Lands Clauses Consolidation Act, and no immediate right of re-purchase arises within the ten years limited by the act. Though a person having an inchoate right of pre-emption under the above sections, may apply to restrain, by injunction, damage to the property, he is not entitled to prevent all use of the land during the ten years; and where a railway company, after abandoning their undertaking, were applying to parliament for fresh powers of constructing another railway upon the land, purchased for the purposes of the abandoned undertaking, the Court allowed a demurrer

to a bill by the vendor to restrain the execution of railway works upon such land, the plaintiff not alleging any special damage.

The bill in this case stated that the defendants were empowered by their acts of parliament to make certain branch railways, called the Whaley Bridge and Hayfield Branches, with compulsory powers for the purchase of land for the purposes of their acts, not to be exercised after the expiration of three years from the 27th of July 1846, and a proviso that the branch railways should be completed within five years from that day, and that on the expiration of that period the powers of the company should cease, except as to so much of the branch railways as should then be completed. Under these powers, they proceeded to purchase compulsorily from the plaintiff portions of his freehold land, for the purpose of constructing the Whaley Bridge Railway, a work of great public utility and particularly advantageous to the plaintiff, and laid down a single temporary line of rails.

By a later act, it was enacted that the powers of the company for the compulsory purchase of land for the purposes of the Whaley Bridge Branch should not be exercised with respect to so much of that branch as was authorized to be constructed over or upon the land of the plaintiff after the 27th of July 1851, and that that portion of the branch should be completed on or before that day, and that all the powers by that act, or by the Companies, Lands, and Railways Clauses Acts, or any of them, granted to the company for executing, amongst other things, the works of that branch, should on the expiration of that day cease, except as to so much of the works as should then be completed.

No part of the Whaley Bridge Branch Railway was ever completed, and in 1850 the company took up the single line of rails from the land purchased of the plaintiff, and entirely abandoned that branch. They had never purchased, and were not at the filing of the bill able to purchase the land necessary for a considerable portion of the branch, and had never done any act towards constructing a considerable part thereof.

In the session of 1857, the company introduced a bill into parliament to enable them to construct several lines of railway comprising branches substantially the same as the abandoned branch; but the bill was opposed by the plaintiff, and withdrawn, and during the present session another bill was introduced, for enabling them to construct a railway from Newton to Compstall, the plans and sections shewing that they intended to use for that purpose the lands purchased of the plaintiff. The bill was then filed. It stated these facts, and, by paragraph 10, that the proposed line of railway was only an unimportant part of the Whaley Bridge Branch, and would not afford to the plaintiff the same advantages as the line for the purposes of which he was compelled to sell and did sell his land, and was in fact an undertaking of an entirely different character, and one for which they would not have been entitled to require the plaintiff to sell his land under the powers of their former acts. It further stated (paragraph 12) that the company had very recently, and under pretence of completing the railway on the plaintiff's land, under the expired powers of their act of 1846, sent a large number of workmen to recommence the formation of a line of railroad upon the said portions of the plaintiff's land which were so purchased by them, as they alleged, for the purposes of their said Whaley Bridge Branch, but the said works had not been recommenced for the purpose, or with a view to the construction of the Whaley Bridge Branch, but as a part of the line of railway proposed by the bill now pending in parliament.

The bill then charged that the defendants had no right or authority to take and compel the plaintiff to sell the land, except for the purposes of the Whaley Bridge Branch; and that as they had abandoned the intention of carrying out, and were no longer able to carry out the purposes for which alone they were empowered to take the land, the plaintiff was entitled to re-purchase the same. It, therefore, prayed a declaration to that effect, and that the company might be decreed to re-convey the land on such terms as the Court should think fit, and might, in the mean time, be restrained by injunction

from further carrying on or prosecuting any railway or other works upon or over the said portions of the plaintiff's land.

The defendants demurred.

Mr. Cairns and *Mr. G. L. Russell*, in support of the demurrer, referred to the 127th section of the Lands Clauses Consolidation Act, and contended that as the company were not bound to sell the land before the expiration of ten years, they might use it in the mean time. If they built upon it, the shareholders might have a right to complain, but nobody else could do so. There might be some equity if it were alleged that the purchase was a fraud, and the company never intended to make their branch line at all, or if it were complained that they were altering the character of the land which the plaintiff had an inchoate right to purchase; but this bill simply asserted that during the ten years the company were not entitled to use the land for any purpose whatever.

Mr. Daniel and *Mr. F. J. Wood*, in support of the bill.—The equity of the bill is founded not upon this being superfluous land which the plaintiff has a right to re-purchase, but upon its being land taken for a purpose which has entirely failed. Being only authorized to take and use land for the purpose of their undertaking, the company claim to use it for any purpose they choose. Where land is compulsorily sold, the right of the landowner is inherent to have it specifically applied to the purpose for which it was bought. *Cohen v. Wilkinson* (1) was a shareholders' bill; but the principle is equally applicable here.

Gray v. the Liverpool and Bury Railway Company, 9 Beav. 391.

Bostock v. the North Staffordshire Railway Company, 5 De Gex & Sm. 584; s. c. 4 El. & B. 798; 24 Law J. Rep. (N.S.) Q.B. 225; 3 Sm. & G. 283; 25 Law J. Rep. (N.S.) Chanc. 325.

Blakemore v. the Glamorganshire Canal Navigation Company, 1 Myl. & K. 154; s. c. 2 Law J. Rep. (N.S.) Chanc. 95.

Bury v. Allen, 1 Coll. 589.

(1) 12 Beav. 125, 138; s. c. 18 Law J. Rep. (N.S.) Chanc. 378, 411; 1 Mac. & G. 481; 1 Hall & Tw. 554.

Bogshaw v. the Eastern Union Railway Company, 2 Mac. & G. 389; s. c. 19 Law J. Rep. (N.S.) Chanc. 410.

WOOD, V.C., without calling for a reply, said it must be taken that the land was properly bought for the purposes mentioned, and for those purposes only, and the right to come to the Court at all was founded upon that, and it was evident a mere stranger could have no right to file such a bill as this.—[His Honour, after reading the 10th and 12th paragraphs of the bill, proceeded thus]—The question is, whether this species of equity exists, that where the work is authorized to be done, and the purchase is *bona fide* made for the purposes authorized by the act, then, if that work partly or wholly fails, the vendor has forthwith a right to file a bill and say, "the land is mine, subject to payment of the purchase-money, and I am in equity the owner." If that were so, then the company ought to have a similar right to compel the repayment of the purchase-money. I cannot understand how the vendor can have an inherent right to say, that having sold the land for a particular purpose only, he is entitled to have it back on the failure of that purpose, or what equity he has, having all the money in his pocket, to be replaced in his former position. It does not appear that I can hold that, when the matter is so carefully provided for by parliament, there can arise any abstract equity by which the vendor can have a right to purchase back his land, and the company have no right to demand back their money. Such a doctrine would be very inconvenient. There is no analogy between this case and the cases referred to, because here the right rests entirely on the statutory provision. It seems so unreasonable that the plaintiff should be allowed to stand by and say, the land shall be used for no purpose whatever, that I should be very much surprised to find the legislature had made no provision for the case, and it seems to me that parliament has made provision, though not perhaps in the most happy form.

In all acts passed previously to the Lands Clauses Act there was a clause by which the land not used for the special purposes, reverted *ipso facto* to the original

owner. The 127th section of that act enacts, with respect to lands which shall not be required for the purposes of the undertaking, that within the prescribed period, or, if no period be prescribed, within ten years after the expiration of the time limited by the special act for the completion of the works, the promoters of the undertaking shall absolutely sell and dispose of all such superfluous lands and apply the purchase-money arising from such sales for the purposes of the special act; and in default thereof, all such superfluous lands remaining unsold at the expiration of such period shall thereupon vest in and become the property of the owners of the lands adjoining thereto, in proportion to the extent of their lands respectively adjoining the same; and the 128th section requires the first offer of the superfluous lands to be made to the person then entitled to the lands from which the same were originally severed. In that way the landowner is amply protected: the intention of the legislature was to give the company ten years before they should be compelled to sell; and having got so far, I come to the conclusion that this gentleman has no right to relief upon the first part of his prayer. Then there remains the question whether, seeing that he is no longer owner of the land, he has made out a case for the interference of the Court by the 12th paragraph of his bill. It is clearly made out by all the authorities that any person having a positive interest could come to prevent by injunction what the act of parliament does not authorize to be done; the case of the regatta (2) was such a case; or if the plaintiff made out a case of damage or injury, that might be a case. Regard being had, therefore, to the position of the owner of the adjoining property and the inchoate right of pre-emption, he has a right to say the property shall not be damaged in the interval. But if he is entitled to restrain them from all use of the land but what is authorized by the act, I ought to interfere to prevent them even from growing a crop of corn during the ten years. Considering that this company is now actually going before

(2) *Bostock v. the North Staffordshire Railway Company*, *ubi supra*.

parliament for powers authorizing the making of a branch line, and in the absence of any special damage to the plaintiff, and considering the possibility of the company getting those powers which they are seeking, I must allow the demurrer.

LORD JUSTICE KNIGHT BRUCE said that when the property was sold, if it was intended to exercise the power of sale, the case would be clear. Then, on an amendment of the petition, the matter might be brought on again.

FULL COURT
OF
APPEAL.
March 8. }

In re HEWITT.

Trustee Act—Mortgagee—Heir-at-Law.

Semble—That upon the legal estate in mortgaged property having descended to the heir of the mortgagee, the Court will not, where there is no sale or transfer proposed, vest the estate in the administrator of the mortgagee, although the administrator is beneficially interested in the money secured.

Mr. Walter Robinson applied to the Court in consequence of a difficulty raised by the Registrar in drawing up an order which had been made under the following circumstances:—The legal estate in certain mortgaged property was outstanding in the co-heiresses of a deceased mortgagee, and the administrator, who was also beneficially entitled to the money, had applied for and obtained the order in question, declaring that the co-heiresses were trustees for the administrator, and vesting the legal estate in him. There was not at present any intention to sell the property, or to transfer the mortgage. He referred to—

In re Meyrick, 9 Hare, 116; s. c. 20 Law J. Rep. (N.S.) Chanc. 336.

In re Boden's Trust, 1 De Gex, M. & G. 57; s. c. 21 Law J. Rep. (N.S.) Chanc. 316.

In re Skitter's Mortgage Trust, 4 Weekly Rep. 791.

The 9th and 19th Sections of the Trustee Act, 1850, (13 & 14 Vict. c. 60.)

The 2nd Section of the Trustee Extension Act (15 & 16 Vict. c. 55.)

The LORD CHANCELLOR doubted whether, as the case stood at present, the Court could make the order.

STUART, V.C. }
March 19. }

EDDELS v. JOHNSON.

Residuary Bequest, Omission of Name in—Administration—Debts, Liability to, as between Real Estate Specifically Devised, and Real Estate Devised by Way of Residue—Statute 7 Will. 4. & 1 Vict. c. 26.

A testator, by his will, dated in 1853, made specific devises of real estate, and also a specific bequest of personalty in favour of each of his six children, by name, viz. A, B, C, D, E, and F. He then made a specific bequest in favour of A. and B. equally, and finally he gave all the residue of his property, real and personal, to his said four children, C, D. and E. equally:—Held, upon the context of the will and the evidence in the cause, that the name of F. had been omitted by inadvertence in the gift of the residue contained in the will as executed, and that F. was entitled to one-fourth of such residue.

The rule that a testator's real estate specifically devised, his real estate devised by way of residue, and his personal estate specifically bequeathed, are to contribute in rateable proportions to make up the deficiency of his residuary personal estate for payment of his debts,—Held, not to have been altered or affected by the Wills Act, 7 Will. 4. & 1 Vict. c. 26.

James Creed Eddels, by his will, dated the 6th of August 1853, devised all his freehold messuages or tenements, lands and hereditaments in the Vale of Ramsgate, Kent, to his wife, Emma Marina Eddels, his daughter, the plaintiff, Emma Wilmot Eddels, and the defendant, Charles Johnson, upon trust, as to Glamire House, for the benefit of his daughter Clara Elizabeth Johnson; as to the Royal Villa, for the benefit of his daughter Emma Wilmot Eddels; as to Chandosa Cottage, for the benefit of his daughter Thirza Eddels, at

twenty-one or marriage; as to the house in the occupation of Mr. Glyn, for the benefit of his son Edgar Eddels, at twenty-one; as to Clarence Villa, for the benefit of his son Frederick Eddels; as to No. 16, Royal Terrace, for the benefit of his son Arthur Eddels; and as to the nine tenements called Victoria Terrace, together with the pleasure-ground thereunto belonging, and also the tenement called Memel Lodge, to the use of his wife for life, and after her decease, to the use of his said six respective children, in equal shares. The testator then devised a leasehold house, called Kent Villa, in which he then resided, situate at St. John's Wood, to his said trustees, upon trust, after the payment of the ground-rent, for his wife for life, and after her decease for all his said children equally, share and share alike. He gave all his furniture, and all other his chattels, to his said wife absolutely; and then made the following disposition:—"I give and bequeath my business, at No. 34, in Piccadilly, and the lease thereupon, together with all my stock-in-trade, book-debts, fixtures and other effects therein, subject to the payment thereof of all the trade accounts and liabilities thereon, to my two sons Edgar and Frederick, as tenants in common as to the lease, and equally between them as to the other effects; and my desire is, that they should continue and carry on the said business and enter into co-partnership together. I give, devise, and bequeath all the rest, residue and remainder of my real and personal estate unto my said four children Clara Elizabeth, Emma Wilmot, and Arthur, equally, as tenants in common as to my real estate, and to share and share alike as to my personal estate; and I hereby declare that every devise or bequest to a daughter or daughters shall be independent of any husband with whom she may intermarry. I desire that the proceeds of a policy of insurance upon my life for 3,000*l.* shall be applied at once in repaying Mr. White a mortgage sum of 3,000*l.*, and that another mortgage sum of 2,000*l.* shall be paid, as well as all my other debts, out of the most convenient portion of my residuary personal estate." The testator appointed the persons named as trustees in his will his executors also. He died on

the 4th of April 1857, leaving his widow, and six children named in the will, him surviving.

It appeared from the evidence that the testator, in his instructions for his will, had named his daughter Thirza as one of the four children to whom he gave his residuary estate; that her name, as well as the names of the three mentioned as residuary legatees in the will, was set forth in the draft copy of the will, but that the name of Thirza had been inadvertently omitted in the will as executed. It appeared, moreover, that the whole of the personal estate of the testator had been applied in payment of debts, and that a balance of debt, amounting to about 1,400*l.*, still remained unsatisfied. The bill, which was filed by the trustees and executors named in the will, alleged that they were advised that they had no power, under the testator's will, to sell any portion of his real estates for payment of the balance of the amount of the debts over the personal estate; and it prayed that the rights of the testator's children under the will might be declared by the Court, and his estate administered under its direction, and that a sufficient part of the real estate to pay the debts remaining undischarged might be sold.

Mr. F. W. de Longueville Giffard, for the plaintiffs.—There are two questions for the consideration of the Court in this case: first, whether the name omitted in the enumeration in the will of the four children of the testator, to whom the residue is given, can be supplied by the Court; and, if so, whether Thirza is not the name to be so supplied; and, secondly, whether the amount of the debts remaining unpaid should be raised by sale of a competent part of the residuary real estate only, or whether the whole of the real estate, whether devised specifically or by way of residue, and the personal estate specifically bequeathed, ought not to bear the burden of the unpaid debts rateably. As to the first question, it is submitted that the plain indication furnished by the context of the whole will of an intention on the part of the testator to benefit all his six children equally, and the evidence of the instructions given by the testator for the will,

are sufficient to enable the Court to treat Thirza as the child omitted by mistake, and as entitled, therefore, to one-fourth of the residue—*Humphreys v. Humphreys* (1).

Mr. T. Smythe, who appeared for the testator's two children, Thirza and Arthur, was heard upon the first point, and submitted, upon the same authority, that Thirza was entitled to one-fourth of the residue.

[STUART, V.C. said, Thirza was the child entitled. The words "my said four children" clearly shewed an intention that four children were to be benefited, and the context of the will and the evidence in the cause afforded a sufficient indication of the intention of the testator to enable the Court to infer that the name of Thirza had been omitted from the will by mistake, and to declare that the testator's said daughter Thirza was entitled to one-fourth of the residue of the testator's estate.]

Mr. J. W. de Longueville Giffard.—As to the second question, it is to be observed that the testator's real estate is not charged with, nor devised subject to, the payment of his debts, and that therefore this is a case in which the creditors can only reach the real estate of their deceased debtor by means of the statute 3 & 4 Will. 4. c. 104, making real estate, whether devised specifically or generally, assets for payment of debts. Under the law prior to the New Wills Act, 7 Will. 4. & 1 Vict. c. 26, every devise, however general in terms, was virtually specific—*Mirehouse v. Scaife* (2); and on that account real estate comprised in a residuary devise was not applicable in priority to that comprised in a specific devise for payment of the testator's debts—*Spong v. Spong* (3). But the statute 7 Will. 4. & 1 Vict. c. 26. (the New Wills Act) has altogether removed the ground of that rule in the administration of assets. By that enactment a general or residuary devise is made to extend to all the real estate belonging to the testator at the time of his decease, which, in effect,

abolishes all distinction between real and personal estate in this particular. It is submitted, therefore, that in administering property affected by any will made since the enactment came into operation (January 1st, 1838,) analogy requires that a uniform rule should be adopted in regard to both real and personal estate, and that real estate comprised in a residuary devise should be applied in payment of the testator's debts in priority to realty comprised in a specific devise, just as in the case of personalty the residuary estate is applied in priority to that specifically bequeathed. As to personal estate specifically bequeathed, that has always stood on the same footing as land specifically devised—*Tombs v. Roch* (4).

Mr. T. Smythe and *Mr. T. F. Morse*, for the defendants, were not called upon to address the Court upon the second question.

STUART, V.C. said, that wherever, as in the present case, the residuary personal estate had been exhausted in the payment of the testator's debts, leaving an amount of debts still undischarged, and the will not creating any charge upon the testator's real estate, so that that estate could only be reached by the creditors by means of the statute 3 & 4 Will. 4. c. 104, the law as clearly settled prior to the Wills Act, 7 Will. 4. & 1 Vict. c. 26, was that the personal property specifically bequeathed by the will and the lands devised—whether devised specifically, or generally, or by way of residue—were liable to contribute rateably towards the payment of the testator's debts remaining undischarged. The Wills Act did not contain any express provision which could operate to alter or affect the law as so settled; nor did it appear why, upon principle, that act should have rendered it incumbent upon the Court to apply to real estate devised the same rule as to the order of liability in payment of debts which prevailed as to personal estate bequeathed. The practice of the Court seemed, moreover, to have been to the contrary, for he understood

(1) 2 Cox, 184.

(2) 2 Myl. & Cr. 695; s. c. 7 Law J. Rep. (N.S.) Chanc. 22.

(3) 1 You. & J. 300.

(4) 2 Coll. 490; s. c. 15 Law J. Rep. (N.S.) Chanc. 308.

that in administering estates since the Wills Act, 7 Will. 4. & 1 Vict. c. 26, came into operation, the old rule had been adopted and acted upon. There must, therefore, be a declaration in this case that the real estate devised by the testator, whether devised specifically or by way of residue, and all the personal estate of the testator specifically bequeathed, must bear the burden of his debts remaining unpaid in rateable proportions. There would be a declaration also that the testator's four children, Clara Elizabeth, Emma Wilmot, Arthur and Thirza, were the persons to whom the testator had given his residuary property by his will.

KINDERSLEY, V.C. }
Nov. 3. } JOHNSON v. ROUTH.

Settlement—Limitation to Executors or Administrators—Beneficial Interest—Conversion of Estate.

By a marriage settlement, an annuity and policy of assurance were assigned by the husband to trustees, upon trust for himself and his wife during their lives, and then for the benefit of the children of the marriage, and in default of children, to such person as the husband should by deed or will appoint, and in default of appointment, "unto the executors or administrators of the husband and for their own use and benefit":—Held, that the executors took the property as part of the husband's general assets.

The husband, by his will, directed the remainder of the produce of his real and personal estate to be placed out at interest, and the dividends and produce thereof to be paid to his wife during her life:—Held, that she was entitled to have all the property of the testator, including the reversionary interest in the annuity, treated as converted at the time of the testator's death.

This suit was instituted for the purpose of administering the trusts of the will of William Johnson, Esq.

The matter had been referred to the Master, who had reported, amongst other things, that by a settlement, dated the

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14th of September 1810, which was made upon the marriage of W. Johnson with Charlotte Consett, W. Johnson assigned and transferred unto Matthew Consett and Stephen Eaton, their heirs, executors, administrators and assigns, all and singular the annuity of 172*l.* 13*s.* 10*d.* therein mentioned, and also the sum of 1,358*l.* 2*s.* 6*d.*, being for the re-purchase of the said annuity, to hold the same unto M. Consett and S. Eaton, their executors, administrators and assigns, in trust to pay, or permit and suffer Charlotte Consett to receive and take the same annuity during the joint lives of W. Johnson and C. Consett, for her sole and separate use, benefit and disposal, and after the decease of either of them, the said C. Consett and W. Johnson, then to the use of the survivor; and after his or her decease the said trustees were to sell the said annuity and invest the produce thereof in the public funds or upon real security, and to stand possessed thereof in trust for the children of the marriage, as therein mentioned; and in case there should be no child or children of such marriage, or they should die before becoming entitled to vested interests, in trust, from and after the decease of C. Consett, for such person or persons, and upon such estates, trusts, intents and purposes, and subject, as he, W. Johnson, by deed to be executed as therein mentioned, or by his last will and testament in writing, or any codicil thereto, should give, dispose, direct, limit or appoint, of or concerning the same, and in default of such gift, disposition, direction, limitation or appointment, then in trust to pay, assign, transfer and set over the said annuity of 172*l.* 13*s.* 10*d.* or the money to be produced by sale thereof as aforesaid, or the stocks, funds or securities in or upon which such money should be then invested, unto the executors or administrators of W. Johnson, to and for their own use and benefit. Upon the death of W. Johnson the annuity of 172*l.* 13*s.* 10*d.* was paid to Charlotte Johnson until the month of September 1819, when the same was re-purchased for the sum of 1,358*l.* 2*s.* 6*d.*, and the same sum was invested by M. Consett and S. Eaton in the purchase of 1,306*l.* 15*s.* 7*d.*, 5*l.* per cent. annuities,

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since converted into 1,372*l.* 2*s.* 4*d.* 3*l.* per cent. annuities. Charlotte Johnson died on the 10th of January 1848 without issue, and without having again married, and by her will, dated the 28th of July 1838, she appointed the defendant Alice Consett and Mary Ann Bell executrixes thereof, and the dividends of the sum of 1,372*l.* 2*s.* 4*d.* stock were paid or accounted for to Charlotte Johnson during her life, and to Alice Consett since and up to the death of Charlotte Johnson. By an order, dated the 27th of April 1849, the said sum of 1,372*l.* 2*s.* 4*d.* stock, with the dividends due thereon, was ordered to be paid into court.

It did not appear from any of the proceedings in the original cause, nor had it been ascertained whether the testator, W. Johnson, ever made any appointment of the said sum of 1,372*l.* 2*s.* 4*d.* under the power for that purpose contained in the indenture of settlement of the 14th of September 1810, or any part thereof.

The defendant Alice Consett alleged that the testator, W. Johnson, by his will, directed that the remainder of the produce of his real and personal estates should be placed out at interest upon real security, and the interest, dividends and produce thereof paid unto his wife Charlotte Johnson and her assigns during her life, to and for her own use and benefit; and she further alleged, that the reversionary interest in the said sum of 1,372*l.* 2*s.* 4*d.* formed part of the personal estate of the testator, and the same should have been sold within one year after the testator's decease, and the produce arising from such sale should have been invested, and the dividends and interest accruing due in respect thereof paid to the said Charlotte Johnson during her life. Alice Consett, as such personal representative of Charlotte Johnson, now claimed by reason of the said reversionary interest not having been sold at the time aforesaid, to be entitled to interest at the rate of 4*l.* per cent. per annum on such a sum as such reversionary interest would have produced had the same been sold at the end of one year after the testator's decease.

Mr. Glasse and *Mr. Cory* appeared for

the plaintiffs, and contended that the limitation contained in the settlement of 1810, "to the executors or administrators of W. Johnson to and for their own use and benefit," was not to be construed as a beneficial limitation in favour of the executors and administrators personally, but they were to be considered as taking it in their representative character for the benefit of the testator's estate. It was also contended that the widow of W. Johnson could have no claim upon the corpus of the reversionary interest in the before-mentioned sum of 1,372*l.* 2*s.* 4*d.* She had no right to have it converted upon the testator's death.

Mr. Baily and *Mr. Hobhouse*, contra, submitted that the executors and administrators of the testator, W. Johnson, were beneficially interested in the fund limited distinctly to them by the settlement of 1810. Nothing could be plainer than the words "to and for their own use and benefit." This being the case of a settlement and not a will, the words must be construed strictly, and there was nothing here to take away from the direct meaning of those words.

Mr. Martindale followed on the same side.

Mr. Farrer, for Alice Consett, argued that Charlotte Johnson was entitled to the corpus of the funds from whence the annuity was derived, and the money ought at once to have been converted.

The following cases were cited:—

The Attorney General v. Malkin, 2 Phil. 64; s. c. 16 Law J. Rep. (n.s.) Chanc. 99.

Daniel v. Dudley, 1 Phil. 1.

Stocks v. Dodsley, 1 Keen, 325.

Marshall v. Collett, 1 You. & C. 232.

Sanders v. Franks, 2 Madd. 147.

Wallis v. Taylor, 8 Sim. 241; s. c. 6 Law J. Rep. (n.s.) Chanc. 68.

Churchill v. Dibben, cited in *Lord St. Leonards' Powers*, 132, 7th edit.

Holloway v. Holloway, 5 Ves. 399.

Howe v. Lord Dartmouth, 7 Ves. 137.

Bulwer v. Asiley, 1 Phil. 422; s. c. 13 Law J. Rep. (n.s.) Chanc. 329.

Hames v. Hames, 2 Keen, 646; s. c. 7 Law J. Rep. (N.S.) Chanc. 123.

Palis v. Hills, 1 Myl. & K. 470; s. c. 2 Law J. Rep. (N.S.) Chanc. 142.

KINDERSLEY, V.C.—The first question is, whether the beneficial interest belonging to the person or persons who might be the executors or administrators, executor or administrator, of Mr. Johnson passed to them personally or not? There is no doubt that, according to the freedom which the law allows to persons to dispose of property, it is perfectly competent to any one so to limit property in favour of his own executors or administrators, or those of another person, that the beneficial interest, free from all trust, shall come to the person answering that description. But that would naturally appear to be a strange, capricious and absurd limitation. A man might appoint his own executor; but if the limitation was to the executor of another person, that person might appoint any one who could not be then known; and still more does this apply to an administrator. Suppose the testator died insolvent, a mere creditor might hold the office. A person might be administrator *durante minoritate* of the person entitled to administer, and then who is to take? The conclusion, therefore, is, that, at all events, *à priori*, it is very improbable that there should be an intention so to limit property.

The opinion which Lord Langdale expressed in the case of *Hames v. Hames* laid down the just principle, namely, that the Court would not adopt that view unless it was necessitated so to do, and if upon the whole context of the instrument there was reason for thinking that there was no such intention, then such a construction must be rejected. In the present case the party was about to be married, and had certain property, which consisted of money invested on an annuity, not being capital, inasmuch as it was secured on a life, and his object was to make a settlement on his intended wife and the children of the marriage. There was no allusion in any of the recitals to any other purpose, and certainly none to any intention that in the event of there being no

children there should be a limitation of the property away from himself and to persons unknown. The Court, no doubt, in reference to the general scope of intention of an instrument, regulates its construction by what it finds to be its nature; for example, in cases where a wife mortgages her property and limits the equity of redemption to her husband, the Court, regarding the language as plain, still considers the intention, but if it finds that the deed contains an express limitation of the inheritance, different from what it was before, it will judge of the intention from that fact. Looking, therefore, at the intention of the parties in this case, the only apparent object was to make provision for the wife and children; and therefore, although you find the terms extremely strong, "for their own use and benefit," (and I feel the force of those words), yet they are very commonly (I do not say properly) put in by conveyancers, not for the purpose of expressing the personal use and enjoyment by the executors or administrators of what might be called the whole interest, but immediately preceding the declaration of a trust; and when the limitation is to persons sustaining a certain character, and for their own use and benefit, it must be considered that these words are used by the conveyancer to express, not the interest which they are to take, but the amount of interest which is to be vested in them in their character of executors or administrators. No case which has been cited is exactly on all fours with the present. The two strongest are *Sanders v. Franks* and *Wallis v. Taylor*; but those are cases, not of a settlement, where the definite nature of the instrument is before you, but of a will. Assuming that those cases are rightly decided (though I think I have heard comments from the Bench not altogether favourable to their soundness), it does not appear to me that the principle of those decisions applies to this case. For these reasons, my opinion is, that the executors of Mr. Johnson take this property as part of the original assets of their testator's estate.

The other question is a very peculiar one. Assuming I am right in my opinion as to Mr. Johnson's executors, what is the

effect of his will with regard to the benefit thereby given to his wife? The principle is, that when a testator devises his general residuary property to his executors, and directs them as soon as may be to convert and invest in any security, and pay the income to A. for life, they are bound on the one hand to convert the property of a wasting nature for the benefit of the remainderman, and on the other hand to convert a reversionary interest for the benefit of the tenant for life. But if the words are "as soon as conveniently may be," the conversion must be treated as immediately made. Supposing, in this case, Mr. Johnson, under a will or settlement, had been entitled to a reversionary interest in stock, or money on mortgage upon the death of A. B. that property, under this will, would be sold, and so if he had a life interest in a government annuity. There are two circumstances in this case, which render it more complicated: one, that it is not a sum on mortgage, but an annuity for the life of the *cestui que vie*, secured by a policy, which, however, does not make any difference, because that is, in effect, an investment; the other is, that the person on the determination of whose life the reversionary interest is expectant, happens to be the wife of Mr. Johnson, for whose benefit the life interest is given. The effect of this settlement is to give her a life interest in this property, so that what remains to Johnson after the settlement is nothing but the reversion upon the life interest of his wife, assuming that there were no children, which event has happened. She being, therefore, the person to whom he thought it right to give the life interest under his will, she was entitled to have the reversion sold. Why was she not? It was said, because it was expectant upon her own life. But there having been no case cited as deciding that, I must proceed upon general principles, and hold that she was entitled to have all the property of Mr. Johnson, whether reversionary or expectant on her own life or on that of a stranger, treated as converted at the time of his death.

[IN THE HOUSE OF LORDS.]

Feb. 11, 12. { BARLOW & OSBORNE AND
OTHERS.

Practice—Opening Biddings—Sale by Auction.

A sale of an estate upon sealed tenders must be treated as a sale by auction, and the biddings may be opened, on application to the Judge, within eight days after the certificate of the chief clerk, approved by the Judge, has been filed.

The practice of opening biddings not in itself approved of.

The word "party," in the 49th Order of October 16th, 1852, must be taken to mean "person."

This was an appeal against an order of Vice Chancellor Stuart, which had been confirmed on appeal to the Lords Justices. The order was for opening biddings on a sale of an estate by the order of the Court. By orders of the 9th and 17th of May 1855 certain freehold premises in Sussex were put up to sale by public auction; but no purchasers having been found, Stuart, V.C. directed that all the premises constituting the estate should be offered for sale on sealed tenders. An advertisement was therefore inserted in the newspapers describing the property, and declaring that tenders for the same would be received at the Vice Chancellor's chambers, subject to certain conditions. The advertisement issued under this order directed the tenders to be marked "private," and gave the form of agreement of purchase, which was to be "subject to the conditions hereto annexed, and subject to this contract receiving the sanction of the Vice Chancellor." It was added, "such tenders will be treated as confidential, and their contents will not be made public." The "conditions" declared, among other things, that "the sale is subject to a reserved bidding; that the chief clerk will proceed to certify the result on Friday, the 8th of February 1856, at 11 o'clock in the forenoon, at which time the bidders may, if they think fit, attend by their solicitors at the chambers of the said Judge, No. 12, Old Square, Lincoln's Inn, in the county of Middlesex, or in person. The certificate of sale, if

any, will then be settled, and will in due course be signed and filed, and become binding without further notice or expense to the purchaser."

The person allowed as the purchaser was to pay a deposit of 2,000*l.* before the 18th of February. The tenders were sent in; that of the appellant, who was a gentleman residing in Staffordshire, amounted to the sum of 36,500*l.*, and was accepted.

On the 8th of February the chief clerk made the certificate, declaring the appellant to be the purchaser; and on the 13th of February this certificate was signed as duly "approved" by the Vice Chancellor.

On the 11th of February a summons (which did not reach the appellant till the 13th of February) was obtained from Stuart, V.C., calling on "all parties concerned" to attend at the chambers on the 16th of February, on the hearing of an application by Heffill. On the 18th of February the appellant paid into the Bank, in the name of the Accountant General, the sum of 2,000*l.* The summons was heard in Court on the 23rd of February, and an order made to open the biddings, which having been done, the estate was re-sold, and Mr. Walter Prideaux became the purchaser for a sum of 44,000*l.* The Lords Justices confirmed the order, on appeal, directing at the same time the costs of the application to be paid to the appellant (1).

The present appeal was then brought.

The Attorney General (Sir R. Bethell), Mr. W. M. James and Mr. Baggallay, were for the appellant. They cited—

White v. Wilson, 14 Ves. 151.

Fergus v. Gore, 1 Sch. & Lef. 350.

Millican v. Vanderplank, 11 Hare, 136.

Bridger v. Penfold, 1 Kay & J. 28.

Vesey v. Elwood, 3 Dru. & W. 74.

Mr. Craig and Mr. Batten, for the respondents, commented on the cases already cited, and mentioned, in addition,—

Attorney General v. Day, 1 Ves. 218, 221.

Jervoise v. Clarke, 1 Jac. & W. 389.

Lefroy v. Lefroy, 2 Russ. 606.

(1) *Osborne v. Foreman*, 25 Law J. Rep. (N.S.) Chanc. 340.

The Attorney General, in reply.

The LORD CHANCELLOR (LORD CRANWORTH) stated the facts, and said that by the ordinary practice of the Court, until there had been a final order establishing the purchaser, a third person might, on the ground of being willing to offer an advanced price, open the biddings. It certainly was true, as stated by the counsel for the appellant, that this was a practice to be deplored, and one which, in consequence of the uncertainty attending purchases, led, as a general result, to estates being sold at less than their proper value. But these were considerations to be addressed to the House in its legislative, rather than its judicial capacity. It certainly did seem somewhat strange that even where the Court had ordered a reserved bidding, the sale might be opened; but such undoubtedly was the law at present. The only question here related to the form and to the dates of the proceedings. The practice in sales ordered by the Court had lately been altered; but the rule was now, what it had previously been, that before a purchase was absolutely confirmed, the biddings might be opened. The new practice seemed to be fully explained by Wood, V.C., in *Bridger v. Penfold*. Instead of obtaining a report, and getting that report confirmed, the practice was now regulated by the Masters' Abolition Act (15 & 16 Vict. c. 80.), and the orders made thereon. The proceeding of the sale was now brought before the chief clerk of the Judge; it was discussed, and at the end of four clear days he certified who was the purchaser, which certificate was equivalent to the former proceeding of obtaining a report. At the end of other four clear days this certificate was ordinarily approved by the Vice Chancellor. The certificate was then filed; this was a new proceeding, for the report in the old practice was not filed until it had become absolute. Now, however, the certificate, after it had been signed, was to be filed, the order said, "in like manner as reports are now filed," and it was "thenceforth to be binding on all parties to the proceeding," not the mere parties to the cause, "unless discharged or varied at chambers or in open court," according to

the form to be prescribed "by any General Order of the Lord Chancellor." By the 49th Order (2) it was directed that "at the expiration of four clear days after the certificate or report shall have been signed by the chief clerk, if no party has in the mean time obtained a summons to take the opinion of the Judge thereon, the chief clerk is to submit the certificate or report to the Judge for his approval, and the Judge may thereupon, if he approve the same, sign such certificate or report, in testimony of his adoption thereof, as follows," and then the form was given. Upon this order, Vice Chancellor Wood, in *Bridger v. Penfold*, treated the signature of the Judge, on declaring his approval of the certificate, as equivalent to the report *nisi*. The 51st Order gave eight clear days after the filing of a certificate for parties to apply to vary or discharge it. Within that period persons might apply to open the biddings either under the old or the new practice. Within the fair construction of the clause, third persons were to be regarded as "parties"; and, therefore, persons wishing to become purchasers might make this application. The question then arose whether this sale was to be considered as differing from a sale by auction, and it seemed to his Lordship that there was no real difference between them. The word "auction" had always been understood to be derived from "*augendo*;" and though this was not exactly a sale in which one person hearing another bid a price, immediately offered an increased price, it was one at which everybody privately communicated what he would give, and he who had offered the most was declared the purchaser. In that way the appellant was declared the purchaser, but "subject to the conditions of sale," and "subject to this contract receiving the sanction of the Vice Chancellor"; in other words, to his sanction in such form as by law might be given. The words in the conditions, that "the certificate will be filed, and the sale will then become binding without further expense to the purchaser," at first appeared important, but in truth they only explained the new practice which did save the purchaser

from the expense to which he was formerly subjected in getting the Master's report made absolute, and the certificate would now become binding within eight days after the Vice Chancellor had signed it, unless in the mean time something was done to prevent that being so. Here something was done to prevent it, and the appellant thereby lost his right to have the purchase declared absolute until the offer of a larger price had been submitted to the consideration of the Court.

It was unnecessary, here, to consider how far this practice was applicable to purchases by private contract, for in them the sale was complete at once; a special order was obtained, and no such question as the present could arise. Here the sale, though not an ordinary sale by auction, was a sale of a character which must be dealt with as having the incidents of such a sale. The proceedings were consequently correct, and the appeal must be dismissed.

LORD BROUGHAM had, after considerable doubt, come to the same conclusion. The observations of the Vice Chancellor, in *Bridger v. Penfold*, must be imported into this case in considering what the practice had been, and what it was now. He doubted whether a sale by auction and a sale by sealed tenders were to be considered identical (but that was not very material for the determination of this case), and though he thought the practice of opening biddings was one of doubtful advantage, still that was a matter which the House could not judicially consider, though in its legislative capacity it might see reason to make some alteration for the future.

LORD WENSLEYDALE concurred in the result of the opinions of both his noble and learned friends, and also in the objection which both of them had suggested as to the practice of opening biddings; but considering that practice as settled,—and it must be so considered at present,—he was of opinion that what had been done here had been correctly done, under the provisions of the 15 & 16 Vict. c. 80, and of the General Orders made in pursuance of that statute. He adopted the case of *Bridger v. Penfold*, as establishing that the present practice was the same as the

(2) 21 Law J. Rep. (N.S.) Orders in Chanc. xii.

former with respect to the sales by auction, and that the certificate after it had been signed and filed, and after a lapse of eight days, stood on the same footing as the report of the Master absolutely confirmed. Then, was there a sale by auction? for if it was a sale by private contract, the biddings could not be opened. He thought that the mode of purchase and the existence of conditions of sale, and the terms of those conditions, shewed that it must be treated as a sale by auction, to be made absolutely valid by the application and effect of certain settled forms. The present practice was to substitute the filing of the certificate and the lapse of the eight days for the whole time of the confirmation of the Master's report. That being so, it seemed to him that within those eight days the biddings might be opened. The order made here had, therefore, been properly made, and this appeal must be dismissed.

Appeal dismissed and order confirmed. The costs of the respondent were ordered to be costs in the cause.

KINDERSLEY, V. C.
Feb. 20.

{ *In re* THE JOINT-STOCK COMPANIES WINDING-UP ACTS, 1848 AND 1849; AND *In re* THE WELSH POTOSI MINING COMPANY.

Company, Limited—Winding-up in Bankruptcy—Liabilities prior to Registration.

A company was formed in 1853, and carried on upon the cost-book principle until 1857, when it was registered as a limited company, under the act of 19 & 20 Vict. c. 47, and an order was subsequently obtained for winding up the affairs in bankruptcy. An order was now made upon petition that the company should be wound up in Chancery, under the acts of 1848 and 1849, in respect of such transactions as occurred prior to the date of registration as a "limited company."

This was a petition, presented by Matthew Lyon and Thomas Gibbes, two of the directors and shareholders in the Welsh

Potosi Lead and Copper Mining Company, that the company might be absolutely dissolved and wound up by order of the Court under the Joint-Stock Companies Winding-up Acts of 1848 and 1849.

The petition stated that the Welsh Potosi Mining Company was formed in 1853 upon the cost-book system; that upwards of forty persons were shareholders and contributories of the company; that the petitioners, besides the money they had paid to the company for their shares therein, had advanced and paid for the company large sums of money for which they claimed to be creditors; that the company was, on the 26th of June 1857, registered and incorporated under the Joint-Stock Companies Act of 1856, (19 & 20 Vict. c. 47.) as a limited company; that the company was at and before the date of such registration, and still continued to be indebted to various persons in sums of money, amounting in the whole to several thousand pounds; that the petitioner M. Lyon and other shareholders in the company had been and still were sued in upwards of fifty actions for recovery of debts of the company incurred and due prior to the 26th of June 1857; that the company had no funds or assets available for payment of the said debts; that a special general meeting of the shareholders in the company was held on the 6th of July 1857, at which it was unanimously resolved, "That the company be wound up by the Court, under the provisions of the Joint-Stock Companies Act, 1856;" that in pursuance of such resolution an application was made to the Court of Bankruptcy, on the 25th of July last, by a shareholder in the "limited company," and an order was thereupon made to wind up the affairs of the company, and William Whitmore was appointed the official liquidator under those proceedings; that nineteen actions by creditors having been brought against the petitioner M. Lyon and other shareholders of the company, for the recovery of debts which had accrued due before the 26th of June 1857, an application was made by the said M. Lyon and the said other defendants to those actions, to the Court of Bankruptcy for an order to restrain further proceedings in such actions, and the Commissioner then decided that he could not make the order prayed, since

the actions were not brought against the "limited company," but against alleged shareholders of the company, for debts prior to the incorporation of the said "limited company." In consequence of this decision, the present petition was presented.

Mr. Baily and *Mr. Roxburgh* appeared for the official liquidator, and stated that his only object was, that the affairs of the company should be wound up as speedily and expeditiously as possible. This petition had been rendered necessary by reason of the Joint-Stock Companies Act of 1856 not providing in any way for such a case as the present, and the only relief open to those shareholders who had been sued for debts incurred prior to the registration of the company, under the act of 1856, was by obtaining an order from the Court of Chancery to wind up the company prior to its registration as a "limited company." There was no necessity for disturbing anything which had already been done in the Court of Bankruptcy, but the order now asked for would be auxiliary to the order for winding up in the Court of Bankruptcy.

They cited—

In re The Welsh Potosi Mining Company, ex parte Lofthouse, and ex parte Birch, since reported, 27 Law J. Rep. (N.S.) Bankr. 1, 4.

Mr. Glasse and *Mr. Baggallay* appeared for the petitioners.

Mr. Doria, for the shareholders who had been fixed as contributories.

KINDERSLEY, V.C.—The difficulty, I cannot say the only difficulty, I feel in this matter, because there are innumerable difficulties in the construction of these acts of parliament relating to Joint-Stock Companies,—but the principal difficulty upon the particular case now before me is to feel quite sure that it was the intention of the Lord Chancellor and the Lords Justices in *Lofthouse's case* and *Birch's case*, to decide the point distinctly, that where there was an order by the Court of Bankruptcy for the winding up of a limited company, (which limited company, before

its registration as a limited company, existed for several years without registration, as an unlimited company,) the jurisdiction of the Commissioner was confined to winding up that company, so far only as related to transactions subsequently, to liabilities happening or accruing subsequently to the time the registration took place. If that was their decision, if that is the effect of these cases, then it is clear that the question is reduced to one or other of two alternatives: either that the effect of all this legislation is, whether intended or not, that in such a case those persons who were shareholders in this company, at the time of the registration, have no remedy whatever, except by bill, for the purpose of administering the equities of any of the shareholders in respect of the transactions which happened, and the liabilities which accrued prior to the registration—or that this Court has jurisdiction under the act of 1848, to make an order for the winding up of the company, as far as relates to the transactions which had occurred and the liabilities which had accrued prior to the date of the registration of the company. One or another of those two alternatives must be adopted if the Commissioner has no power, no jurisdiction whatever, to deal with any matter, except what relates to the company subsequent to the time of registration. Now, one cannot help saying that *à priori* one would be rather surprised to find that the legislature should mean this,—that if a company (whether it be a mining company or any other company, does not affect the question,) has carried on its business for a great many years in the ordinary way, without limited liability, without registration, but proceeding upon the old law before the act of 1848, and at a subsequent period becomes registered as a limited company, in such a case jurisdiction is given to a particular Court to wind up that company before the registration, and to another Court to wind up the affairs subsequently to the registration: it certainly does seem to me that *à priori* I should have expected the object and purpose of the legislature would have been to say, "Well, that Court which is to have the winding up, at least, as to a portion of

this matter, shall have jurisdiction to wind it up altogether"; and it would be most extraordinary to find intentional legislation (though it may have been inadvertently done) to bring about a result, the effect of which is to be that there is to be a certain company, which for ten years was unregistered, and the subsequent five years registered, with limited liability; and that the Court of Bankruptcy is to wind it up so far as relates to one part, and the Court of Chancery is to wind it up so far as relates to the other part. Enormous difficulties must arise,—difficulties with respect to the persons liable, difficulties with respect to the creditors, and difficulties with respect to transactions commenced at one period and completed at another, and extreme difficulties with respect to the possession and administration of the property of the company. As there are those difficulties, I should have thought it almost impossible for the legislature to intend such legislation; but I conceive it very possible that such legislation has taken place inadvertently: that is a very common case.

Then, on the other hand, it certainly appears to me to be a very extraordinary thing, and equally out of all contemplation, that the legislature could have meant this: that having, in 1848 and in 1849, passed an act for the purpose of preventing the mischief and evil that arose from the defect in the law with regard to the administration of the equities by a suit in Chancery, which was their only remedy, the legislature should, for the very purpose of preventing that mischief and evil, give that remedy—a summary and, as it was hoped, a cheaper and more expeditious remedy—that the legislature should do that, should let it go on for a certain number of years, and then afterwards pass another act of parliament in the year 1856—eight years afterwards—to produce this effect; to provide in cases where there has been a subsequent registration as a limited company, that to a certain extent the Commissioners in Bankruptcy should wind the company up. As to the last act of parliament, it is no remedy at all. You have lost the benefit of that careful legislation that took place in 1848; at least, intended to be careful, and yet now all is thrown back

upon the evil and mischief which that act of 1848 was intended to correct. Either of those matters it appears to me *a priori* almost impossible to contemplate that the legislature would pass acts to effectuate; but either the one or the other might result from inadvertence.

Now what was decided by the Lord Chancellor and the Lords Justices was this, in *Ex parte Lofthouse*: that inasmuch as Mr. Lofthouse had parted with his shares before, though within a twelve-month before the registration of the company, he was not a holder of shares within the meaning of the 63rd section of the act of 1856 (1); and the construction put upon that section by this decision was this:—that it did not apply to a person who was not an existing shareholder at the time when the registration took place, even though the party had ceased to be a shareholder within twelve months prior to the time at which the winding-up order was made. That was the effect of the decision. Now that is not, in very direct terms, a decision that the Commissioner had no jurisdiction in the case. The Commissioner put Mr. Lofthouse on the list. The decision was, that the Commissioner had no jurisdiction to do it. Now, certainly, that is no direct expression of an intention to decide that the Commissioner had no jurisdiction in any matter prior to the winding up. But if Mr. Lofthouse could not be put upon the list by the Commissioner, you are reduced to the alternative, either that Mr. Lofthouse was never liable at all as between himself and his brother shareholders in respect of the transactions which existed prior to the time when he ceased to be a shareholder, or this Court must have jurisdiction under the old act of 1848 to make him liable; not to make him liable for anything that occurred sub-

(1) Section 63. "In the event of any limited company being wound up by the Court or voluntarily, any person who has ceased to be a holder of any share or shares within the period of one year prior to the commencement of the winding-up, shall be deemed for the purposes of contribution towards payment of the debts of the company, and the costs, charges and expenses of winding up the same, to be an existing holder of such share or shares, and shall have in all respects the same rights and be subject to the same liabilities to creditors as if he had not so ceased to be a shareholder."

sequent to the registration, but to make him liable for what occurred prior to the time when he ceased to be a shareholder. Therefore it does appear to me that I must consider that the view of the Lord Chancellor and the Lords Justices in these two cases, of *Lofthouse* and *Birch*, was to the effect that the Commissioner has no jurisdiction to make a call. If he has no jurisdiction to make a call, he can have no jurisdiction to deal with any matter except what related to the period during which it was a limited liability company. I must, therefore, come to the conclusion, that I am reduced to the necessity of determining between the two alternatives I mentioned before, either that there is no jurisdiction, or that this Court must have jurisdiction; and I think that I ought to come to the conclusion that this Court has jurisdiction in respect of that portion of the transaction which occurred prior to the registration as a limited company. But then I must take care in making the order to confine it, so as not to interfere with the jurisdiction of the Commissioner with respect to that portion of the matter which is within his jurisdiction: and though I am not aware that there is any particular precedent for it, I think that the order ought to be in some such form as this. It must be an order for the winding up of the company as it existed at the date of the registration; or it must be in respect of the transactions prior to the date of the registration. Either one or other of those two forms would, I think, be right. The costs of all the parties served must be paid out of the estate.

set off the monies due to him on his running account, against the debts due from him; and that the assignees had merely the rights of the assignors, and could claim no advantage beyond what the bankers were entitled to (1).

This suit was instituted, by General Cavendish, to establish a right of set-off against the trustees of the marriage settlement of Mrs. Fitzgerald, and against Mrs. Gore. Prior to 1830 the plaintiff kept a banking account with Robert Snow, Sir John Dean Paul, Bart., both deceased, and John Dean Paul afterwards Sir John Dean Paul, Bart., who then carried on the business of bankers in co-partnership. The plaintiff owed the firm 5,000*l.* and 3,000*l.*, which were respectively secured to the firm by two bonds given to R. Snow and Sir J. D. Paul, and respectively dated the 30th of November 1830. In 1832, the firm consisted of R. Snow, Sir J. D. Paul the elder, J. D. Paul the younger, Robert Snow the younger and William Strahan. In 1836, R. Snow the elder retired from the firm. At the end of 1841 R. Snow the younger also retired from the firm; and from that time to the year 1852 the firm consisted of W. Strahan, Sir J. D. Paul and his son and Robert Makin Bates. On the 16th of January 1852 Sir J. D. Paul the elder died, and the business was continued by the surviving partners; at every change of the firm the plaintiff's securities held by the bankers with those of other persons were assigned to the successive partners, who from time to time constituted the firm. In February 1841 the firm advanced 500*l.* to the plaintiff, who repaid it in the June following. On the 9th of September 1843 the firm advanced 1,500*l.* to the plaintiff upon his promissory note, payable at four months after date. Interest was duly paid by the plaintiff on all the money due up to September 1847, and at this time the firm were the holders of both the plaintiff's bonds and the promissory note. On the 14th of September 1847 Sir J. D. Paul and his son, W. Strahan and R. M. Bates assigned the bond for 3,000*l.* to Lord

(1) *Farley v. Turner*, 26 Law J. Rep. (n.s.) Chanc. 710.

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M.R.	}	CAVENDISH v. GRAVES.
1857.		
April 23, 24;		
May 28.		

Set-off—Bankers' Securities—Assignment—Notice.

Bankers assigned the securities given by a customer indebted to them without giving him any notice of the assignment. The bankers afterwards became bankrupt. In a suit, by the debtor, against the assignees of the securities,—Held, that he was entitled to

Alvanley and Sir J. D. Paul, the then trustees of Mrs. Fitzgerald's settlement, to secure a like amount belonging to the trustees of that settlement, which had been sold out by Sir J. D. Paul. On the same day the firm also assigned the bond for 5,000*l.* to Mrs. Gore to secure 5,000*l.* belonging to her, which had been taken by or on behalf of the firm. No notice of either of these assignments was given to the plaintiff. In November 1848 the plaintiff paid 1,000*l.* to the firm in part discharge of his debt due on the promissory note. In May 1851 another sum of 1,000*l.* was advanced by the firm to the plaintiff, but he gave no fresh security for the amount. In May 1852 the plaintiff paid 500*l.* in further discharge of the debt due from him. Entries of these payments were made as they were received in the books of the firm. The firm afterwards indorsed the promissory note for 1,500*l.* to Mrs. Gore, and delivered it to her. On the 9th of June 1855 the firm stopped payment. At this time the plaintiff was indebted to the firm not only in the sum of 5,000*l.* and 3,000*l.* secured by the two bonds, but he also owed them 1,000*l.*, for which no security was given. There was due to the plaintiff from the firm 1,505*l.* 1*s.* 5*d.* on his general banking account.

On the 28th of February 1856 the assignees of the bonds brought two actions, in the name of Sir J. D. Paul, against the plaintiff, to recover the two sums of 5,000*l.* and 3,000*l.*, with interest.

General Cavendish then filed this bill, and on the 29th of July 1856 upon the plaintiff's paying 2,316*l.* 3*s.* to James Lyons Geaves and Edmund William Paul, the trustees of the settlement, made on the marriage of Edward Fox Fitzgerald and Jane his wife, on account of their claim, and of his paying 3,860*l.* 5*s.* 1*d.* to Catherine Frances Gore on account of her claim, and undertaking to account for any monies or interest as the Court should direct, an order was made staying the actions, and restraining all further proceedings upon the bonds.

The plaintiff now insisted that he was entitled to set off the 1,505*l.* 1*s.* 5*d.* against the 9,000*l.*, or against some part of it; and, assuming he was entitled to set off 1,000*l.* of that sum against the

1,000*l.* advanced by the firm to him in May 1851 on simple contract, then it was insisted, that he was entitled to set off the remaining 505*l.* 1*s.* 5*d.* against the money due on the bonds.

Mr. Follett and *Mr. T. Stevens*, for the plaintiff. — The plaintiff considered the bonds to be partnership property, and he had a right to set off any debt due from the firm against any claim they had against him. Had the firm any right to sue him upon these claims without allowing a set-off? Had there been no bankruptcy, the plaintiff was clearly entitled to a set-off, and he might have set off the bonds against the drawing account. The assignment of the bonds passed no interest to prevent the plaintiff dealing with the bankers until notice of the assignment was given; and he received no notice until after the bankruptcy. If a payment would have discharged the bonds, so also might a set-off have discharged them while they were in the same position. The plaintiff did not dispute the validity of the assignments, but the assignees could claim no right to interrupt the dealings between banker and customer; both the defendants insisted that the set-off should not be made against the bond which each had: the plaintiff, therefore, had a right to ask against whom the set-off was to be made. It was clear, however, that the defendants had notice that the bonds were given to the firm, in consequence of dealings between the bankers and their customer.

Clark v. Cort, Cr. & Ph. 154; s. c.

10 Law J. Rep. (N.S.) Chanc. 118.

Jones v. Mossop, 3 Hare, 568; s. c.

13 Law J. Rep. (N.S.) Chanc. 470.

Mangles v. Dixon, 3 H.L. Cas. 702;

s. c. 1 Mac. & G. 437; 1 Hall &

Tw. 542; 19 Law J. Rep. (N.S.)

Chanc. 240.

Ex parte Monro, Buck, 300.

Norrish v. Marshall, 5 Madd. 475.

Slipper v. Stidstone, 5 Term Rep. 493.

French v. Andrade, 6 Ibid. 582.

Mr. Hardy, for the assignees of the bankrupt. — These defendants ought not to have been made parties to the suit. When the bill was filed, actions had been brought by Mrs. Fitzgerald and Mrs. Gore, or their

trustees, in the name of Sir J. D. Paul. The promissory note also was indorsed by the firm to Mrs. Gore before the bankruptcy. These defendants claimed no interest in these securities, and they had only answered the bill in consequence of the allegation that the facts were disputed.

Mr. Lloyd and Mr. F. O. Hynes, for Mrs. Fitzgerald.—The plaintiff admits that the assignments dealt with the bonds as the beneficial property of the bankers. The entries in these several pass-books ought to have put the plaintiff on inquiries, and that more especially when the 8,000*l.* entered in the pass-books as one sum, and for which the two bonds were given, was, in subsequent pass-books, divided into two sums, upon which interest was charged separately. Neither the pass-books nor the entries in them were sufficient evidence of the assignments made from one firm to another, and no actual set-off was made by the plaintiff until after he had notice of the assignments. That of itself destroyed all right to set-off, though it had existed immediately before, as no debt was due to the firm upon the bonds. In this case there were no cross-demands between the parties; neither was there an allegation in the bill that the plaintiff allowed the balances of account to be against him upon the belief that the bankers were the owners of the bonds, and that he had a right to set off one against the other. To support the right to set-off, the plaintiff must bring the case within the statutes 8 Geo. 2. c. 24. s. 4. and 2 Geo. 2. c. 22. s. 13.

Freeman v. Lomas, 9 Hare, 109, 113; s. c. 20 Law J. Rep. (n.s.) Chanc. 564.

Chapman v. Derby, 2 Vern. 117.

Downam v. Matthews, Prec. Ch. 580.

Whitaker v. Rush, Amb. 407.

Cherry v. Boulbee, 4 Myl. & Cr. 442; s. c. 9 Law J. Rep. (n.s.) Chanc. 118; 2 Keen, 319; 7 Law J. Rep. (n.s.) Chanc. 178.

Priddy v. Rose, 3 Mer. 86.

Hill v. Caillovel, 1 Ves. sen. 122.

Brearcliffe v. Dorrington, 4 De Gex & Sm. 122; s. c. 19 Law J. Rep. (n.s.) Chanc. 331.

Beavan v. Lord Oxford, 6 De Gex, M. & G. 492; s. c. 25 Law J. Rep. (n.s.) Chanc. 299.

Rawson v. Samuel, Cr. & Ph. 161, 178; s. c. 10 Law J. Rep. (n.s.) Chanc. 214.

Mr. R. Palmer and Mr. Baggallay, for Catherine Frances Gore.—Sir J. D. Paul was the sole surviving trustee of Mrs. Gore's settlement; he was also the sole legal owner of the bonds. The principle of set-off is, that the interests of each should be mutual and due in the same right. In this case, the legal owner of the bond for 5,000*l.* was the trustee for Mrs. Gore. There was no mutuality between him and the plaintiff; if the bankers had received on the plaintiff's account more than the amount of the bonds they could not have set them off against it. The plaintiff says that he had notice of the assignments made to the successive firms, but that he had no notice of the assignments made to the defendants. The bank books do not prove this; but they prove that the bankers were the agents of divers persons. In *Ex parte Geaves, in re Strahan* (2), Sir J. D. Paul was held to be the owner of the bond; but it was held that the money was the property of the parties for whom he was trustee.—

Ex parte Carbis, 4 Dea. & C. 354.

Devaynes v. Noble, 1 Mer. 529.

Winter v. Innes, 4 Myl. & Cr. 101.

Kinderley v. Jervise, 22 Beav. 1; s. c. 25 Law J. Rep. (n.s.) Chanc. 538.

West v. Reid, 2 Hare, 249; s. c. 12 Law J. Rep. (n.s.) Chanc. 245.

Watts v. Christie, 11 Beav. 546; s. c. 18 Law J. Rep. (n.s.) Chanc. 173.

Whitworth v. Gaugain, 3 Hare, 416; s. c. 13 Law J. Rep. (n.s.) Chanc. 288; 1 Ph. 728; 15 Law J. Rep. (n.s.) Chanc. 433.

Mr. Follett, in reply.—The pass-books are evidence that the interest was paid by the plaintiff to the bankers as the legal owners of the bonds. There was no evidence to the contrary. Why did not the defendants prove that the interest was paid to the bankers for them?—*Tinson v. Fran-*

(2) 25 Law J. Rep. (n.s.) Bankr. 53.

cis (3). As to costs, he cited *Ford v. the Earl of Chesterfield* (4).

THE MASTER OF THE ROLLS.—If a customer borrows money from his bankers, and gives a bond to secure it, and afterwards, upon the balance of his general banking account, a balance is due to the customer from the bankers (the obligees in the bond), a right to set off the balance against the money due on the bond would exist both at law and in equity. If the firm were altered and the bond assigned by the original obligees to the new firm, and notice of that assignment given to the debtor, and if after this a balance was due from him to the new firm (the assignees of the bond), then no right of set-off would exist at law, because the assignment of the *chase in action* would be inoperative at law, and the obligees of the bond and the debtors on the general account would be different persons; but, as in equity the persons entitled to the bond and the debtors on the general account would be the same persons, a right of set-off would exist in this court, and the customer would be entitled to set off the balance due to him against the bond debt due from him. If, after the bond was given, the bond had been assigned to a stranger, and no notice of the assignment had been given to the original debtor (the obligor of the bond), then his rights would remain the same. Thus, if the assignment had been made to a stranger before any alteration of the firm, then the right of set-off would still remain at law where the obligees of the bond and the debtors on the general account would be the same persons, and in equity also, if the matter of account were brought here, as the assignees of the *chase in action* would be bound by the equities affecting the assignors. But if notice of the assignment had been given to the original debtor, no right of set-off would exist in this court, as the persons entitled on the bond would, as the obligor knew, be different persons from the debtors to him on the general account. If the assignment of the bond had been made to the new firm, with notice to the obligor, they

would, if debtors on the general account, be liable to the same rights in equity of set-off as if they had been the obligees. If, after the alteration of the firm, and after the assignment of the bond to the new firm, with notice to the debtor, (the obligor of that assignment,) another assignment had been made of the bond to a stranger, and no notice of that second assignment given to the obligor, then the rights of set-off would still remain to him in equity as against the first assignees of whose assignment he had notice; and the second assignees would then in equity be bound by it, because the assignees of the bond took it subject to all the equities which affect the assignors.

It was argued that Mrs. Fitzgerald's trustees and Mrs. Gore, neither at law nor in equity, owed anything to the plaintiff; and that, therefore, there could be no set-off against them; the answer to which is, that if they took the bond subject to the equities which affected the assignors, then they stood for this purpose in the place of the assignors, and whatever could be set off against the assignors could be set off against them as the assignees bound by the same equities, and standing in their shoes.

First, then, when in November 1848 the plaintiff paid 1,000*l.* to the firm, to be applied generally in part discharge of his debt, that, as it was applied by the bankers, must be taken to have been applied in part discharge of what was due on the promissory note. There was no specific appropriation in the books, and none stated to be in the evidence; and I presume the pass-books are an exact copy of the ledger, and if so, the consequence would be that after that payment, only 500*l.* was due on the promissory note. The promissory note could not be made a security for 1,000*l.* afterwards advanced to the plaintiff in May 1851, because it was not expressed to be made for the purpose of securing further advances; when the plaintiff, in May 1852, paid the further sum of 500*l.* in part discharge of what was due from him, that sum must be applied in discharge of the earlier debt, namely, that due on the note according to the principle of *Clayton's case* (5), and

(3) 1 Camp. 19.

(4) 16 Beav. 516; s. c. 22 Law J. Rep. (n.s.) Chanc. 630.

(5) 1 Mer. 572.

Devaynes v. Noble. * If this be correct, the consequence will be that in June 1852, nothing was due on that note. At the same time, it is but proper to observe, that the note was never cancelled; and that it was not payable on demand, but at four months after date, and was indorsed over to Mrs. Gore when it was overdue: she, therefore, took it subject to all equities that attached to it. It is not easy to imagine that anybody could attach much value to the indorsement of a note twelve years after date, and due eleven years and a half before it was indorsed. No notice of this indorsement was ever given to the debtor.

In May 1851, the firm, consisting of Sir J. D. Paul, and his son, W. Strahan, and R. M. Bates, advanced 1,000*l.* to the plaintiff, being debtor by specialty for 8,000*l.*, and by simple contract for 500*l.* In May of the following year, the plaintiff paid them a sum of 500*l.*, which must be applied in discharge of the former simple contract debt of 500*l.* Independently of the specialty debt, he owed the firm 1,000*l.* on simple contract for money advanced to him by the firm after the assignment of the bonds to the defendants, and a sum of money not secured by these bonds. When the firm failed, he was a creditor of that same firm on his general account for 1,505*l.* 1*s.* 5*d.* Both in law and in equity the plaintiff is entitled to set off 1,000*l.* part of the balance due to him against this 1,000*l.* due from him to the firm, and the advance made in May 1851. This particular debt of 1,000*l.* was never assigned to the trustees of Mrs. Fitzgerald's marriage settlement, or to Mrs. Gore; it was not secured by the promissory note; no one made or could make any claim, either at law or in equity, in respect of it, against General Cavendish, except the bankers, and they owed him 1,505*l.* 1*s.* 5*d.*; the debtor and creditors are the same, and the debt is of the same kind. The rights of set-off in respect of this sum are complete, and the right of set-off against the money due on the bonds only affects the 500*l.*, the balance of the general account. This question must depend on whether the plaintiff had distinct notice of the assignment of the bonds to the several and successive partners constituting the firm with

which he dealt; if he had, and if he treated them as the owners in equity of the bonds given by him to Mr. Snow and Sir J. D. Paul, and as such paid them the interest on the bonds, and if besides this he had no notice of any assignment of the bonds by them to other persons, then, as against the firm, and also as against all persons claiming through them, he is entitled to set off the balance due to him by simple contract against the debt due from him on specialty; and, further, if this be so, the assignees of the bonds from the firm having given no notice of the assignment to the obligor, are bound by the equities which bind the assignors, and are compellable to allow this set-off to the plaintiff.

No other notice was given to the plaintiff than that appearing from the entries in his pass-books which passed between him and the firm: three of these pass-books are produced; the first began in January 1836; the prior pass-books are of no importance because no change took place in the partners constituting the firm from the date of the bonds until after January 1836, when R. Snow the elder retired. These three pass-books extend from the 1st of January 1836 down to the stoppage of the firm; the first is entitled "The Hon. Henry Frederick Compton Cavendish, in account with Messrs. Snow, Strahan & Pauls." This, therefore, contains information to the plaintiff that the firm consisted of Snow, Strahan and the two Pauls. On the 30th of June there is an item by which the plaintiff is debited in account with the payment of interest for six months on 8,000*l.* to Snow & Co., at 4*l.* per cent. per annum. A similar entry occurs at the end of December in that year; a similar entry to Snow & Co. of six months' interest on 8,000*l.* occurs on the 30th of June 1837, and on the 30th of December 1837. The entries for interest are in the same words and at the same times in 1838 and in 1839, until December 1839, when the interest appears to have been raised to 5*l.* per cent., but this pass-book contains no notice of the alteration of the firm by the retirement of the elder Mr. Snow. The entries continue the same down to the close of 1841, when the first pass-book ends, and a new pass-book begins. In this pass-book the title

of the account is, "The plaintiff in account with Messrs. Strahan, Pauls & Bates," giving information that the firm then consisted of Mr. Strahan, the two Pauls, and Mr. Bates. In this account there is no entry of payment of interest in June, but on the 30th of December 1842, is the following entry: "Strahan & Co. on 8,000*l.*, 194*l.* 3*s.* 4*d.*" that is, the interest for six months, less income-tax; and immediately after this follow two items, one of which is in these words: "Omitted, June 30th, Strahan & Co. for 8,000*l.*, 200*l.*" This is a distinct notice to the plaintiff that the interest paid by him heretofore on the two bonds to Snow & Co. was now paid by the firm to Strahan & Co., and it is important to observe that one of the obligees of the two bonds was still a partner in the new firm. The same entries continue through this pass-book, with the exception that the interest is reduced to 4*½* per cent., and with this addition that immediately following it, after December 1843, the pass-book contains entries of the payment of interest on the 1,500*l.* advanced by the firm. This continues down to the middle of June 1847. The third and last pass-book begins with the 24th of June 1847. It is entitled, like the former, "The Hon. Henry Frederick Compton Cavendish, in account with Strahan, Pauls & Bates." On the 30th of June 1847 is the entry on the debit side of the account of "Strahan & Co., six months, 230*l.* 11*s.* 6*d.*," the interest on the two sums, both the bonds and the simple contract debt of 1,500*l.*, being united together. In December 1847, the first entry after the assignment of the bonds to the defendants, they are separated, the interest on the 3,000*l.* being one item and the other being interest on the 6,500*l.*, thus uniting the simple contract debt to the bond for 5,000*l.*, but interest on both is expressed to be paid to Strahan & Co. The same course is adopted in the entries on the 1st of January 1848. On the 27th of November in that year is an entry on the debit side, "Strahan & Co. principal and interest, 1,020*l.* 10*s.* 11*d.*" This is the 1,000*l.* which had been paid off; and, accordingly, the next entry of the payment of interest, which is on the 30th of December 1848, is, "Strahan & Co. six months on 5,500*l.* Ditto, six months on

3,000*l.*" The same entries occur on the 29th of December 1849, the same in June and December 1850, except that though the account of the interest is the same, the principal sums are not mentioned. In June 1851, besides the entries for interest, specifying the sums 5,500*l.* and 3,000*l.*, is a third entry for interest on 1,000*l.* for fifty-five days, being the sum advanced by the firm in May 1851. In December 1851 the entries are interest on the 3,000*l.* and interest on 6,500*l.* In May 1852 is an entry of payment of principal and interest on 500*l.* by the plaintiff to the firm of Strahan & Co.; and on the 30th of June and the 31st of July the entry of the payment of interest is on 3,000*l.* and on 6,000*l.*, and so is the same entry in December 1852, in July and December 1853, and in June and December 1854, which is the last entry in the book on this subject, as the firm stopped payment on the 9th of June 1855.

These entries of interest are distinct notice to the plaintiff that Strahan & Co. were the holders of the bonds given to Snow and Paul, and that they were entitled to receive the interest on these bonds, and if, after seeing and allowing these entries to go unquestioned, the plaintiff had privately paid the interest or principal to the elder Mr. Snow, or to the executors of Sir John D. Paul, the surviving obligee of the bond, he could not successfully have contended in equity that this payment was a good discharge of the interest and principal as between himself and the firm of Strahan & Co. The payees of the interest are specified, and altered to correspond with the alteration in the style of the firm. If the entry had been six months on 3,000*l.* to Mrs. Fitzgerald or the trustees of her settlement, or six months on 5,000*l.* to Mrs. Gore, I should have held the plaintiff bound with notice that the persons so named were entitled to receive the interest on the bonds, and, consequently, that the bonds had been assigned. This must be considered a notice to the plaintiff, and acquiesced in by him, that the bonds had been assigned to the successive firms. The separation of the 8,000*l.* into two sums of 3,000*l.* and 5,000*l.* was not a notice that other persons than Strahan & Co. were entitled to receive the interest, the more especially as the capital of the

further advances made by the firm was united to the capital of one of these bonds. If, therefore, the plaintiff had paid to Strahan & Co. the 8,000*l.*, this would have been a good discharge of all his liabilities on the bonds as against the assignees of them, of whom the plaintiff had no notice. It follows, then, that the right of set-off stands exactly in the same situation. Neither the trustees nor the *cestuis que trust* of Mrs. Fitzgerald's settlement, nor Mrs. Gore, thought fit to give General Cavendish notice of the assignment of the bonds under which they claim. They must, therefore, stand in the same situation as their assignors, so far as regards the plaintiff; and as between the plaintiff and the firm, the right of set-off exists to the extent claimed by the plaintiff. Were it otherwise, in taking the account, General Cavendish would not be allowed any of the payments of interest made to the firm which had not been accounted for by the firm to the defendants, and if the assignees of these bonds had not received interest on the bonds, they would be entitled to claim it against the plaintiff to the extent not barred by the Statute of Limitations.

The decision in *Ex parte Geaves, in re Strahan*, has not, as contended, decided differently. The evidence is different; the questions are quite distinct, and it may well be that these bonds were not in the order and disposition of the bankrupts, as the reputed owners thereof, and yet that the assignees of them are bound by the same equities of set-off, as against the plaintiff, which would have attached in case the bankrupts had been the persons beneficially interested in the bonds. The facts of the case, therefore, bring it within the principles on which set-off depends, and the assignees of the bond must stand in the same situation as the assignors; and the assignors being the firm, or the members of the firm, and the assignment being for money advanced to the firm, as between themselves and the plaintiff, the assignees stand in the same situation in equity as they would have done at law, if the original firm had continued unchanged to the present time, in which case a right of set-off would have existed at law, and could not have been

disputed here. The plaintiff, therefore, is entitled to set off the balance of his account against, in the first place, the 1,000*l.* advanced to him by the firm in May 1851; and, secondly, any balance that may remain due to him, over and above that sum, against the amount due from him on the security of the two bonds in question. The way in which this will be worked out practically will be, that the 1,000*l.* of the balance will be set off against 1,000*l.* advanced by the firm to the plaintiff in May 1851, and that the 505*l.* 1*s.* 5*d.* remaining will be set off against the two bonds, to be apportioned as against each, according to their respective amounts. This is assuming all interest to be paid. The account of interest may follow the amounts, but will not affect the principle. General Cavendish is, consequently, entitled to a decree, and he is also entitled to the costs of the suit up to the present time, which have been occasioned by the resistance to this claim. If the decree stands, it will scarcely be necessary to take the account, but upon the payments being verified by affidavit, a decree may be taken for the amount at once. The plaintiff must pay the costs of the assignees. They were made defendants, and the suit prosecuted against them, after it was known that they disclaimed all interest in these bonds, or in the promissory note, or, in fact, in the question in the cause. I hesitated as to whether there was nothing due on the promissory note; but I have treated their disclaimer as extending to the whole amount that was due; and, in that view, they are entitled to their costs.

M.R.
Dec. 7, 8, 9, 10. } THE ATTORNEY GENERAL
1858. } v. THE DEAN AND CANONS
Jan. 19. } OF WINDSOR.

Charity—Overplus—Increase.

If lands are given to a corporation, subject to certain specified charges for charitable purposes, the increased rents will belong to the donees of the lands.

This was an information filed by the Attorney General *ex officio*.

The Royal Castle at Windsor was built by William the Conqueror in 1067; it was enlarged by Henry the First, who erected a chapel and founded a college for eight canons, who were to be maintained by an annual pension, payable out of the Royal Exchequer. Edward the Second subsequently founded, in the castle, a chantry for four chaplains and two clerks; he also founded, in the Royal Park adjoining, another chantry for four chaplains: but this was afterwards removed by Edward the Third, and annexed to the chapel in the Castle; he also completed the Royal Chapel; and about the same time he founded, in the said college or chapel, the Most Noble Order of the Garter. The chapel was subsequently enlarged by Edward the Fourth and other monarchs of England, and it now is the Royal Chapel of St. George in Windsor Castle.

Edward the Third, by letters patent, dated the 6th of August 1348, after reciting that he desired to increase the number of canons and their income, he ordained and established one *custos*, or president, and fifteen further canons, twenty-four poor knights impotent of themselves, or inclining to poverty, and for ever to be supported of the goods of the chapel, and other ministers of the chapel; and he willed that the canons should celebrate divine service; and the king, for him and his heirs, gave and granted the rights of patronage and the advowsons of the Churches of Wyndesbury and Southtanton and Uttoxeter, to hold to them and their successors in free and perpetual alms, and free from all secular exactions for ever, and he granted licence to the *custos* and canons to appropriate the said churches, and so to hold them to their use and to the use of their successors for ever, the Statute of Mortmain notwithstanding (1); and he further willed, that the *custos*, canons, knights and ministers should have so much bestowed from his treasury in each year, as with the emoluments of the said churches should seem sufficient for their diet, and the support of the charges incumbent on them according to the fitness of their station until he should provide immovable goods,

lands, benefits or rents to the extent of 1,000*l.* per annum.

About the same time Edward the Third founded the Most Noble Order of the Garter, and the 34th statute or ordinance of his Majesty relating to such order provided, that so many veteran knights reduced to poverty as equalled the companions of the said order in number should be appointed to offer prayers, receiving there *wherewith to live*, if they had not sufficient of their own, and that the choice of them, as of the canons, should belong to the sovereign of the order.

The king shortly afterwards increased the number of canons and poor knights by two, making twenty-six of each, being the number of the sovereign and knights companions of the Order of the Garter.

Pope Clement the Sixth, by a bull, dated at Avignon, in the ninth year of his pontificate, 1350 (1351), and directed to the Archbishop of Canterbury, and the Bishop of Winchester, sanctioned the foundation: and by another bull, in the same year, he exempted the canons, presbyters, clerks, poor knights and ministers, when endowed, from all archiepiscopal and episcopal jurisdiction, and the *custos* was to take cure of souls from the Bishop of Sarum.

The foundation and endowment were certified, in 1352, by William de Wykeham, the Bishop of Winchester, who had been the king's surveyor in the completion of the castle, and he gave spiritual and ecclesiastical jurisdiction to the *custos* over the canons and others, but he gave to each member of the college a right of appeal to the Lord High Chancellor of England. Annexed to this was an entire body of the statutes of the college and chapel, dated the 30th of November 1352. These were signed by the king, William de Wykeham, the Bishop and Chapter of Sarum and William Mugg, the first *custos* and the canons of the chapel, and they have uniformly been and still are subject to modifications made by the Lord Chancellor, and by the statutes of the Order of the Garter.

By the statutes of the order made by Edward the Third, the sovereign and twenty-five knights companions were and are the complete Chapter, under whom

(1) 7 Edw. 1. stat. 2. c. 1.

were instituted a *custos* and twenty-five canons, twelve secular (or *majores*) and thirteen vicarial (or *minores canonici*), and a governor and twenty-five other alms or poor knights. The first *custos* and governor were nominated by the king, but each of the twenty-five first knights companions had the privilege of presenting his canon and alms knight. The future presentations, however, were all to be in the sovereign.

William de Wykeham, by the statutes of the college and chapel, after investing the canons with *jus canoniale*, empowered them to hold and enjoy all rights and properties of all ecclesiastical benefices, lands, manors and hereditaments then granted to belong in common to the *custos*, canons and other ministers, including, as now insisted, the poor knights. The second statute provided that the *custos* should receive yearly, *nomine custodiæ suæ*, 100 marks sterling, or the value thereof in other money, and that the *custos* and each of the canons should receive 40s. a year like money for their share of the prebends, &c., and 12d. a day for and during their residence, by the name of quotidian distributions. By the third statute the vicars were to receive from their prebends 8 marks yearly of like money, the deacon and sub-deacon clerks each of them 8 marks yearly, and other two clerks each 6 marks, and each of the clerical choristers 5 marks yearly. By the fifth statute the alms knights were to receive 12d. a day *pro quotidiano victu*, and 40s. a year for all other necessities. The nineteenth statute provided that after the above payments to the *custos*, canons, alms knights, vicars, clerks, choristers, and the other *onera capellæ incumbentiæ*, are discharged, a third part of the overplus or remainder of the revenues of the said chapel and college should be deposited every year in the treasury for extraordinary cases, as fire, murrain, &c., or in defence of the rights of the college and chapel, or for increasing the revenues thereof.

By the 8 Hen. 6. (A.D. 1429), after reciting that the foundation of the chapel consisted of a warden, canons, poor knights, and other ministers, and that in the statutes of the Order of the Garter the "warden" was written "dean," and that from the foundation of the chapel the "wardens"

had been usually called "deans," and that divers persons had given to the chapel lands, rents and goods under the several names of "warden and chaplains," "dean," "warden and canons," "dean and chapter," or "college," it was enacted, that the warden or dean and canons by the name of "the Warden or Dean and Canons of our Free Chapel of St. George within our Castle of Windsor," might hold the said lands, rents and possessions.

Differences afterwards arose between the dean and canons and the alms knights respecting the revenues of the chapel, and by the 22 Edw. 4. (A.D. 1482) it was ordained, that the dean and canons of the chapel should be incorporated in thing and name by the name of "the Dean and Canons of the King's Free Chapel of St. George within the Castle of Windsor"; that they should have power to acquire and hold lands in perpetuity; that letters patent of the 6th of December, in the 19th year of his Majesty's reign, and all other letters patent of his progenitors made to the dean and canons or to any of their predecessors or ministers of the chapel or college, by whatever name, should be good to the then dean and canons and to their successors, as if they had been incorporated from the foundation, and other of the letters and grants, collations and confirmations had been originally made to them in their corporate name. It was also ordained, that they should enjoy all lands, &c. and possessions, by whatsoever name the same should have been given to them by the king or his progenitors, saving the right of all persons existing before the act.

The act further recited, that by the foundation sustentation was to be found out of the goods and possessions of the chapel for the poor knights, and that from the king's increase of ministers, the goods and possessions were insufficient to sustain all the charges, and that the king had provided otherwise for the poor knights, it was ordained that the dean, and canons and their successors should be utterly discharged from all manner of exhibition or charge for any of the same poor knights.

The king, however, never made any permanent provision for the poor knights, and in the reign of Henry the Seventh,

they petitioned the king and parliament to repeal the act, alleging that it was obtained by surprise and fraudulent representation, and without their knowledge.

The sovereign, however, from time to time, notwithstanding the act, appointed the poor knights (now reduced to thirteen), and they continued and still reside as before in the houses appropriated for them in the Castle, and are maintained by the Crown.

By a warrant of his late Majesty, William the Fourth, as sovereign of the most honourable and noble Order of the Garter, and dated the 17th of September 1833, the poor knights are now designated as "the Military Knights of Windsor."

About 1511 Henry the Eighth appointed Peter Narbonne to be an alms knight, and at the request of the king, the dean and canons gave him a maintenance of 20 marks per annum, for which his Majesty, by letter, dated the 18th of July 1511, thanked them, and stated that he would not bother them further, but that he would settle lands for the maintenance of the alms knights; but by an indenture, dated the 18th of July 1511, Peter Narbonne covenanted with Nicholas West, the then dean, and the canons to relinquish the pension when his Majesty should grant and settle lands to the chapel and college unto the deans and canons for the maintenance of the alms knights.

In 1546, the dean and canons, by indenture, conveyed the manor of Ivor, in the county of Bucks, with other hereditaments valued at 160*l.* 2*s.* 4*d.*, to his Majesty, Henry the Eighth, in exchange for other hereditaments to be conveyed.

No such lands were ever conveyed by the king; but by his will, dated the 30th of December 1546, his Majesty gave directions, which he commended to his son the Prince, afterwards Edward the Sixth, who subsequently carried the same into effect, and by several assurances granted the parsonages and churches of Bradninch, Northam, Iplepen, Ilsington and South Molton, in the county of Devon, and divers prebends, parsonages, tithes and hereditaments now called the New Dotation, to hold the same to the use of

the dean and canons and their successors, to hold of the king, his heirs and successors in free alms. These documents it is unnecessary to repeat, as they are stated in the judgment.

The information now prayed for a declaration, that the whole of the lands in the letters patent of the 7th of October 1547, granted to the dean and canons, except those granted as a recompense for those which they had granted to the Crown, were granted upon charitable trusts, and for the purposes of the will of his Majesty Henry the Eighth, by the indenture of the 5th of August 1547, and that the objects were entitled to participate proportionately in the improved rental. It then prayed that the objects of the New Dotation might be ascertained, and that a scheme might be settled for the future application of the income. It also asked for accounts of the lands of the New Dotation and of the income thereof, and for all necessary inquiries, and for a receiver.

The Attorney General, Mr. Selwyn and Mr. T. H. Terrell, in support of the information, cited—

Moggeridge v. Thackwell, 7 Ves. 36.

The Attorney General v. the Mayor of Bristol, 2 Jac. & W. 294.

The Attorney General v. Caius College, 2 Keen, 150; s. c. 6 Law J. Rep. (n.s.) Chanc. 282.

The Attorney General v. Heelis, 2 Sim. & S. 67; s. c. 2 Law J. Rep. Chanc. 189.

Nightingale v. Goulburn, 5 Hare, 484; s. c. 16 Law J. Rep. (n.s.) Chanc. 270 : affirmed 17 Law J. Rep. (n.s.) Chanc. 296.

Mr. Teed, Mr. Follett and Mr. Dew-snap represented the military knights of Windsor, and referred to—

The Attorney General v. the Skinners Company, 2 Russ. 407; s. c. 5 Sim. 596.

The Attorney General v. the Mayor and Corporation of Beverley, 6 H.L. Cas. 310; s. c. 27 Law J. Rep. (n.s.) Chanc. 66; 15 Beav. 540; 6 De Gex, M. & G. 256; 24 Law J. Rep. (n.s.) Chanc. 374.

Mr. Bernard and Mr. Cracknall, for other of the military knights, referred to *The Attorney General v. the Mayor of Coventry* (1).

The Solicitor General and Mr. Wickens, for the Crown.

Mr. R. Palmer and Mr. Hobhouse, for the Dean and Canons of Windsor, cited—*Page v. Leapingwell*, 18 Ves. 463.

43 Eliz. c. 4. 'Charitable Uses.'

The Mayor of Southmolton v. the Attorney General, 5 H.L. Cas. 1; s. c. 23 Law J. Rep. (N.S.) Chanc. 567; 14 Beav. 357.

The Attorney General v. the Cordwainers Company, 3 Myl. & K. 534. *Jack v. Burnett*, 12 Cl. & F. 812.

The Attorney General v. Smythies, 2 Russ. & M. 717; s. c. 2 Law J. Rep. (N.S.) Chanc. 58.

The Attorney General v. the Grocers Company, 6 Beav. 526; s. c. 12 Law J. Rep. (N.S.) Chanc. 195. 4 & 5 Vict. c. 39.

Mr. Dugmore and Mr. Fleming, for the Ecclesiastical Commissioners.

Mr. Selwyn, in reply.

THE MASTER OF THE ROLLS.—This information seeks to obtain a new distribution of the property granted to the Dean and Canons of Windsor by Edward the Sixth, in accordance with what is alleged to be the trusts properly attaching to it. The object is that, under such re-distribution, the poor knights of Windsor may receive such a share of the charity as they were originally intended to receive, or if it shall appear that the whole property is given upon charitable trusts which were not validly or accurately defined, then that the whole money may be distributed, according to a scheme for that purpose, to be settled by the Court. To this information, the Ecclesiastical Commissioners, Her Majesty's Solicitor General and the poor knights of Windsor are made parties. The Ecclesiastical Commissioners are made defendants, by reason of certain portions of the property derived under the grant of Edward the Sixth having been vested in them, for the purposes specified

by 3 & 4 Vict. c. 113. Their case is, that whoever may be the *cestuis que trust*, and on the assumption that the Court shall make a decree establishing such trusts, still, as Ecclesiastical Commissioners, being the persons in whom the property is vested, by the 3 & 4 Vict. c. 113, they are entitled to hold the property discharged of those trusts; this, however, is an erroneous view of the construction and effect of the statute. It is true that the general saving clause protecting the rights and interests of all absent parties, which is invariably inserted in all private acts of parliament, is not to be found in the present, which is a public act; but I apprehend that the introduction of this general clause in private acts of parliament arises *ex majore cautela*, and that the omission of it in public statutes, transferring property from one body to another, does not infer that the legislature thereby intended to defeat the interests of absent parties, whose rights they had no knowledge or notice of; and when such is the intention of the legislature, a clause is introduced expressly for that purpose, as in the 12 & 13 Vict. c. 77. relative to the sale of encumbered estates in Ireland, declaring that the estate conferred by parliament is to be infeasible. Here the legislature intended to transfer certain property from the Dean and Canons of Windsor to the Ecclesiastical Commissioners for certain ecclesiastical purposes but in so doing, it did not intend to render the title of the dean and canons valid as to lands they were not entitled to hold. If, therefore, it should afterwards appear that the property so transferred was, while in the hands of the Dean and Canons of Windsor, subject to a trust in favour of others, and that this trust has not been taken away by the statute, it still continues in force on the property in the hands of the Ecclesiastical Commissioners. In other words, what is conveyed to the Ecclesiastical Commissioners by the act of parliament, is the interest of the Dean and Canons in the property specified, and that the interest of others, not at that time known to, or considered, and who were not, if I may so say, before parliament when that act was passed, is not affected thereby. The question, therefore, as re-

(1) 7 Bro. P.C. 235, 2nd edit.

gards the Ecclesiastical Commissioners, stands exactly upon the same grounds as that of the Dean and Canons of Windsor, and the property so given will be subject to the same trusts, if any, that attach to the property in favour of the poor knights of Windsor in the possession of the Commissioners, as if it were in the possession of the dean and canons.

The Solicitor General was made a defendant by reason of some interest in the Crown of a private and individual character, which might result from the original grant and the mode of administering the property, and distinct from the rights of the Crown as *parens patriæ* in favour of the charitable trusts, and which are properly represented by the Attorney General.

The poor knights of Windsor, in one sense, support the information, but only in a qualified manner, and only so far as it seeks for such relief which might ultimately give them an increased share and interest in the estates in question. They contend that they were the original and principal objects of the charity, and what is required for the purpose of duly executing the trusts impressed upon the property granted by Edward the Sixth is, to give them the same share of the rents of the property as they had when the new dotation was made. The Attorney General, however, has contended that the residue of the whole property, subject to certain specified charges, is given to, or impressed with a general charitable trust; and that this having failed, or not having been validly or sufficiently expressed, it becomes the duty of the Court to direct the mode of application thereof by a scheme to be settled for that purpose.

The question in the cause, which has been agitated without being decided for two centuries and upwards, is the ascertaining and defining of the character in which, and subject to what trusts and obligations the Dean and Canons of Windsor held the property derived from Edward the Sixth, prior to the act transferring a portion of it to the Ecclesiastical Commissioners, and what is the extent of such trusts and obligations, if any, as may be still subsisting. It is necessary to examine the evidence which has been adduced

in this cause. I feel but little doubt that all the material evidence which is extant has been brought to the attention of the Court. The mass of it is considerable; little of it is without weight, but the bearing of the different portions of it vary considerably.

The evidence of paramount importance is, first, the deed or original grant by Edward the Sixth; secondly, such documents as explain, or assist in explaining and construing the tenour of those documents; thirdly, the evidence of usage and dealing with the property by the parties concerned. I think it unnecessary to go into any circumstances connected with the original constitution of the charity, or the history of it prior to the time of Henry the Eighth. It is sufficient to remark, that the Dean and Canons of Windsor and the poor knights were originally a part of, or intimately connected with the establishment of the Order of the Garter, all of whom, as well as the knights companions of the Garter, were under the special patronage and protection of the sovereign of the realm, who was and is the sovereign of the Order. The number of the poor knights, as distinguished from the knights companions, was reduced from the number originally contemplated; and although a sufficient endowment had been afforded for the support of the dean and canons in the time of Edward the Fourth, which is called the old dotation, no endowment had been made by the Crown for the support of the poor knights. Henry the Eighth seems to have had it in contemplation very early to repair this deficiency, and accordingly as early as the year 1511, when he requested the dean and canons to provide for the support of Peter Narbonne as a poor knight, he referred to the promise he had made to grant lands to the college of the dean and canons for the purpose of making a provision for the poor knights, and he proceeded then to confirm that promise. Nothing, however, was done by him in this respect, and it was not till the reign of Edward the Sixth that any grant of land or endowment was made. Indeed, Henry the Eighth, so far from carrying his purpose into effect, had, in the last years of his reign, taken from the dean and canons lands and hereditaments of the

annual value of 160*l.* 2*s.* 4*d.*, in exchange for nothing more substantial than a promise made by him to convey, at some future time not specified, lands and hereditaments of equal value to the Dean and Canons of Windsor, but which promise he did not live to perform. He did, however, by his will, bearing date the 30th of December 1546, refer expressly to this subject, and as far as in him lay at that time he made such provision as he could for the purpose of inducing his successor to carry this promise into execution. This document is one of great importance for the decision of the question, and having regard to the manner in which it is referred to in the instrument constituting the grant, it may be regarded almost in the same light as the instrument of Edward the Sixth. It is, however, important to estimate it at its real value, which was, so far as regards the conferring of any rights on the dean and canons, or on the poor knights, wholly valueless. It passed nothing. Under it no one took any lands or any interest in any land. The value of that document is, that instigated by this will, Edward the Sixth, under the advice of his councillors, made the grant in question, and this will, therefore, must be regarded as the source from whence the bounty of Edward the Sixth flowed, and must be looked at for the purpose of explaining exactly whatever is ambiguous in the grant of Edward the Sixth. If the documents are contradictory the grant of Edward the Sixth is paramount. That monarch was under no obligation, other than a moral one, to comply with the will of his father; if he has done so in a different manner to that pointed out by the father's will, still the grant by the son is paramount and must govern the question. Regarding the will in this limited manner it is still of the highest value and interest. That portion which relates to this part of the subject is in the following words:—"Also we will that with as convenient speed as may be done after our departure out of this world, if it be not done in our life, that the Dean and Canons of our Free Chapel of St. George within our Castle of Windsor shall have manors, lands, tenements and spiritual promotions to the yearly value of 600*l.* over all charges, made

sure to them and their successors for ever, upon these conditions hereafter ensuing; and for the due and full accomplishment and performance of all other things contained with the same in the form of an indenture, signed with our own hand, which shall be passed by way of covenant for that purpose between the said dean and canons and our executors, if it pass not between us and the said dean and canons in our life, that is to say, the said dean and canons and their successors for ever shall find two priests to say masses at the said altar to be made where we have before appointed our tomb to be made and stand, and also after our decease keep yearly four solemn *obits* for us within the said college of Windsor, and at every of the same *obits* to cause a solemn sermon to be made, and also at every of the said *obits* give to poor people in alms 10*l.*, and also to give for ever yearly to thirteen poor men which shall be called poor knights, to every of them twelve pence every day, and once in the year yearly for ever a long gown of white cloth with the garter upon the breast, embroidered with a shield and cross of St. George within the garter, and a mantle of red cloth, and to such one of the said thirteen poor knights as shall be appointed to be head and governor of them 3*l.* 6*s.* 8*d.* yearly for ever, over and besides the said twelve pence by the day. And also to cause every Sunday in the year for ever a sermon to be made for ever at Windsor aforesaid, as in the said indenture and covenant shall be more fully and particularly expressed. Willing, charging and requiring our son, Prince Edward, all our executors and councillors which shall be named hereafter, and all other our heirs and successors which shall be kings of this realm, as they will answer before Almighty God at the dreadful day of judgment, that they and every of them do see that the said indenture and assurance to be made between us and the said dean and canons, or between them and our executors, and all things therein contained, may be duly put in execution and observed and kept for ever perpetually according to this our last will and testament."

The observation which is obvious upon this will is, that the property is given to

the Dean and Canons of Windsor, on condition thereafter specified, to be secured by covenant to the dean and canons. It then specifies what those conditions are, and it might reasonably be contended that the dean and canons, taking the lands and performing the conditions, were entitled beneficially to any surplus that might remain after the due performance of such conditions. Henry the Eighth died the 23rd of January 1546-7, within a month after executing this will. Shortly after his decease his successor, Edward the Sixth, shewed a desire to carry the intentions of his father into effect; and on the 24th of February 1547 he took the advice of his Councillors and of the Barons of the Exchequer, the King's Serjeant, and the Attorney General and Solicitor General, for the purpose of ascertaining in what manner he could best effectuate the wishes of Henry the Eighth, and could best bind the dean and canons and their successors to fulfil any obligations or conditions which might be imposed on them. Accordingly, under the advice of his Councillors, and in the manner pointed out by the Barons and the other learned persons who were consulted, Edward the Sixth made the grant in question, which is called the New Dotation. The documents constituting this grant, and evidencing the terms and conditions on which it was made, are three in number, which bear date respectively the 2nd of August, the 4th of August and the 7th of October, 1547. The first of those documents is one professing to be the particulars of grant by Edward the Sixth to the Dean and Canons of Windsor, the grantees; it is extracted from the records of the Court of Augmentation. It enumerates the parcels of land and tithes of various rectories belonging to the Crown, and specifies the annual rental of them, which is there set down as amounting to the clear yearly sum of 812*l.* 12*s.* 9*d.* From this amount it says there is, first, to be deducted the sum of 160*l.* 2*s.* 4*d.* for the lands taken by Henry the Eighth; then the dotation of 600*l.* to the Dean and Canons of Windsor, in accomplishment of the will of Henry the Eighth, and the residue, amounting to 52*l.* 10*s.* 5*d.* is expressed to belong to the Crown; and it is stated that the king is pleased that the lands shall be

exonerated from all first fruits and tenths payable to the Crown. The document is signed by Sir Edward North, the Chancellor of that court, and it contains a memorandum, "that the Dean and Canons must be bound to observe and keep all such rules, orders and ordinances as shall be hereafter advised by the Lord Protector and other his co-executors, which is set forth in a book indented, or otherwise by indenture, to be subscribed with the hands of the said Lord Protector and the said executors, and delivered to the said Dean and Canons." It is a matter of some importance in the consideration of this memorandum, that it does not contemplate the necessity of the indenture which is to be prepared; and it sets forth the ordinances by which the dean and canons are to be bound, being executed by them. This will prove material when we come to consider the deed, not now forthcoming, alleged to have been executed by Queen Elizabeth.

The next document, of the 4th of August 1547, is the most important of the whole series. All the parties to this cause, as well as those who have an interest in the question to be here decided, must rely upon it. This indenture is that which imposed on the Dean and Canons of Windsor the obligation which they had to perform, as the condition of the grant which they were about to obtain. It is expressed to be made between the King, of the first part; the executors of the will of Henry the Eighth of the second part; and the Dean and Canons of Windsor, of the third part. It is duly executed by all the parties to it. It recites the will of Henry the Eighth; it recites that by his will he desired that all his grants which had not been perfected by him should be completed; it recites the appointment of the Council of State during the minority of Edward the Sixth; it recites the grant of the land and hereditaments of Ivor and Damarye Court by the Dean and Canons of Windsor to Henry the Eighth, amounting to 160*l.* 2*s.* 4*d.*, and that the dean and canons were still remaining unrecompensed in respect thereof; and it further recites the intention of Henry the Eighth, that all the lands shall be exonerated from tenths and first fruits. The indenture witnesses

that Edward the Sixth did thereby promise and grant, and that the Lord Protector and his co-executors did covenant and grant to the Dean and Canons of Windsor and their successors all the parsonages, lands, tithes and hereditaments constituting the new dotation, to hold the same to the dean and canons and their successors for ever; to hold of the king in free alms, and yielding yearly to the king, his heirs and successors 4*l.* 2*s.* 8*d.* in respect of a portion of the lands, and 48*l.* 7*s.* 9*d.* in respect of the residue thereof, making together 52*l.* 10*s.* 5*d.*, in full of all rents, services, tenths and first-fruits; and then it was witnessed, that the king was further pleased and contented, and the Lord Protector and other his co-executors covenanted to and with the dean and canons that the king should, by his letters patent, acquit and discharge the dean and canons and their successors from all manner of first-fruits and tenths; and further, that the king would within the space of three years, at the suit of the dean and canons of Windsor, do all such further acts, whether by letters patent or otherwise, as might be necessary for the purpose of confirmation or otherwise; and further, that at the day of the grant the land should be worth 760*l.* 2*s.* 4*d.* over and above the 52*l.* 10*s.* 5*d.*; and besides this, the indenture provided that the dean and canons were to take the rents from Michaelmas 1546. Then followed a covenant by which the dean and canons covenanted with the King and the Lord Protector and his co-executors, that they and their successors would employ the rents, revenues and profits of so much of the said hereditaments, to be granted to them in the form therein so far mentioned, as should amount to the said yearly sum of 600*l.*, or so much thereof as to the Lord Protector and his co-executors should be thought meet and convenient in and about such acts and purposes as the King, the Lord Protector and his co-executors should prescribe in a tripartite indenture, to be made between his Majesty, the Lord Protector, his co-executors, the dean and canons,—I shall have to refer to the exact words,—and also that the dean and canons and their executors would for ever observe, perform and fulfil

all and singular such acts, ordinances and rules as in the same indenture thereafter to be made should be specified and contained.

The third of these documents is the letters patent of the 7th of October 1547 under the Great Seal, whereby, as well in performance of the promises and requests by the will of Henry the Eighth made and declared, as in performance and fulfilment of the grants, covenants, and promises contained and specified in the indenture of the 4th of August, as in consideration of the hereditaments of Ivor and Damarye Court, given to Henry the Eighth by the dean and canons, the king granted to the dean and canons all the hereditaments therein described, which are the same as those specified in the indenture of the 4th of August 1547, to hold the same in free and perpetual alms unto and to the use of the dean and canons and their successors for ever, paying to the king, his heirs and successors for part of the said premises 4*l.* 2*s.* 8*d.*, and for the residue 48*l.* 7*s.* 9*d.* in lieu of all money, tenths and first-fruits, and the king exonerated all the hereditaments from the payment of tenths and first fruits, and gave them the rental from Michaelmas 1546.

Those instruments constitute what is called the New Dotation. The last instrument, that which vests the property in the dean and canons, is made, as it would be observed, in consideration of the lands taken by Henry the Eighth in performance of the promise contained in his will, and in performance of the covenants contained in the indenture of the 4th of August preceding the consideration. Therefore, it may properly be marshalled between the two parts of these instruments. Each applies to its particular portion. The lands worth 160*l.* 2*s.* 4*d.* are given in consideration of the lands of Ivor and Damarye Court taken by Henry the Eighth. The lands worth the 600*l.* are given in consideration of and in performance of the promise contained in the will of Henry the Eighth, and of the covenants contained in the indenture of the 4th of August 1547. And, accordingly, that instrument is that which will shew the character in which the dean and canons took the lands. There are obviously, therefore, two purposes:

prominently pointed out and kept distinct throughout these four documents, namely, the will of Henry the Eighth, and the three instruments of Edward the Sixth. One is, the restoration to the dean and canons of lands of equivalent value to those taken by Henry the Eighth; the next is, the grant of lands of the value of 600*l.* per annum for the purpose to be specified and settled hereafter; that the dean and canons took the hereditaments which corresponded in yearly value to the 160*l.* 2*s.* 4*d.* as their own property, to be held exactly as they held the hereditaments of Ivor and Damarie Court, as an equivalent for which they were given, is quite clear. The question is, in what character did the dean and canons take the hereditaments which produced at the time of the grant the 600*l.* per annum? If the matter stood upon these documents alone, and if no subsequent deed had been executed, and if the question were wholly unaffected by any subsequent usage or mode of dealing with the property, I should entertain a clear opinion that the dean and canons did not from this grant alone take any beneficial interest in this property, but that they took it upon trusts to be afterwards declared. It is true that the word "trust" is not used in the operative part of the deed of the 4th of August 1547, as it rarely is, if ever, to be found in the operative parts of instruments of that date; but the hereditaments are given to the dean and canons and their successors, in these words:—"The said lands, tenements and hereditaments to the said yearly value of 600*l.* to be had and made to the said dean and canons, and to their successors, to and for such uses, intents and purposes mentioned in the last will, and for the maintenance and performance of all and every such ordinance, rules, acts, and things as hereafter shall be limited, prescribed and appointed to the said dean and canons by our said Sovereign Lord the King, and the said Lord Protector and his said co-executors, or the more part of them in an indenture tripartite to be made between the same our Sovereign Lord, the said Lord Protector and his said co-executors, and the said dean and canons." And they covenant in the words following at a later part of the indenture:—"And

also the said dean and canons further covenanting, and by these presents granting to and with our said Sovereign Lord the King, the said Lord Protector and his said co-executors, that they, the same dean and canons and their successors shall bestow and employ the rents, revenues and profits of so much of the said prebends, parsonages and other the premises to be granted to the said dean and canons in form aforesaid as shall amount to the said yearly value of 600*l.*, or to so much thereof as to the said Lord Protector and his said co-executors shall be thought meet and convenient, in and about such acts, ordinances, intents and purposes as by our said Sovereign Lord the King, the said Lord Protector and his said co-executors shall be prescribed, limited and appointed in the said tripartite indenture hereafter to be made between the same our Sovereign Lord the King, the said Lord Protector and his said co-executors, and the said dean and canons. And also that they, the same dean and canons and their successors, shall for ever observe, perform and fulfil and keep all and singular such acts, ordinances and rules as in the same indenture hereafter to be made shall be specified and contained." Here it omits simply the words "intents and purposes," which are specified in the former part of the covenant. How do these words differ in substance from what would be the modern form, namely, a conveyance to the dean and canons to hold to them and their successors upon such uses, trusts, intents and purposes as should be hereafter specified? To me they appear to be equivalent, and that consistently with all the cases. If such intents and purposes were never afterwards specified a resulting trust would exist in favour of the grantor. It is unnecessary to refer to the cases upon this subject. All that are material are referred to in *The Corporation of Gloucester v. Wood* (2), where a testator had given a sum of money to the corporation for the purpose already mentioned, and he had not previously or subsequently stated any purpose whatever. The corporation took the property impressed with the trust which was not specified, and, consequently, they were held to take no beneficial interest but to be trustees

for the residuary legatees. The circumstance that the property was given as real estate instead of personal estate is unimportant. It is equally unimportant that the gift is made by deed instead of by will: it is equally immaterial that the giver was a king instead of a private individual. The same principle affects all the cases: they must all be governed by the same rule. On reading this indenture, I see a marked distinction between the grant to the dean and canons for themselves beneficially, and the grant to them for the intents and purposes to be specified in an indenture hereafter to be made.

It is suggested, on behalf of the informant, that, upon the face of this instrument, there appears to be a general dedication to charitable purposes; and if the matter rested there instead of there being a resulting trust in favour of the grantor there would be a general dedication of the property to charitable purposes, and if that is a trust in favour of unknown charitable purposes, this Court will execute that trust and settle a scheme for the application of the income. But I dissent from that view of the case. It is true that there is, both in the will of King Henry the Eighth and in the discussions in the subsequent reigns as to the means of carrying Henry the Eighth's will into effect, a desire to effect a charitable object; but it is a particular specified charitable object, namely, the support of the poor knights; and, therefore, if the indication of this intention is to govern the deed of the 4th of August 1547, it would be a trust for the poor knights: if that object failed, there would be no purpose expressed in favour of the charity generally, other than this particular one which this Court can carry into effect. But the real answer appears to be that this indication of intention does not alter or govern the deed of the 4th of August 1547, which is not to be construed by any evidence of the intention of the framers of it, or those who were parties to it, but which must be construed as it stands on the just meaning to be attributed to the words contained in it, which grants the property to be held upon trusts to be afterwards declared. If, therefore, this case were untouched by any subsequent transaction or usage, I should

be unable to discover from the documents more than this, that the hereditaments were granted to the dean and canons, in order that the rents might be employed for certain intents and purposes to be afterwards specified by the king and the executors of Henry the Eighth, but which was never done. The projected indenture, it is contended, was never in fact executed. This, at least, is clear, that no intents and purposes were ever specified by Edward the Sixth or the executors of Henry the Eighth, or the survivor of them. What, then, is the effect of this? On the part of the dean and canons it is argued, that as no such contemplated instrument was ever executed they took the property beneficially; but my opinion is in that event, that is, assuming that such contemplated indenture was never executed, a resulting trust would take effect in favour of the Crown, and that the beneficial interest in the property according to the true and just construction of the instrument of the 4th of August 1547 itself was not finally and completely parted with by the Crown. And I should hold that if the matter rested here alone the Solicitor General might contend, that the Crown was entitled to a beneficial interest in these hereditaments. The subsequent transactions, however, render it impossible, and the Solicitor General has not urged that case on behalf of Her Majesty. It becomes, however, highly important to see whether the view which I take of the construction of this instrument was that put upon it by the parties themselves, and how far their acts and conduct are in accordance with or contradict this view. The conduct of the dean and canons at the time of the execution of this grant, and for a considerable length of time subsequently, contradicts the notion that they took, or that they supposed they took, the property beneficially. In the first place, they kept the accounts of the hereditaments belonging to the old and the new dotation quite distinct; they set apart and carried over, as belonging to the old dotation, hereditaments sufficient to produce the 160*l.* 2*s.* 4*d.*, or rather, they did, in fact, devote for this purpose hereditaments producing 2*l.* 2*s.* 1*d.* more than was sufficient to answer the 160*l.* 2*s.* 4*d.*; and accordingly in their

book they charged their lands with that sum as payable to the object of the new dotation, and they carried over all the rest of the property and the rents accruing thereupon to the account of the new dotation. Some inference might possibly have been derived from the circumstance, if the fact had been so, that during the interval that had elapsed after the grant of the lands by letters patent in October 1547, the rents and revenues of all the hereditaments, until the dedication of them to some charitable purpose, had been employed by the dean and canons for their own use and benefit; but, as far as I can make out from the accounts which, on the whole, are carefully kept and well preserved, no portion of these revenues, or if any, certainly a very inconsiderable portion, was taken by the dean and canons for their own purposes beneficially. During the remainder of the reign of Edward the Sixth, of Mary, of Philip and Mary, and during the beginning of the reign of Elizabeth, until the next transaction occurred, to which I will presently refer, the income of the property seems to have been applied in building the new houses intended for the accommodation of the poor knights; and the extracts from the Ashmolean Manuscripts are admissible, and are *prima facie* evidence, at least, of this, that the rents of the hereditaments were employed as therein described. But what is of still greater importance is, the accounts of the rents received are duly rendered to the Crown, and audited by proper officers of the Crown appointed for that purpose, and no sum of money appears to have been applied or retained by the dean and canons which was not liable to be disallowed on the part of the Crown, and reasons were urged by the dean and canons for the consideration of the Lord Treasurer why particular items should be allowed; and during the whole of this period not a suggestion appears in any instrument, not even in their own books, of any claim made by the dean and canons to a beneficial interest in these hereditaments belonging to the new dotation. It is justly observed, that the usage or the mode of keeping the accounts cannot alter the rights of the parties; but here the whole of this usage in the accounts, the mode of keeping them, the mode of render-

ing them, and the mode of auditing them, and the application of the revenues, all tend to confirm the construction which I deem to be the true construction of the deed of the 4th of August 1547, when taken by itself, namely, that the dean and canons took these hereditaments for intents and purposes to be afterwards specified, and under the specification of which intents and purposes, and to the extent so specified, they took no beneficial interest therein. If no valid specification of the intents and purposes was ever made, then the dean and canons took nothing, but were bound to account to the Crown as the grantor in whose favour a resulting trust existed. If a valid specification of these intents and purposes was made, then those are to be carried into effect. In making these observations, I do not mean to prejudice any case that might arise where an original endowment or declaration of trust is to be inferred from long and continued usage. That case does not occur here, where the original deeds are all preserved, and the usage is conformable with them.

I come now to consider the document called the deed of distribution of the 18th of August 1559, expressed to be made by Queen Elizabeth of the first part, and the Dean and Canons of the second part. The questions which have been much discussed are—First, whether this deed had ever any existence as executed by the Queen; secondly, whether, if it had, it was executed by the dean and canons; and, thirdly, if not so executed, whether it had any validity or binding effect on them.

As to the existence of the deed originally, and that it was executed by the Queen, I do not entertain the slightest doubt. The fact that a copy of it appears in the books of the dean and canons, purporting to be so executed, that they admitted the possession of it for a considerable period, and all they disputed was the binding character of it against themselves,—all clearly prove the existence of such a document executed by the Queen; and the document produced from the Chapter House, which appears to be an engrossment originally of the document in another form, never executed, but afterwards altered into the shape in which it appears in the copy contained in the

book of the dean and canons, tends to confirm this view.

The next question urged, and which seems, from the reign of James the First, to have been always urged by the dean and canons, and which seems their principal ground of defence, is, whether the deed of Queen Elizabeth was executed by the dean and canons, and if not, whether it had any binding force upon them. If I thought that the execution of the deed was material, it would be difficult in the state of the evidence as to the existence of this deed to infer positively that it was not executed by the dean and canons. It is plain that they had the original in their possession, executed at least by the Queen, and that they made a copy of it in their books. Evidence is always to be taken most strongly against the persons who keep back a document, and the circumstance that the body keeping it back is a corporation does not affect this principle, although it exonerates the present members from the slightest blame in that respect. It is true it is urged that this deed is lost, and that nothing of wilful suppression is to be presumed against the predecessors of the present corporation, and yet the circumstances undoubtedly require explanation which they cannot now receive. The claim of the poor knights to a larger participation in the income of the charity arose in the reign of James the First, and has been continued, at intervals, with greater or less energy, down to the present time. The dean and canons always thought this deed of Queen Elizabeth, if held to be binding on them, would establish the title of the poor knights. Whether this belief of theirs was correct or not in law is immaterial. That such was their conviction appears from the result of the proceedings before the Judges in the reign of James the First, and before Sir Dudley Ryder in the reign of George the Second; the dean and canons always disputed the validity of this deed as against them, and claimed to be entitled to the lands beneficially under the grant of Edward the Sixth. It could not have failed to have been a matter of great advantage to them if the deed were not forthcoming. It was their duty to preserve it carefully, and the question with respect to it was continually arising. If I

considered the execution of that deed by the dean and canons as material for the decision of this case, I should hesitate before I could assume the non-execution of it by them; but I consider it wholly immaterial, and without such execution the deed of 1559 was binding to all intents and purposes on the dean and canons. If I am right in the construction which the deed of the 4th of August 1547 bears, so far as the hereditaments of the new dotation are concerned, the dean and canons, under the grant of Edward the Sixth, took no beneficial interest in them, but took them in trust as completely as if that word "trust" had been expressly used.

Those trusts, or as they are called in the instrument in question, the intents and purposes, were to be specified in and by some further indenture afterwards to be executed. But, unless it be the deed of distribution, executed by Queen Elizabeth, on the 13th of August 1559, no such indenture was ever executed. That deed was either a valid deed under the indenture of the 4th of August 1547, declaring the intents and purposes for which the dean and canons were to employ the revenues of the new dotation, or it was not. If it was, the question is disposed of, because the deed contemplated by the indenture of Edward the Sixth, of the 4th of August 1547, has been duly executed, binding the dean and canons and their successors for all time. If it was not, then no deed was executed in pursuance of the direction contained in the deed of the 4th of August 1547, and the resulting trust in favour of the Crown took effect, and then Queen Elizabeth might have resumed the hereditaments of the new dotation or disposed of them as she pleased. She did so dispose of them by this deed of distribution of the 13th of August 1559; it is only material in what character, whether it be under the power contained in the deed of the 4th of August 1547, or whether it be as a grant of the interest vested in her by reason of the resulting trust arising from such powers having ceased. In fact, it appears to be obvious that the question of a beneficial interest in the dean and canons under the grant of Edward the Sixth was never raised by them before the Queen, as, indeed, it could not have been; and it ap-

pears from the various documents, and from evidence of greater or less degree of weight preserved in the British Museum, the Ashmolean Museum at Oxford, and, above all, their own books, clear (as this evidence is admissible as having a bearing on the subject,) that the dean and canons never, till the reign of James the First, claimed a beneficial interest in these hereditaments, but that they accepted them and acted in accordance with the directions contained in the deed of distribution of Queen Elizabeth for a considerable period of time, and, indeed, so far as the fixed payments are mentioned in that deed, continued to do so down to the present time, to and this very day. The construction and effect of the deed of distribution are totally different matters, but the validity and binding effect of it appear incapable of being successfully contested at the present time. In truth, down to the present time, the whole question was supposed to turn on whether, under the grant of Edward the Sixth, they took the hereditaments of the new dotation beneficially, or merely as trustees, and this has been the point always urged and relied on by them. In the reign of James the First they contended for this and rested their case upon it. Their case was heard by Sir James Popham and Sir Edward Coke, in 1605, but the facts were not investigated, and it was assumed that their assertion was correct, but it does not appear that the deed of Edward the Sixth was produced or examined. Exactly the same course was pursued by Sir Dudley Ryder, who made a most careful and elaborate report of the hearing before him on this subject. He seems to have thought, and both the dean and canons and the poor knights seem to have assumed that if the deed of distribution of Queen Elizabeth was in force, the poor knights were entitled to an increased share of the rents of the property; and the sole point contested was the validity of that instrument, which seems, before Sir Dudley Ryder, to have been treated as depending on the terms of the grant of Edward the Sixth, under the deed of the 4th of August 1547. That deed was not produced. It was alleged that it could not be produced, and, in reality, it was not forthcoming; the consequence was, that the beneficial grant of

the hereditaments, originally to the dean and canons, so strenuously asserted by them, and which the will of Henry the Eighth seemed to support, was not disproved by the poor knights, and Sir Dudley Ryder made his decision, or rather his report, in favour of the dean and canons.

The concluding sentences of his report contained the essence of the whole matter: "upon the whole, it appears that the right to this demand of the poor knights is founded simply on the letters patent of Queen Elizabeth and the book thereto annexed. But it appears that the dean and canons had a right to the estate in question precedent thereto, and wholly independent of the letters patent; and it does not appear that the dean and canons ever executed any counterpart thereof, or acted under it in respect to the payments therein directed, excepting the small quarterly sums of 2s. and 20d., which being inserted among the rules for the government of the poor knights, by which the dean and canons were made in effect their visitors, and for their service in attending the solemn *obits* for their founders, may have been more easily submitted to. And as there has been this long acquiescence, both on the part of the poor knights and all others equally concerned in interest, except in one instance, where it was adjudged against their demand, I am humbly of opinion that the dean and canons are not bound by these letters patent of Queen Elizabeth to make the several payments directed by the ordinance contained in the book thereto annexed; and, therefore, whatever might be the construction thereof in case the dean and canons were bound by them in respect of a distribution of the improved revenues in proportion among the particular objects of that dotation, which may be a very doubtful question, yet I am humbly of opinion that the poor knights have not made out a title to any share of those improvements." He states before, that he wished to see a copy of the deed of the 4th of August 1547; but it was alleged it was not forthcoming. In truth, nothing could be clearer than that if the grant of the hereditaments was originally made to the dean and canons beneficially, except so far as they were directed to pay sums out of the revenues by some

instrument binding on them, the surplus rents and revenues belonged to the dean and canons, if the deed of Queen Elizabeth was valid, and the whole of them if the deed was invalid. But it is also equally clear, that if the dean and canons took the hereditaments originally as trustees, then to the extent that such trusts have been validly declared, they are to be performed, and that as to all surplus, if any, they are trustees for the heirs and successors of the original grantor, Edward the Sixth. In truth, however, the deed of distribution of Queen Elizabeth does dispose of the whole of the rents and revenues arising from the hereditaments of the new dotation. This, therefore, puts an end to any claim on behalf of the Crown, in what I may call its individual character; and, therefore, if I am right, the question in this case resolves itself into a consideration of what is the true and proper construction to be put on the deed of Queen Elizabeth. I must notice one point, which was urged by the dean and canons against that deed, which is, that the deed of Queen Elizabeth is not confined to the distribution of the revenues of the lands of the new dotation, but it disposes of the sum of 661*l.* 6*s.* 8*d.* annually; and it appears from the books of the dean and chapter that this was the total amount of rental in that year of all the hereditaments comprised in the grant to the dean and canons by the letters patent of Edward the Sixth, and which lands, to the extent of 160*l.* 2*s.* 4*d.* at least, were confessedly the property of the dean and canons, of which they were purchasers for value, having given the lands of Ivor and Damarye Court in exchange for them. It is certainly a matter difficult to explain, that the deed of distribution amounted only to 661*l.* 6*s.* 8*d.* a year; when the grant was made they amounted to 812*l.* 12*s.* 9*d.*, and the year before the deed of distribution they amounted to 815*l.* 11*s.* 11*d.*, and the year after the deed of distribution they amounted to 817*l.* 5*s.* 9*d.*; and there is also evidence that the dean and canons took fines for the leases granted, whether at this exact period or not I cannot say; these circumstances do not alter the view I expressed. I accede to the observations of the Chief Justice in the reign of James the

First, and of the Attorney General in the reign of George the Second. I think that this deed, unless executed or assented to by the dean and canons was legally inoperative, so far as it extended to the distribution of the hereditaments belonging to the dean and canons beneficially, that is, to the hereditaments which had been set apart, the rents of which had been carried over to the accounts of the old dotation, but that it was and is operative over the rest of the property; and that if it were not so, the dean and canons would be but mere trustees of that land in favour of the Crown. Therefore, although this fact is established, and though no sufficient elucidation of this subject is to be found in the evidence, still, so far as regards the lands of the new dotation, it can have no effect, except so far as it may affect the construction of the deed. The deed itself was obviously intended as an expression of the intents and purposes referred to in the deed of the 4th of August 1547. It recites that the poor knights were a principal object of the bounty of their predecessors, and it proceeds to distribute 430*l.* annually out of the rents for the purpose of effectuating this object; and the deed then disposes of the residue of the rents in the manner therein specified. It has been constantly acted upon in the following manner:—The rents of the hereditaments set apart to answer the 160*l.* 2*s.* 4*d.* have been deducted as belonging to the old dotation, the sum of 52*l.* 10*s.* 5*d.* has been paid to the Crown in lieu of tenths and first-fruits, a portion has been applied in making the fixed payments specified in the deed of distribution, and the residue has been divided among the Dean and Canons of Windsor as being a part of their possessions. Therefore the circumstance that the deed professes to deal with the rents and the revenues of the whole of the hereditaments, though it suggests various hypotheses to explain how that circumstance has arisen, does not render the deed invalid. All that it does is to introduce the consideration into the construction to be given to the deed, namely, that Queen Elizabeth made no distinction between one class of the revenues and the other class of the revenues arising from the hereditaments granted; but she directed

the application of both, whether with or without the assent of the dean and canons themselves, I know not.

Coming now to the consideration of the effect of the deed itself, as affecting the revenues of the hereditaments producing the 600*l.* per annum, and called the new dotation, it is to be observed that poor knights are the principal objects of the bounty of the Crown, and the institution of the charity. The whole of the transactions and the evidence shew this—the promise of Henry the Eighth, the grant of Edward the Sixth, the application of the revenues in the building of residences for them, the appointment of nine knights by Queen Mary, and four more by Queen Elizabeth, and then the recital in the deed itself, all establish the fact. For this purpose so expressed, she directs the dean and canons and their successors for ever, not only to cause her ordinances and rules to be observed, but also to bestow the rents, issues and profits of the hereditaments to such uses and intents as is hereafter declared. The deed then contains a series of ordinances all apparently pointing to the support of the poor knights, and how they are to proceed, and by what rules they are to be bound; and it then contains the Queen's ordinances for perpetual charges amounting altogether to 430*l.* 7*s.* 9*d.* Of those fixed payments, 288*l.* 6*s.* 4*d.* are for the poor knights; 94*l.* 19*s.* 10*d.* for the dean and canons, clerks, choristers and officers belonging to them; 20*l.* for four quarters' doles; and 26*l.* 13*s.* 4*d.* for the support of four scholars at the University;—certainly, therefore, to this extent pointing out that both the dean and canons and their officers are to be paid by fixed salaries as well as the poor knights, but giving the knights much the larger share. Then the deed disposes of the residue in these words—“which said lands and other the premises, amounting to the said sum of 661*l.* 6*s.* 8*d.*, we will and ordain, and by these presents declare, shall remain to the said dean and canons and to their successors for ever, that is to say, for the maintenance of the charges of 430*l.*, before declared; and the residue, being 231*l.* 6*s.* 8*d.*, to remain for the vicars' and serving priests' wages, when need requireth, reparation of the said lands,

the officers' fees, and for the relief of the said dean and canons and their successors.” And then it contains an entry afterwards, which it is not necessary to read.

It might seem naturally to follow from the observations that the view I have taken of this case, would be to lead to a decision in favour of the poor knights, but that is not so. Nor is it necessary to consider what would have been my view of this case if it had been presented to a Court of equity some years back; but upon a full construction and consideration of the deed before me, I cannot arrive at that conclusion. I abstain, therefore, from entering into any detailed discussion as to the effect of the final provisions of the deed or of the deed itself, or into an examination of the previous deeds on this subject. The view I have taken in similar cases is expressed in the observations I made in *The Attorney General v. the Mayor and Corporation of Beverley*, but the judgment of the House of Lords, in that case, clearly governs the present case; and all the observations of their Lordships, in giving judgment, are applicable to this deed of distribution. In fact, *The Attorney General v. the Mayor and Corporation of Beverley* was a stronger case than the present, and the decision of the House of Lords is binding on all the Courts except itself; the Lord Chancellor, indeed, introduces a special warning in his judgment to the inferior Courts, reminding them of their duty to follow that decision. The House of Lords alone can, if it thinks fit, decline to apply the principle of that case to the present. I forbear going into this case. I follow the expressions used by Sir Dudley Ryder in saying that the question is one of very considerable difficulty and nicety, but that it is clearly and plainly governed by the latter decision in the House of Lords. The consequence is that the dean and canons must be declared entitled to the surplus of the rents, and that the whole of the residue of the income arising from the hereditaments, whatever might have been the intention of the grantor of these hereditaments and the founder of this institution, is applicable as the income of the dean and canons, except so far as they have been diverted by act of parliament to the Ecclesiastical Commissioners.

I have already stated that no question would be decided in favour of the instrument depending on a general dedication to charity. In truth, on considering the evidence with the pleadings, I perceive that the information was first filed on the assumption that if the deed of distribution were established, the poor knights might be entitled to a considerable increase of their salary, and that case was to a certain point prepared and got up with this view, which seems to have been assumed in the time of James the First and also in the time of George the Second, and which the dean and canons then endeavoured to repel by setting up a beneficial grant in their own favour which the production of the deed of the 4th of August 1547 destroys, but that the decision of the House of Lords in *The Attorney General v. the Mayor and Corporation of Beverley* pending the progress of this suit, has made it impossible to maintain this view of the case, and that consequently this suggestion of a general dedication to charity has been brought forward with a view, if possible, to maintain the information. I think that this is not possible, and that the information must be dismissed *simpliciter*, of course without costs, as it is *ex officio*, but in no case should I consider it a case for costs.

WOOD, V.C. }
Feb. 19, 20. } CHAPPELL v. HAYNES.

Custom of London—Partial Intestacy—Non-appointment of Executors.

Where a freeman of the city of London by his will appoints an executor, the whole of the personal property is taken out of the custom; but where no executor is appointed, the custom is only displaced to the extent of the disposition contained in the will.

James Jezeph, a freeman of the city of London, by his will, dated the 30th of December 1843, devised as follows:—"I give, devise and bequeath, and to the sole use of my dear wife, all and every my freehold estate situate and being in the county of Middlesex; also, I give, devise and bequeath to my said dear wife, all my leasehold estate situate in and being No.

Cross Street, Westmorland Place, City Road, in the occupation of Mr. William Nash, together with all my personal estate, of what nature or kind soever, for her whole and sole use for and during her natural life; also, I give to my said wife, the amount of the policy of insurance on my life in the Hope Life Office, Bridge Street, Blackfriars, together with all additions of bonuses for her sole use, excepting 5*l.* to each of my sisters; and after the decease of my said wife, I give or devise my freehold estate, as aforesaid, to—" The will broke off suddenly at this point, but was duly signed and attested.

The testator died on the 30th of December 1843, without issue, and leaving Eleanor Jezeph his widow, and Mary Ann Haynes and Ann Brown his two sisters and sole next-of-kin.

No executor having been named in the will, letters of administration with the will annexed were, shortly after the decease of the testator, granted to the widow, who entered into the possession or the receipt of the rents and profits of three undivided fourth parts which had belonged to the testator in the estate in Cross Street, which property was held for a term of years which would expire on the 25th of December 1877, at a rent of 4*l.* for the whole, and was let at a very considerable improved rent, and she continued in possession to the time of her decease.

The said three undivided fourth parts of the said leasehold estate constituted part of the personal estate of the testator at the time of his death.

Eleanor Jezeph died on the 26th of December 1854, having, by her last will and testament, dated the 5th of December 1853, appointed the plaintiff executor thereof, and since her death, administration *de bonis non*, with the will of the said James Jezeph annexed, had been granted to the defendant Ann Brown.

According to the custom of the City of London, the personal estate of an intestate freeman dying, leaving a wife and no child, was, at the respective times of the deaths of the said James Jezeph and Eleanor Jezeph, distributable as follows, (that is to say) one equal half part thereof belonged to the widow, and the other or remaining equal half part of such personal estate

went to the administrator, to be disposed of by him or her according to the Statute for the Distribution of the Estates of Intestates (1).

The question, on this special case, for the opinion of the Court was, whether, under the circumstances above stated, the remainder expectant upon the life estate of the testator's widow in the three equal undivided fourth parts of the leasehold estates became and was distributable according to the custom of the City of London, or according to the Statute of Distributions.

Mr. Renshaw, for the plaintiff, after referring to *Pickford v. Brown* (2) and *Wheeler v. Sheer* (3), contended that the division must be according to the custom. The non-appointment of an executor made all the difference. She would, therefore, take half by the custom, and one half of the remaining half by the Statute of Distributions. No doubt the custom is ousted where an executor is appointed; but where there is no executor, the property goes first to the ordinary, and then to the administrator, and is distributable according to the custom. *Beard v. Beard* (4) is the only case in which the distinction between a legal and an equitable intestacy has been denied.

Wilkinson v. Atkinson, Turn. & Russ.
255; s. c. 1 Law J. Rep. Chanc.
222.

11 Geo. 1. c. 18. s. 17.

Mr. H. F. Bristowe, for the defendants, the next-of-kin.—The custom does not apply. The gift of the whole estate to a tenant for life is sufficient to oust the custom. *Fitzgerald v. Field* (5) and the other cases cited in *Pickford v. Brown*, were cases on the custom of York, and were before the passing of the 11 Geo. 4. & 1 Will. 4. c. 40.

(1) The custom is now abolished, see 19 & 20 Vict. c. 94.

(2) 2 Kay & J. 426; s. c. 25 Law J. Rep. (N.S.) Chanc. 702.

(3) Mos. 303.

(4) 3 Atk. 72.

(5) 1 Russ. 416; s. c. 4 Law J. Rep. Chanc. 170.

NEW SERIES, XXVII.—CHANC.

Wood, V.C., without calling for a reply. I have had an opportunity of considering this case since yesterday afternoon, and it seems to me that though the precise point has never been decided, yet there is not only the dictum of Lord King, in *Wheeler v. Sheer*, but upon principle it can scarcely be otherwise than that the custom is applicable where no executors are appointed. The question is, whether the testator has taken the estate out of the custom by making his will to operate upon it. If the will operated on the estate, then from that moment it becomes freed from the custom. Where an executor is appointed, the appointment causes the will to operate; but here, there being no executors, it can have no operation on the residue of the term which remains after the death of the wife. It operates only upon so many years of the term as shall elapse in the lifetime of the wife. The testator says nothing about the residue; and it seems to me to be a necessary consequence of this omission that he has not exercised his statutory power, and the property remains subject to the custom. *Mr. Bristowe* put the case of the next-of-kin upon the only ground on which it could be put, when he said that dealing with the property to a certain extent, the testator indicated an intention of taking it out of the custom; but I cannot hold that he had any larger intention in that respect than he expressed, and the matter is left entirely as it existed before the statute of 11 Geo. 4. & 1 Will. 4. c. 40. I do not think any case of election can arise; the statutory power is only exercised to a limited extent, and what remains is still subject to the custom.

Declare, that the remainder expectant upon the life estate of the testator's widow, given to her by the will of the testator, James Jezeph, of and in the three equal undivided fourth parts of the leasehold estate in the special case mentioned, became and is distributable according to the custom of the City of London.

M.R.
1854.
Feb. 28. }

STORRY v. WALSH.

Vendor and Purchaser—Charge of Debts, &c. — Payment — Inquiry — Purchase-Money—Interest.

*E. D., by will, appointed R. S. D. and T. T. R. trustees and executors of her will, and she gave to them and the survivor 2,000*l.*, upon trust to invest it and pay the produce to her daughter for life, with remainder to her children; and in default of children, or descendants of a child who should attain a vested interest, in trust for R. S. D. She also gave her residuary real and personal estate, "subject to the payment of her debts and legacies," to R. S. D. absolutely. R. S. D. died; and T. T. R., by a deed which recited that all debts and legacies had been paid, conveyed the testatrix's real estate to the devisees of R. S. D. The plaintiff purchased the rectory of J; and on a re-sale the conditions provided "that if from any cause whatever the purchase-money was not paid at the time appointed interest should be payable." It was objected, that there was no proof that the debts and legacies were paid, and it was found that the 2,000*l.* had not been duly invested; but after some delay and expense, the objection was removed. Upon the vendor claiming interest upon the purchase-money,—Held, that the devisees made a good title to the vendor, without proving that the debts and legacies were paid as stated by the recital in the deed conveying the estate to them, and that a purchaser from them was not bound to make inquiries into the payment.*

Held, also, that the fact of proving the payment of the debts and legacies did not dispense with the conditions of sale; but that the vendor was entitled to interest upon the balance of the purchase-money.

This was a special case, under the 13 & 14 Vict. c. 35.

Elizabeth Dixon was seised of the advowson of the rectory of Great Jey and Chapel, in the county of Essex. By her will, dated the 29th of March 1830, she gave a sum of 4,000*l.* (which she by codicil subsequently reduced to 2,000*l.*) to the Rev. Richard Samuel Dixon and Tipping

Thomas Rigby, and the survivor of them, in trust to invest the same in some or one of the public funds, and hold the produce thereof in trust for her daughter, Jean Dixon, for life, for her separate use, and after her decease, upon trust for her children on their attaining the age of twenty-one years, with trusts for maintenance in the mean time; and in the event of the daughter dying without leaving any child or children, or descendant of a child or children, living and attaining twenty-one, then upon trust for R. S. Dixon; and the testatrix gave the residue of her real and personal estates (including the rectory of Great Jey and Chapel), subject to the payment of her debts and the legacies bequeathed by her, unto or in trust for R. S. Dixon absolutely; and she appointed her trustees executors of her will.

R. S. Dixon survived the testatrix, but died in the lifetime of T. T. Rigby; having, on the 21st of July 1841, executed his will, and appointed Thomas Long, Robert Latter and William Roper Weston, trustees and executors thereof.

On the 30th of December 1845 an indenture was executed by T. T. Rigby, whereby, after reciting that all the debts, contracts, engagements and obligations of Elizabeth Dixon, and all her funeral and testamentary expenses were paid, and that all legacies bequeathed by her had been fully paid, discharged and satisfied, he conveyed the residuary real estate of Elizabeth Dixon, including the rectory of Great Jey, &c., to the trustees and executors of the will of R. S. Dixon.

The rectory of Great Jey and Chapel was purchased by the plaintiff, in 1846, from Messrs. Long, Latter and Weston, the trustees of the will of R. S. Dixon; and in consequence of an objection to the title, a statutory declaration, dated the 23rd of November 1846, was then made by Samuel Amy Leverne and Jean, his wife, formerly Jean Dixon, that Jean Leverne was entitled for her life, for her sole and separate use, to the annual dividends and income of the sum of 2,000*l.*, bequeathed by the will of Elizabeth Dixon to the Rev. R. S. Dixon and T. T. Rigby, upon the trusts in the will mentioned, and that the said 2,000*l.* had been paid and fully provided for out

of the personal estate of E. Dixon; and that the said declarants had not, nor had either of them, any claim whatever in respect thereof upon all or any part of the real estates devised by the said will and codicil, or either of them, and further, that the said 2,000*l.* had been and was invested entirely to the satisfaction of them, the said S. A. and Jean Leverne respectively.

On the 14th of July 1852 the plaintiff put up the advowson for sale by public auction, subject to conditions, the third of which was, that the purchaser was to pay down at the time of sale a deposit of 18*l.* per cent., and sign an agreement to pay the remainder, and complete the purchase on the 29th of September then next; but if from any cause whatever the purchase should not be completed on the 29th of September, the purchaser was to pay interest on the remainder of the purchase-money at the rate of 5*l.* per cent. from that day until the purchase should be completed. The fourth condition declared that the vendor was, within fourteen days after the day of sale, to deliver an abstract of title, and deduce a good title to the property, in compliance with the conditions of sale. By the sixth condition, notice of all objections to the title were to be delivered to the vendor on or before the 28th of August then next. By the 7th condition the vendor was to produce a statutory declaration of S. A. Leverne and Jean, his wife, that a legacy or sum of 2,000*l.*, bequeathed by the will and codicil of E. Dixon, who died in August 1832, had been fully provided for out of her personal estate; and any other evidence that might be required touching the satisfaction of the same legacy was to be obtained at the purchaser's expense.

The advowson was not sold at the auction; but on the 16th of July 1852, the defendant agreed to purchase the same for 8,500*l.*, subject to the conditions of sale, and he paid 1,275*l.* as a deposit.

On the 22nd of July 1852, an abstract of the title was delivered; and on the 25th of August, requisitions on the plaintiff's title were sent by the defendant's solicitors; the 12th of which was "As the executors of E. Dixon did not sell to pay debts, it should be shewn that the trusts of the will of E. Dixon have been satisfied as

far at least as to the payment of the four legacies of 50*l.* by the production of the legacy receipts, and as to the 2,000*l.* by the declaration of S. A. Leverne and Jean his wife. In whose name is the legacy of 2,000*l.* now standing?"

On the 31st of August 1852, answers were returned by the plaintiff's solicitors, that to the 12th requisition set out the recital in the conveyance by T. T. Rigby, and said "from this recital, and after the lapse of twenty years from the death of E. Dixon, it is submitted that these legacies must now be deemed satisfied. Moreover, the charge being general, the legatees could have no remedy against the estate. The vendor is unable to afford further information than is given by the statutory declaration of the 23rd of November 1846."

The reply sent on the 16th of September 1852, stated that the recital in the deed introduced the questions of payment of the legacies; that the legacies other than the 2,000*l.*, being of small amount, might be assumed to be paid; that the condition stated that the 2,000*l.* belonged to S. A. Leverne and his wife; but that though Mrs. Leverne was interested in the 2,000*l.* as tenant for life, the principal did not belong to them, and evidence was asked for to shew that the 2,000*l.* was invested in the public funds as directed by the will of E. Dixon. On the 25th of September 1852, the defendant's solicitors required the requisite evidence at the expense of the vendor as the conditions expressed, that a declaration should be produced by the parties "entitled thereto."

On the 29th of September 1852, the defendant sold a sufficient sum of consols to produce 9,937*l.* 10*s.*; and on the 29th of November he placed 7,225*l.*, the balance of the purchase-money, to a separate account at his bankers. On the 6th of October, the defendant expressed in writing his anxiety to complete the purchase as the money was lying idle; and on the 16th of October his solicitors suggested that the money should be either invested in stock or in Exchequer bills, at the risk and expense of the vendor.

On the 15th of November 1852, the defendant's solicitor obtained from Mr. Pugh, the solicitor of T. T. Rigby, an inspection

of a deed of declaration of trusts, dated the 27th of February 1846, and made between T. T. Rigby of the first part; Jean Leverne of the second part; and the executors of R. S. Dixon, of the third part. It recited that the 2,000*l.* had been advanced by R. S. Dixon to S. A. Leverne, with the consent of his wife, and that interest had been paid to her at the rate of 5*l.* per cent., and that she had requested the 2,000*l.* to be invested in the purchase of the same amount of consols, as if it had been invested at the expiration of twelve months from the decease of E. Dixon, and that the executors of R. S. Dixon should be trustees jointly with T. T. Rigby, and that 2,240*l.* 18*s.* consols had been purchased; and it was declared that T. T. Rigby and the executors of R. S. Dixon should stand possessed of the said consols upon the same trusts as had been declared in respect of the legacy. Neither the plaintiff nor his solicitors ever knew of the existence of such a deed, or of the application of the 2,000*l.* thereby declared until they received a copy of the deed from the defendant's solicitors.

It was then objected, by the solicitors of the defendant, that the 2,000*l.* had never been duly invested in accordance with the will of the testatrix. To remove this objection, it was proposed to make an application to the Court under the Trustee Act, 1850 (1), to make the executors of R. S. Dixon co-trustees with T. T. Rigby; and on the 8th of March 1850, upon the petition of Mr. and Mrs. Leverne and their daughter and only child, an order was made by the Court to the effect suggested.

The defendant then accepted the title; and on the 4th of March 1853, the balance of the purchase-money was paid over to the plaintiff, without prejudice to the claim made by the vendor under the third condition of sale for interest at 5*l.* per cent., from the 29th of September 1852 to the 14th of April 1853.

Mr. R. Palmer and Mr. Dickinson, for the plaintiff.—The vendor was guilty of no default. The excessive delays were caused by the requisitions of the purchaser. The setting apart and isolation of the purchase-money, therefore, will not prevent the

(1) 13 & 14 Vict. c. 60.

claim made by the vendor for interest. A good title to the estate was shewn within the time limited by the conditions of sale. The conveyance made by the surviving executor specifically recited the full payment of the debts and legacies, and the general charge of debts rendered the proof of the payment of the legacies unnecessary.

Wallis v. Sarel, 5 De Gex & S. 429; s. c. 21 Law J. Rep. (N.S.) Chanc. 717.

Stroughill v. Anstey, 1 De Gex, M. & G. 635; s. c. 22 Law J. Rep. (N.S.) Chanc. 130.

Forbes v. Peacock, 1 Phill. 717, 721; s. c. 15 Law J. Rep. (N.S.) Chanc. 371.

Robinson v. Lowater, 17 Beav. 592; s. c. 23 Law J. Rep. (N.S.) Chanc. 641; 5 De Gex, M. & G. 272.

Sugden's Vend. and Pur. c. 16.

Mr. Bailey and Mr. Faber, for the defendant.—The whole delay in the completion of the purchase has arisen in consequence of the vendor's ignorance of his title. He ought to have investigated all the facts relating to it when he purchased: at that time it was clearly liable to the payment of the 2,000*l.* The charge of debts and legacies upon this estate cannot free the purchaser from seeing to the application of the purchase-money. The trustees of E. Dixon's will never sold the estate to pay debts. The survivor alone conveyed it to the devisees of the other trustee, who, subject to the charge, was entitled to it beneficially. They had no power to give receipts for the purchase-money under the will of E. Dixon; it was only by a sale for the purposes of her will that a power to give receipts could be implied. No sale was made for the purposes of her will; there was merely a conveyance by T. T. Rigby without any consideration. The recital contained in the deed was not the fact, and it could not have the effect of discharging the estate from liabilities, and the declaration of Mr. and Mrs. Leverne could not be received as evidence of payment: they were but partially interested in the money. It certainly had been the cause of inquiry, the result of which was that the 2,000*l.* had not been

duly invested, and until that was done the vendor could make no title to a purchaser, and he cannot now claim interest upon the balance of the purchase-money.—

Weddall v. Nixon, 17 Beav. 160; s. c.

22 Law J. Rep. (N.S.) Chanc. 939.

Sherwin v. Shakspeare, Ibid. 267;

s. c. 23 Law J. Rep. (N.S.) Chanc.

177, 898.

De Visme v. De Visme, 1 Mac. & Gor.

336; s. c. 1 Hall & Tw. 408; 19

Law J. Rep. (N.S.) Chanc. 52: re-

versing 18 Law J. Rep. (N.S.)

Chanc. 159.

THE MASTER OF THE ROLLS.—The plaintiff is entitled to interest upon the balance of the purchase-money. By reference to the principles which govern the Court in cases of this description all difficulty in the present case is removed. The question here really is, whether if the 2,000*l.* legacy had been misapplied, payment of it could now be enforced against this estate: the case cannot be put in a manner more favourable to the defendant than in this form. I had to consider these principles in *Robinson v. Lowater*. This Court holds, that if an estate is charged with the payment of debts, the executor can sell the estate and make a good title to a purchaser. If, however, the debts charged upon the estate are scheduled, then the purchaser must see that they are paid; so, also, if an estate is charged generally with the payment of legacies which are specified, then, also, the purchaser must see to the application of the purchase-money; but if the estate is charged with the payment of debts and legacies, the charge exonerates the purchaser from seeing to the application of the purchase-money, as the legacies are not properly payable until after the debts are paid. This rule arises from the principles of equity acted upon by the eminent Judges who have presided in past times and adapted them to the exigencies of society. One reason upon which they have held that a purchaser is bound to see to the application of the purchase-money in the payment of specified sums is, that it may be easily done, and the performance of the trust duly secured, but if the trusts be for the payment of debts

generally, there would be no security that the debts were paid, and it would be improbable that any person would purchase the estate if he was to be made liable for the complete performance of a trust at once unlimited and undefined. The result therefore would be, that no one could safely purchase an estate from an executor when the testator had omitted to declare that his receipt should be a good discharge for the purchase-money. It is then said, that this case is wholly different, because the sale was made, not by the executor, but by persons to whom he had conveyed the estate, who were the devisees in trust of the person to whom the estate was devised subject to the payment of the debts and legacies. The reason, however, is the same, and if that induces the Court to say that the purchaser shall not be compelled to see to the performance of an undefined and unlimited trust, the rule applies exactly the same as in the case of a sale by an executor himself. The executor, it is admitted, could have sold the property to A. for a sum of money which in the executor's opinion would have been sufficient to pay the debts and legacies, and the purchaser would have got a good title, and would not have been bound to see to the application of the purchase-money, and the unpaid legatees could not have come against him. But the executor asserts that he had paid all the debts and legacies, and he conveys the estate to the devisees, who sell it; the purchaser, therefore, is in the same situation, and in both cases they must trust to the word of the executor. It is obvious that the time of the sale does not matter,—it might be the next day: the purchaser from the devisees would be in the same difficulty, that this unlimited and undefined trust had been performed. The interposition of the devisees does not create an equity which would not exist if the purchase had been from the executor himself. The devisees, therefore, who had the conveyance from the executor had a good title; and if this legacy had been misapplied, the legatees could not have recovered against the estate in the hands of the purchaser; that is not saying that the recital in the deed is equivalent to a receipt for the purchase-money, but it is

saying that this Court will not compel a person who is a purchaser for value to see to the application of the purchase-money or to the due performance of an unlimited or undefined trust, when the executor in a deed executed by him says that the trust has been performed, or that I shall be enabled to perform it by what you are going to do. The vendor, therefore, is entitled to interest on the balance of the purchase-money. I shall consider this as if it were a case of arbitration, and I shall give no costs.

LORDS JUSTICES. } TINKLER v. THE BOARD OF
 Jan. 26, 27; } WORKS FOR THE WANDS-
 March 12. } WORTH DISTRICT.

Nuisances Removal Act — Metropolis Local Management Act — District Board — Powers — Jurisdiction of the Court of Chancery.

The Board of Works of the W. District passed a resolution that no privies or cesspools should be allowed in that district, and on the 27th of January 1857 served a notice on the owner of cottages, requiring him, within fourteen days, to convert privies into water-closets, and threatening compulsory proceedings in case of neglect. In June following they served a second notice, which, like the former, was entitled in the Metropolis Local Management Act (18 & 19 Vict. c. 120.) and in the Nuisances Removal and Diseases Prevention Act (18 & 19 Vict. c. 121.), stating that as the former notice had not been attended to, they should, within seven days, enter and enforce the provisions of those acts against the owner. On the 7th of November, they entered and commenced the works, whereupon the owner filed a bill for an injunction, which one of the Vice Chancellors granted:—Held (affirming that decision), that the Board had exceeded its powers in coming to the resolution; that under the Nuisances Removal Act, they had no authority to enter unless a previous order of Justices of the Peace had been disobeyed; and that the jurisdiction of the Court of Chancery to interfere by injunction was not ousted by the 211th section of the Metropolis Local Management Act, giving an appeal to the Metropolitan Board of Works.

A Board of Works, empowered as above, is bound to exercise its authority with regard to the circumstances of each particular case, and it is their bounden duty to keep strictly within their powers, and not to be guided by any fancied views of the spirit of the act.

This was an appeal motion combined with a motion for a decree. Vice Chancellor Stuart, on the 19th of November 1857, made an order, restraining the defendants, their agents, servants and workmen, and all other persons acting under their orders or directions, from entering or digging in or upon the premises in the plaintiff's bill mentioned, or any part thereof, or removing the earth therefrom, and also from interfering with, pulling down or converting the privies attached to the thirty-nine cottages, belonging to the plaintiff, situate at Ford's Buildings, Battersea, in the county of Surrey, or any of them, into water-closets.

From that order the defendants appealed, and it was agreed that, to save time and expense, the appeal motion should stand over, and the plaintiff should give notice of motion for a decree, which was accordingly done, and the two motions came on to be heard together. The statements of the bill were that the plaintiff, Mr. Tinkler, being possessed of the above property, held by him upon lives, was desirous of forming a drain from the cottages to carry off water, and, therefore, applied to the defendants, the Wandsworth Board of Works, for liberty to do so. No reply was sent to this application; but the defendants, on the 27th of January 1857, served a notice on Mr. Bacon, the agent for the plaintiff, of that date, in the following words:—"No. 165.—Metropolis Local Management Act, 18 & 19 Vict. c. 120; Nuisances Removal and Diseases Prevention Act, 18 & 19 Vict. c. 121. The Board of Works for the Wandsworth District. Offices, Bolingbroke House, Wandsworth Common. Whereas at a meeting of the Board of Works for the Wandsworth District, holden on the 24th of December 1856, it was duly made to appear to the said Board of Works that the house and premises, situate and being as hereinafter mentioned, require certain

works to be executed thereto, which we have particularly set forth in the schedule hereunto annexed, and which works are requisite and necessary for the removal and abatement of the nuisance now existing, and which is injurious to the health of the persons dwelling in or near the said house and premises; and whereas it was duly ordered by the said Board of Works, that notice in writing be given to the owner or occupier of the said house and premises, requiring him to do, perform and execute the works, matters and things on or before the day mentioned in the said schedule; I am directed to inform you that unless the said works are commenced on or before the day mentioned in the said schedule, and forthwith completed to the satisfaction of the said Board, compulsory proceedings will be taken under the above-mentioned acts of parliament for executing the said works, and for the recovery from you of all costs and expenses incurred thereby. Dated this 27th day of January 1857. By order of the Board of Works for the Wandsworth District.

“(Signed) Samuel Steel,

“Inspector of Nuisances to the Works for the Wandsworth District.”

The schedule specified, amongst others, operations for converting the privies into water-closets. The works to be commenced within fourteen days of the notice being served (and being served the same day), on or before the 10th of February.

The plaintiff, on the 4th of February, stated to the defendants that no inconvenience, unwholesomeness or nuisance arose from the privies; that the occupiers of the cottages were satisfied with them, and that the conversion into water-closets would probably be found inconvenient. The defendants, by their chairman, then stated that it was their intention to do away with all privies whatsoever in their district, or to that effect; and on the 8th of June 1857 they served the plaintiff's before named agent with the following notice:—

“Metropolis Local Management Act, 18 & 19 Vict. c. 120. The Nuisances Removal and Diseases Prevention Act, 18 & 19 Vict. c. 121. The Board of Works for the Wandsworth District. Offices, Bolingbroke House, Wandsworth

Common. No. 64. To Mr. Bacon, of Ford's Buildings.— Notice having been served upon you by order of the Board of Works for the Wandsworth District, to do certain works upon the premises situate in Ford's Buildings, York Road, in the parish of Battersea, and the time mentioned in such notice having expired without such works having been completed, the Board of Works for the Wandsworth District hereby give you notice that their workmen, or the workmen of their contractor, will enter upon the said premises to commence and forthwith execute the said works on or after the expiration of seven days from the service hereof; and that the Board will then adopt the course which the law provides for enforcing the payment of all costs and expenses thereby incurred. Dated the 8th day of June 1857. By order of the Board of Works for the Wandsworth District.

“(Signed) Samuel Steel,

“Inspector of Nuisances for the Parish of Battersea, No. 3, Somerset Terrace, Church Road.

“Notice of your intention to commence these works must be given in writing at least twenty-four hours before commencing.”

A correspondence ensued between the solicitors of the plaintiff and the defendants, which appeared to have been ineffectual. On the 7th of November the workmen of the defendants entered, and two days after began the work of converting the privies into water-closets; and immediately the plaintiff filed his bill praying for an injunction.

As to the state of the privies, the evidence was contradictory; the inspector, Mr. Steel, and two medical witnesses swearing that the condition of the premises was injurious to the occupiers and to the neighbourhood, while several inhabitants of the cottages and a surgeon gave contrary testimony. The affidavit evidence was copious.

The argument on the appeal was very voluminous, and consisted chiefly of references to the acts of parliament and to the particulars referred to in the judgment. For the plaintiff, it was insisted that the defendants had proceeded under the Nuisances Removal Act (18 & 19

Vict. c. 121.), and had not conducted their proceedings regularly. That act, in section 8, defined what should be deemed to be nuisances thus:—"Any premises in such a state as to be a nuisance or injurious to health; any pool, ditch, gutter, water-course, privy, urinal, cesspool, drain, or ashpit so foul as to be a nuisance or injurious to health; any animal so kept as to be a nuisance or injurious to health; any accumulation or deposit which is a nuisance or injurious to health"; and then by the 12th section it enacted, "that in any case where a nuisance is ascertained by the local authorities to exist, or where the nuisance, though discontinued, is, in their opinion, likely to recur, they shall cause complaint thereof to be made before a Justice of the Peace, and such Justice shall thereupon issue a summons requiring the person by whose act the nuisance arises or continues, or if such person cannot be found or ascertained, the owner or occupier of the premises on which the nuisance arises, to appear before any two Justices in petty sessions, who shall proceed to inquire into the said complaint; and if it be proved to their satisfaction that the nuisance exists, or did exist at the time when the notice was given, or that it is likely to recur or to be repeated, the Justices shall make an order for the abatement or discontinuance of the nuisance;" and then by the 13th section the Justices, by their order, may require the person upon whom it is made to execute such works as are necessary for the abatement or discontinuance of the nuisance; and by the 15th and 40th sections appeal from the orders so made may be made to the Court of Quarter Sessions.

Thus, it was plain that, the defendants having elected to proceed under 18 & 19 Vict. c. 121, they should have laid their first complaint before a Justice of the Peace, and obtained from him a summons for the appearance of the plaintiff before two Justices, as directed by the 12th section. The defendants having so elected, the plaintiff would have had the opportunity which the statute afforded him of appealing to the Quarter Sessions against any order which might have been made against him. But as the defendants had not followed the directions of the statute under

which they assumed to act, they had driven the plaintiff to seek the only remedy open to him, by applying for an injunction from this Court.

The defendants claimed to ground their authority on the Metropolis Local Management Act (18 & 19 Vict. c. 120.), notwithstanding that the notice of the 8th of June 1857 was entitled in the Nuisances Removal Act, and they chiefly relied upon the provisions of the 81st and 85th sections, which are as follows:—

Section 81.—"After the commencement of this act it shall not be lawful newly to erect any house, or to rebuild any house pulled down to the extent aforesaid, within any parish mentioned in Schedule A. to this act, or any district mentioned in Schedule B. to this act, without a sufficient water-closet or privy and ashpit, furnished with proper doors and coverings, and also furnished as regards the water-closet with suitable water supply, and water-supply apparatus, and with suitable trapped soil-pan, and other suitable works and arrangements so far as may be necessary to insure the efficient operation thereof; and whosoever shall offend against this enactment shall be liable to a penalty not exceeding 20*l.*; and if at any time it appear to the vestry or district board of such parish or district, that any house in any such parish or district, whether built before or after the commencement of this act, is without a sufficient water-closet or privy and ashpit, furnished with proper doors and coverings, and with other apparatus and works as aforesaid, the vestry or district board shall, in case the same can be provided without disturbing any building, give notice in writing to the owner or occupier of such house, requiring him forthwith or within such reasonable time as shall be specified in such notice, to provide a sufficient water-closet or privy and ashpit, so furnished as aforesaid, or either of them as the case may require; and if such notice be not complied with, it shall be lawful for the vestry or district board to cause to be constructed a sufficient water-closet, or privy, and ash-pit, or either of them, or do such other works as the case may require, and to recover the expenses incurred by them in so doing from the owner of such house in manner hereinafter provided."

Section 85.—“If upon such inspection as aforesaid, any drain, water-closet, privy, or cesspool appear to be in bad order and condition, or to require cleansing, alteration or amendment, or to be filled up, the vestry or board shall cause notice in writing to be given to the owner or occupier of the premises upon or in respect of which the inspection was made, requiring him forthwith, or within such reasonable time as shall be specified in such notice, to do the necessary works; and if such notice be not complied with by the person to whom it is given, the vestry or board may, if they think fit, execute such works, and the expenses incurred by them in so doing shall be paid to them by the owner or occupier of the premises.”

The law having so defined the powers and the remedies to be followed, had pointed out with precision the mode in which the Board of Works should proceed to recover the amount of costs incurred by them in performing the works necessary to be performed, and did so by the 225th section, in the following terms:—

“In every case where the amount of any damage, costs, or expenses is by this act directed to be ascertained or recovered in a summary manner, or the amount of any damage, costs, or expenses is by this act directed to be paid, and the method of ascertaining the amount or enforcing the payment thereof is not provided for, such amount shall, in case of dispute be ascertained and determined by and shall be recovered before two Justices; and the amount of any compensation to be made under this act by the said Metropolitan Board, or any vestry or district board, shall, unless herein otherwise provided, be settled in case of dispute by, and shall be recovered before, two Justices, unless the amount of compensation claimed exceed 50*l.*, in which case the amount thereof shall be settled by arbitration, according to the provisions contained in the Lands Clauses Consolidation Act, 1845, which are applicable where questions of disputed compensation are authorized or required to be settled by arbitration.”

Nor did the act leave the plaintiff without a remedy, provided in section 211; one to which he was bound to resort if he felt aggrieved; and not having done so, he

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was precluded from resorting to the remedy by injunction in this court:—

“Any person who deems himself aggrieved by any order of any vestry or district board in relation to the level of any building, or any order or act of any vestry or district board in relation to the construction, repair, alteration, stopping or filling up, or demolition of any building, sewer, drain, water-closet, privy, ashpit or cesspool, may within seven days after notice of any such order to the occupier of the premises affected thereby, or after such act, appeal to the Metropolitan Board of Works against the same; and all such appeals shall stand referred to the committee appointed by such board for hearing appeals as herein provided; and such committee shall hear and determine all such appeals, and may order any costs of such appeals to be paid to or by the vestry or district board by or to the party appealing, and may, where they see fit, award any compensation in respect of any act done by any such vestry or district board in relation to the matters aforesaid; provided that no such compensation shall be awarded in respect of any such act which may have been done under any of the provisions of this act, on any default to comply with any such order as aforesaid, unless the appeal be lodged within seven days after notice of such order has been given to the occupier of the premises to which the same relates.”

The other arguments for the defendants are enumerated and commented on in the judgment of Lord Justice Turner, and in support of their case the following authorities were cited:—

Stainton v. the Metropolitan Board of Works, 23 Beav. 225; s. c. 26 Law J. Rep. (N.S.) Chanc. 300.

The Blackwall Railway Company v. the Limehouse District Board of Works, 26 Law J. Rep. (N.S.) Chanc. 164.

Frewin v. Lewis, 4 Myl. & Cr. 249.

Mr. Bacon and *Mr. Schomberg*, for the plaintiff.

Mr. Malins and *Mr. W. D. Lewis*, for the defendants.

Mr. Bacon was heard in reply.

Their LORDSHIPS reserved judgment.

2 Y

March 12. — LORD JUSTICE KNIGHT BRUCE.—In this case the entry upon the plaintiff's land, and the acts there done by the defendants' order, which form the groundwork of the suit, and the interlocutory order on appeal, are shewn, I think, to have taken place in consequence and in the prosecution of an intention upon their part to substitute upon the land a number of water-closets—more than thirty altogether—for an equal number of old privies now and at that time there, and to do so, *nolente volente* the plaintiff. And it is, I apprehend, clear that, unless the defendants have a lawful power to do so, the suit was well founded, and the injunction right. The defendants claimed, and claim, that power solely under 18 & 19 Vict. c. 120. and c. 121. (often mentioned, and of necessity much discussed during the argument), but especially the sections 81. and 85. of c. 120. Remarkable as some of the provisions of that statute seem to be, I am of opinion that they do not deal with the rights of property in such a way as the defendants contend that they do; nor can I find in the two statutes, or either of them, any warrant for what the defendants have been attempting and now insist upon. The question is, not whether they have power to cause or order privies within their district to be put in a proper and decent state, if not in that state; but it is, whether they have the right or power to force on the plaintiff the mechanical contrivance of water-closets, with their requisite apparatus, for which he is to find water supply as best he may, instead of the privies (sufficient as privies if kept in a condition proper for such conveniences are,) which are upon his land for the purposes of his cottages there. The claim of the defendants in that respect appears to me manifestly groundless. I should have thought so had they begun their operations by giving the plaintiff an opportunity of being heard and of producing testimony, or in any event of hearing him, and if they had regulated themselves by analogy to judicial proceedings and had deemed it reasonable to hear both sides; but as matters were conducted, there has, perhaps, been a double error, although upon this point I do not mean to speak as having formed an opinion; nor do I mean to intimate my

impression how the case might possibly have stood had there been, as there has not been, any order of a Justice or Justices of the peace relating to the work or to the privies. The right, however, or power to appeal given by sections 211. and 212. c. 120, upon which stress was laid in the argument, appears to me not at all to prejudice or affect the plaintiff. The case now being before us for hearing, as well as on the appeal motion, the defendants ought, I think, to be ordered to pay the costs of the suit, and to have the injunction continued against them, with liberty to apply. I so express myself, because, by possibility, there may be hereafter some occasion—lawful occasion—for the entry by their servants upon the land, or for getting upon the land.

LORD JUSTICE TURNER.—The plaintiff in this suit holds, under lease for lives, a piece of land situate within the district of the Board of Works for Wandsworth, and upon which there is erected a block of thirty-nine cottages, called Ford's Buildings. Upon the 27th of January 1857 the plaintiff was served by the defendants, the Wandsworth District Board of Works, with the following notice [the notice dated the 27th of January 1857]. The schedule annexed to this notice is in these terms:—“Nuisance now existing upon the said houses or premises. Cesspool overflowing, and no dust-bins.—Works required to be done for the removal and abatement of the nuisance. Cesspools to be emptied and filled up. Drains from privies and sinks constructed. Privies to be panned, trapped, and water-supply apparatus provided. Cisterns to be provided. Lime white where necessary. Pavements to be made good. Dust-bins to be provided.” In consequence of this notice the plaintiff executed some works mentioned in the schedule, but he did not pan or trap the privies or provide water-supply apparatus, or, as I presume, cisterns; in other words, he did not convert the privies into water-closets. It does not seem clear upon the evidence whether he completed all the other works required by the notice; at least there is a dispute as to the dust-bins. The privies not having been converted into water-closets, the defendants, the Wandsworth Board of Works, upon the 8th of June

1857, served upon the plaintiff the notice of that date. The plaintiff, upon the receipt of this second notice, placed the matter in the hands of his solicitor, who immediately wrote to the defendants to this effect, that the plaintiff considered he had done all that the premises required or the law rendered imperative; but the defendants in reply insisted that the terms of the notice should be strictly complied with. Upon the 7th of November 1857, having given the notice in June, they entered upon the premises and commenced removing the earth at the rear of one of the cottages, and deposited a number of pans and also a quantity of piping in some of the cottage gardens. On the 9th of November in the same year their workmen commenced the work necessary for converting the privies into water-closets. The plaintiff then, upon the 11th of November 1857, filed a bill in this court, which prayed that the defendants, and all persons acting under their orders or directions, might be restrained by the injunction of the Court from entering or digging in or on the premises, or any part thereof, or removing the earth therefrom, and also from interfering with, pulling down, or converting the privies attached to the said cottages, or any of them, into water-closets; and that the defendants might pay the plaintiff the costs of the suit. The only allegation in the bill which, in my view of the case, is material to notice, is that found in paragraph five of the bill, which alleges that, in consequence of the notice of January 1857, the plaintiff, upon the 4th of February 1857, went to the defendants, and stated to them that no inconvenience, unwholesomeness, or nuisance arose from the privies, that the occupiers of the cottages were satisfied with them, and that the conversion of them into water-closets would, in all probability, occasion unpleasant smells and be found inconvenient, and be far worse than the privies, and be perpetually getting out of order; and, moreover, there was no sewer for the drains required by the notice to fall into; that the defendants, by their chairman, then stated to the plaintiff that it was their intention to do away with all privies whatsoever, and that they would have none in their district, or words to that effect, and that

they would construct a sewer within a short distance of the premises, so that the drains required by the notice might have a proper outlet; and that, on the plaintiff observing that it would be better for him to defer the construction of the drains until the sewer was made, the defendants refused to consent thereto. Upon the 19th of November 1857, Vice Chancellor Stuart granted the injunction prayed by the bill, putting the plaintiff, however, to some undertaking, to which no objection was raised on his part; and the defendants have appealed from the Vice Chancellor's order granting the injunction. The case, therefore, first came before us upon an appeal motion; but upon the motion being opened, it was arranged that the cause should be heard with it, and we are now to dispose of both the motion and the cause. The notices served by the defendants upon the plaintiff upon the 27th of January and the 8th of June 1857, purport to be given under the Metropolis Local Management Act, 18 & 19 Vict. c. 120, and the Nuisances Removal and Diseases Prevention Act, 18 & 19 Vict. c. 121, and they are entitled under both these acts, for it seems clear that the defendants cannot justify their proceedings in this case under the latter, the Nuisances Removal and Diseases Prevention Act. That act gives no authority to enter upon any premises in such a case as the present, except in the event of disobedience to the order of the Justices, but there has been here no order of Justices. If, therefore, the case of the defendants can be supported at all, it must be under the Metropolis Local Management Act, and it was indeed upon that act that the defendants relied. The 81st and 85th sections of that act are as follows:—

“Section 81.—After the commencement of this act it shall not be lawful newly to erect any house, or to rebuild any house pulled down to the extent aforesaid within any parish mentioned in schedule (A) to this act or any district mentioned in schedule (B) to this act without a sufficient water-closet or privy and ashpit, furnished with proper doors and coverings, and also furnished, as regards the water-closet, with suitable water supply, and water-supply apparatus, and with suitable

trapped soil-pan, and other suitable works and arrangements, so far as may be necessary to ensure the efficient operation thereof; and whosoever shall offend against this enactment shall be liable to a penalty not exceeding 20*l.*; and if at any time it appear to the vestry or district board of such parish or district that any house in any such parish or district, whether built before or after the commencement of this act, is without a sufficient water-closet or privy and ashpit, furnished with proper doors and coverings, and with other apparatus and works as aforesaid, the vestry or district board shall, in case the same can be provided without disturbing any building, give notice in writing to the owner or occupier of such house, requiring him forthwith or within such reasonable time as shall be specified in such notice, to provide a sufficient water-closet or privy and ashpit, so furnished as aforesaid, or either of them as the case may require; and if such notice be not complied with, it shall be lawful for the vestry or district board to cause to be constructed a sufficient water-closet or privy and ashpit, or either of them, or do such other works as the case may require, and to recover the expenses incurred by them in so doing from the owner of such house in manner hereinafter provided.

Section 85.—If upon such inspection as aforesaid any drain, watercloset, privy, or cesspool appear to be in bad order and condition, or to require cleansing, alteration, or amendment, or to be filled up, the vestry or board shall cause notice in writing to be given to the owner or occupier of the premises upon or in respect of which the inspection was made, requiring him forthwith, or within such reasonable time as shall be specified in such notice, to do the necessary works; and if such notice be not complied with by the person to whom it is given, the vestry or board may, if they think fit, execute such works, and the expenses incurred by them in so doing shall be paid to them by the owner or occupier of the premises.

It was argued, on the part of the defendants, that this case falls within these sections. The argument was this, that it was sufficient to bring the case within the sections, and especially within the 81st

section, if it appeared to a district board that the house was without a sufficient water-closet or privy and ashpit; and that in the event of its so appearing to the district board, they were justified in requiring a sufficient water-closet or privy and ashpit to be provided; that they were constituted by the act the sole judges of the sufficiency both of what was in existence and of what ought to be required; and that, if their judgment was wrong, the remedy was by appeal under the 211th section of the act against the order founded upon it; and that, if the case fell within the act, the jurisdiction of this Court was excluded. Whether this conclusion is well founded, and whether the powers given by the act are such that no abuse of them can be committed which would warrant the interference of this Court, I do not intend to give an opinion, for the defendants' arguments plainly rest upon the hypothesis that the case falls within the act, and I am of opinion that this case does not fall within the act. I take it to be fully established by the evidence before us, that the order issued by the defendants proceeds upon the footing that there shall be no privies in their district, that all the privies there shall be turned into water-closets, and that this resolution had been come to before this order was issued, and without reference to the present case. This, I think, plainly appears, not only from the affidavit of the plaintiff, who verifies the fifth paragraph of the bill, and says that, when he went there, the defendants, by their chairman, stated at that time that it was their intention to do away with all privies whatsoever, and that they would have none in their district—to which I do not find that there is any contradiction—but it appears also from two affidavits of Mr. Corsellis filed by him upon the part of the defendants. In one of the affidavits he says, after referring to the completion of the drain, which was another question in the cause, "it is the practice of the above-named defendants, in all cases where drainage can be provided to carry off the water, to require the owners of the houses to fill up all cesspools upon their premises and to turn the privies into water-closets, and of this the plaintiff was informed, as stated in the bill of com-

plaint." In another passage, in another affidavit filed by Mr. Corsellis, I find him stating this: "the plaintiff and his solicitor (referring to the meeting of the 4th of February, at which he says Bacon was not present)—were called into the room where the meeting was being held; that they thereupon complained to the defendants of the requirements in the notice that the privies should be converted into water-closets, and that the plaintiff was then informed by the Honourable Mr. Curzon, the chairman, one of the above-named defendants, that it was their practice, in accordance with the 'spirit' of the act under which they were constituted, in all cases where sufficient drainage could be provided, to require the owners of the houses to fill up all cesspools on their premises and turn the privies into water-closets, and that they had ordered a new sewer to be completed." Now, whatever may be the powers given by this act to the local authorities to order water-closets to be provided instead of privies in particular cases in which that alteration may be required (I am assuming that, without in the least meaning to decide that the act gives that power), I think that, whatever may be the powers given, upon the true construction of the act, and viewing it in the light most favourable to these defendants, they were bound to exercise their jurisdiction in each particular case, and that it was not competent to them to lay down any such general rule as that upon which the defendants acted, and that in acting upon that rule they have exceeded the powers given to them by the act, and that, therefore, this order was, in that respect, illegal and void, and that the defendants had not the power to enter upon the premises for the purpose of giving effect to this part of the order. I think it unnecessary to enter into the question of the alleged non-completion of the other works, or into the other sections of the act referred to in the course of the argument before us. This order being *ultra vires*, the argument upon the appeal clause of course falls to the ground. If a tribunal having a limited jurisdiction goes beyond that jurisdiction, it is unnecessary to resort to the appeal clause, as this Court interferes for the purpose of restraining the exercise of powers be-

yond the jurisdiction of bodies of this description. I am of opinion, therefore, that there must be a decree for the plaintiff according to the prayer of the bill, with costs. I may observe that Mr. Corsellis, in one of the affidavits to which I have referred, speaks of carrying out the "spirit" of the act. It may be as well to caution Mr. Corsellis, and these defendants, intrusted as they are by this act with very extensive powers, that it is their bounden duty to look well that they keep strictly within their powers, and not to be guided by any fancied views of their own as to the "spirit" of the act by which they are to be governed. The decree must be for the plaintiff, with costs.

FULL COURT
OF
APPEAL.
Dec. 14;
Feb. 25.

CLEMENTS v. HALL.

Partnership—Mines—Interest of deceased Partner.

A. & B. worked mines in partnership. The lease of the mines expired in 1845, and they continued to work them as tenants from year to year. In November 1847 A. died, and B. continued to work the mines only sufficiently to keep them going. At Lady-day 1851, B. obtained a new lease of the greater part of the mines, upon certain terms. On the 24th of November 1851, E, who claimed an interest under A.'s will, filed a bill against C. (A.'s executrix) and B, for the administration of A.'s estate, and that the mine might be worked under the direction of the Court. Answers were put in, but nothing further was done in the suit. B. continued to work the mine until December 1853, when he died intestate, and C. took out letters of administration. On the 1st of June 1854 E. sold his interest under A.'s will to X, who, on the 17th of the same month, instituted a suit to establish an interest on behalf of A.'s estate in the mine after A.'s death:—Held (reversing the decision of the Master of the Rolls, and Knight Bruce, L.J., doubting), that the interest of A. in the mine did not cease on his death, but was still continuing.

This suit was instituted, by the assignee of Henry Foley Hall, who was a legatee under the will of his father, Walter Hall, under the following circumstances:—Walter and Alfred Hall were working some mines in partnership. They were held, under a lease from the Duke of Northumberland, for a term of twenty-one years, which expired in 1845. After that time the partners continued to work the mines without any fresh lease, and as tenants from year to year. On the 14th of November 1847 Walter Hall died, having by his will, dated the 20th of April 1839, appointed his sister Matilda executrix. Alfred Hall continued to work the mine only so far as was necessary to keep it going. No claim was then made on the part of the representative of Walter Hall. In September 1850 the Duke of Northumberland gave notice to Alfred to quit the mine at Lady-day 1851, alleging that he had not worked it sufficiently. Before that day arrived, or soon after, Alfred entered into a negotiation with the Duke, and obtained from him an agreement for a new tenure of the greater part of the mine, on the terms of paying an annual rent of 500*l.* certain, besides royalties, and an undertaking to employ a larger amount of capital. On this new agreement Alfred Hall worked the mine on his own account. On the 24th of November 1851, Henry Foley Hill filed a bill against the present defendant, Matilda Hall, Alfred Hall, and another legatee, praying that the estate of Walter Hall might be duly administered, and that the mine in question might be worked under the authority of the Court. To this bill the defendants put in their answer, but nothing further was done, an order having been obtained that all proceedings in the suit should be stayed. Alfred Hall continued to work the mine under the new agreement until the 31st of December 1853, when he died intestate, and the defendant Matilda Hall obtained letters of administration of his estate, and thus became the personal representative of both her brothers. On the 1st of June 1854 H. F. Hall sold and assigned to the present plaintiff all his estate and interest under the will of Walter, and on the 17th of the same month the bill in the present suit was filed. One important object of

the suit was to establish an interest in Walter's share of the Settlingstones Mine. On the 9th of July 1855, a decree was made, by the Master of the Rolls, directing, amongst other things, "an inquiry of what the testator's interest in the several mines and mining property in the pleadings mentioned consisted at the time of his death, and how the mines had been worked and by whom; and by whom the profits, if any, in respect of the testator's interest therein, had been received; and whether the testator's interest in any of the said mines, mining property and shares, or any of them, or any part thereof, had ceased or determined, and if so, how." On this inquiry, the chief clerk, by his certificate, dated the 24th of April 1857, certified that "the testator's interest in the mines at Settlingstones ceased upon his death, and the said mine then became the sole property of the said Alfred Hall, subject to his accounting for the testator's capital therein at the time of his death, and the profits produced by the use thereof by the said Alfred Hall." This certificate was, on the 23rd of May 1857, on a motion to vary the same, confirmed by the Master of the Rolls (1). From that decision the

(1) The judgment of the Master of the Rolls was as follows:—In this case a perusal of the affidavits confirms the view which I expressed yesterday, and which, in fact, was the view which I had before taken of the matter in chambers. In my opinion no account can properly now be directed of so much of the profits of the working of this mine as are attributable to the leasehold interest which the testator had in the property at the time of his death. Now it is not disputed on either side that a general rule applying to these cases, which is the rule laid down in *Clegg v. Fishwick* and a great number of other cases, is that upon the death of a testator his property in a mine, like property in any other partnership, (for it is exactly the same), still continues his property, and that if not sold or disposed of between the parties, it would *prima facie* be property of a testator producing a profit of which his estate is entitled to have the benefit. But if the testator dies carrying on a coal-mining partnership with another,—take the present case, as with his brother,—as tenants from year to year under a landlord, there is no law in this country which makes it imperative on his legal personal representative to continue to carry on that trade. He is bound undoubtedly up to the time that his interest remains in it, that is to say, he would be bound to the original landlord; but there is nothing to compel the legal personal representative to continue in that trade, neither is there anything to compel the surviving partner to continue to carry it on in partner-

plaintiff appealed, and the appeal was argued before the Lords Justices, who desired that it should be re-argued before the full Court by one counsel on each side.

Mr. R. Palmer (with whom was *Mr. Kent*), for the plaintiff, in support of the appeal, contended that here was a direct trust in the surviving partner, and that, therefore, those representing the deceased partner were entitled to what was asked in this suit. The decision of the Master of the Rolls was mainly caused by supposed

ship. Then the only question that arises on the facts of the present case is this, whether it is reasonably to be inferred in this case that there was, if not an express agreement, an agreement by assertion on the one side and by acquiescence or waiver on the other, that the testator should cease to have any further concern or interest in the mine. I find that what took place was this. The testator died in November 1847; the brother asserted that all the interest in it survived to him; the sister, the legal personal representative, never enforced any account from him, never took any steps to make him account in respect of this mine, but still, in an answer filed in a suit four years afterwards by the person under whom the present plaintiff claims, she stated that she had applied to him for accounts of this and other mines; that he had refused; and that he had claimed to be entitled to the mine absolutely for his own benefit; and that he was not carrying on the business either as her agent or as a partner with her, unless there was any partnership which might arise by construction of law. I think in that state of circumstances it would have been totally impossible for the brother to have said against the executrix that the testator's estate was liable in respect of any expenses incurred in carrying on the mine, neither does it appear to me that the present plaintiff, whom I must treat in exactly the same way as the person under whom he claims, that is, the other Hall, who had a charge upon this under the will of the testator, can be allowed, after more than six years have elapsed, to say that this is a case in which the property must be treated as part of the property of the testator. The legal personal representative has not thought fit to do so. I think that she is bound, and she, being bound, binds all the persons claiming under her; and that the only question which would arise would be between her *cestuis que trust* and herself for an account on the ground of wilful default in case she had improperly exercised her judgment and not enforced the right of the testator to have the mine carried on for their common and joint benefit. It is also to be observed that in point of fact a new letting took place four years afterwards, on Lady-day 1851, for the Duke of Northumberland, the landlord of the mine, having given notice to quit, a new arrangement was made between him and the brother of the testator. The brother of the testator, who is now dead, may fairly be assumed to have said that he would carry on

laches in making the claim. He referred to—

Norway v. Rowe, 19 Ves. 143.

Clegg v. Edmondson, 3 Jur. N.S. 299; s. c. 26 Law J. Rep. (N.S.) Chanc. 673.

Prendergast v. Turton, 1 You. & C. C.C. 90; s. c. 13 Law J. Rep. (N.S.) Chanc. 268; 11 Ibid. 22.

Hart v. Clarke, 6 De Gex, M. & G. 232; s. c. 24 Law J. Rep. (N.S.) Chanc. 137.

Wedderburn v. Wedderburn, 4 Myl. & Cr. 41; s. c. 2 Keen, 722; 8 Law J. Rep. (N.S.) Chanc. 177.

Clegg v. Fishwick, 1 Mac. & G. 294; s. c. 19 Law J. Rep. (N.S.) Chanc. 49.

Mr. Selwyn (with whom was *Mr. Karslake*), for the defendant, contended that there was no case of direct or express trust. There was only an inchoate right, which should have been actively asserted. It was said that there being the plant, the

this mine for his own benefit, but that he would not carry it on in partnership with the executrix, and that the executrix has acquiesced in that proceeding by taking no steps whatever, which she might have done, to enforce any account or to enforce a sale during that period. I think, therefore, on the statement of these affidavits, that it must be treated that the claim made by the brother to carry on the mine on his own account was acquiesced in by the legal personal representative, and that the present plaintiff was bound by these proceedings. I think this more strongly in the case of mines, because,—I refer again to the observation I made yesterday, and which is the principle of *Norway v. Rowe*, which was observed on at the bar,—in a case of mines it is the more incumbent on a person to act speedily and diligently in the matter, because it is a matter of very considerable doubt and speculation; and it cannot be open to the legal personal representative of a deceased owner to stand by for five or six years and say 'if the mine turns out unprofitable and turns out ill, I will have nothing to do with it; but if it turns out a profitable speculation, I will come in and insist on having an account.' On these circumstances I am of opinion that the conclusion to which I previously came in chambers is a correct one, and must be affirmed on the present occasion. There is an account directed of how much of the stock in trade may belong to the brother, and as he has never paid for it or accounted for it, so much of the profits as are properly attributable to the use of that capital, must be accounted for for the benefit of the *cestuis que trust*. I decide this on the same principle as *Wedderburn v. Wedderburn* and a great many other cases, in which the principle has been established.

right to account continued, but in *Clegg v. Edmondson* there was considerable property remaining. Upon the renewal of this tenancy by Alfred Hall there was fresh risk and consequent outlay, new liabilities, alteration of tenure, and alteration of the extent of the property taken, and this could not, therefore, be treated as a continuation of the old partnership.

Mr. Palmer, in reply.—From the death of the testator to the renewal of the lease nothing was done to alter or vary the rights of the persons claiming under the testator. The case, in fact, raised by the defendant was, that the mine was not worked at profit or loss. There was no need of advances, or case made of application for advances. No notice of the intended alterations was given. The nature of property in mines might be peculiar, but the nature of a partnership in mines was not different from that in any other property. The doctrine of direct and not of constructive trust was applicable here.

Feb. 25.—The LORD CHANCELLOR [after stating the facts of the case] said—The general rule of law is, that, on the death of a partner, in the absence of express stipulation, his representative is entitled to have the whole concern wound up and disposed of, and if the surviving partner continues the trade, the representative of the deceased may elect to take two-thirds of the profits, or charge the survivor with interest on the capital retained. If the property consists in part of leaseholds, the representatives of the deceased may treat the survivor as trustee, and if the survivor renews the lease, he is considered to do so for the benefit of the other partner. This rule is subject to qualification where the trade is one of a speculative character requiring outlay with an uncertain return. Then, if the surviving partner continues the trade in his own sole name and renews the lease, the Court will not consider the representative of the deceased partner has any interest in the trade unless he comes ready to contribute a due proportion of money for the purposes of the business. The Court considers it unjust to permit the executors of the deceased partner to lie by and allow the other to run all the risk

of loss and then claim profit. This is the general principle, which is clear enough; the application of it to particular cases is often difficult. In the present case, that Alfred had no right to retain to himself the old lease and so obtain a new lease for his own benefit if Matilda had interposed, is a matter admitting of no doubt; and the only question is, whether she did all that was necessary for her to do for the purpose of preserving her right. On the part of Alfred, it is urged, that no effectual step was taken during the six years that elapsed between the death of Walter in November 1847, and that of Alfred in December 1853, so that she must be considered as having abandoned all right as representing the deceased partner. It was said that she must have thought it was not prudent to go on with the working, and it cannot be allowed to those claiming under Walter, when the speculation has turned out successful, to assert their right. This is the view of the case taken by the Master of the Rolls, but in which, with all respect, I do not concur. If the evidence had shewn that Matilda had during the life of Alfred remained passive, and, without making any adverse claim, had allowed him to obtain a new lease and incur a large expenditure, believing he was acting for himself alone, the principles on which the decisions were founded might have been applicable. Here Alfred, by his conduct, precluded himself from setting up such a case. Matilda, in her answer to the bill, filed in 1851, states that Alfred who had ever since his brother's death been in the possession of the mine, had refused to comply with her repeated applications to render an account of the rents and profits of the mine. Though I accede to the proposition, that the representative of a deceased partner in a mining concern may forfeit his right to the subsequent profits if he does not, with reasonable expedition, come forward and contribute, this doctrine can never apply to a case where the survivor keeps the representative of the deceased partner in ignorance of the real state of the case. He is bound to disclose every fact which will enable the representative to exercise a sound discretion as to the course he ought to pursue; and here the defendant states that Alfred, up to a period long

subsequent to his obtaining a new lease, refused to furnish her with any accounts of the mine, and kept her in ignorance of all that was necessary to enable her to decide on the propriety of insisting on her rights. On these grounds, I think the certificate is wrong, and that it ought to be varied by stating that the testator's interest in the Settlingstones mine did not cease on his death; and then there might be a further inquiry, whether the same has been worked by the surviving partner. Substantially, it should be stated that the testator's interest in the Settlingstones mine did not cease at his death.

LORD JUSTICE TURNER.—The general principle to be applied to the determination of this case admits, and can admit, of no dispute. The partnership did not determine by the death of Walter Hall, so as to entitle Alfred Hall to Walter Hall's share of the mine. The share, indeed, became legally vested in Alfred, but it was affected by a trust, or *quasi* trust, for the benefit of Walter's estate. This trust, or *quasi* trust, draws with it the benefit resulting from the possession held by the person who is affected by it; and every renewed interest, therefore, becomes subject to the trust, or *quasi* trust, unless it has been effectually determined. The question we have to consider in this case is, whether it has been so determined, and I am of opinion that it has not. It is, in my judgment, most important to adhere to the rule of the Court, which subjects property acquired by means of a confidential relation to the trusts, or *quasi* trusts, which attached to the interests, by means of which it was acquired; and, although I agree that this rule has been, and ought to be, modified in the case of mines and other property of a doubtful and speculative character, and that the Court is bound in such cases to look carefully into the conduct of the parties who claim the benefit of the acquisition, with a view to the question, whether they may not by their conduct have raised a counter equity sufficient to defeat their claim, I think that the grounds brought forward for defeating the claim ought in all cases to be watched with jealousy, the more so, as it is always in the power of the Court to dic-

tate the terms on which the claim shall be admitted. This, in my opinion, ought to be the rule in all cases of this nature, but more especially in a case like the present, where the acquisition has been made without any communication with the parties interested under the trust, or *quasi* trust. The intention to acquire the property in question, under the arrangement of 1851, does not appear, upon the evidence before us, to have been communicated even to the defendant Matilda Hall; and I think that the circumstances of this case furnish no sufficient grounds for displacing the equity of the parties interested under the will of Walter Hall. It is alleged by the answer of Matilda Hall, in this suit, that there were no profits of the mine before the death of Walter Hall; and that after his death Alfred Hall worked the mine only to such an extent as to keep it going. This, I think, is a sufficient excuse for Matilda Hall not having filed a bill at any time between the death of Walter Hall and Lady-day 1851; and ever since November 1851 there has been a bill upon the file of this court claiming the right which is now insisted upon. Under these circumstances, I think it would be going much too far to say, that the equity claimed by the plaintiff has been displaced, and, in my opinion, therefore, this order ought to be reversed; and it ought to be declared that the testator's interest in the mines at Settlingstones did not cease upon his death, but is still continuing,—of course, leaving the terms on which the plaintiff is to have the benefit of it to be settled hereafter.

LORD JUSTICE KNIGHT BRUCE.—This case appeared to me at the close of the first argument, as I then said, and still appears to me to be one of nicety and difficulty. The inclination of my opinion, however, being rather in accordance with the conclusion of the Master of the Rolls than otherwise, I am unable to give a voice in disturbing it. The order of the Court will be, however, according to the united opinions of the Lord Chancellor and the Lord Justice Turner.

KINDERSLEY, V.C. } *In re* THE NORTHUM-
 Feb. 1, 12. } BERLAND AND DUR-
 HAM DISTRICT BANK-
 ING COMPANY.

Joint-Stock Companies Acts, 1856 and 1857—Registration after Suspension of Payment.

Where a banking company was registered under the Joint-Stock Companies Acts, 1856 and 1857, after having suspended payment, it was held, that the Court had no jurisdiction to interfere with the Registrar's certificate of registration, except in the case of fraud.

Where a creditor brought an action against a company pending a petition for winding up, the Court held that discretion was given to the Judge to stay proceedings, and an injunction was granted to restrain the action until the hearing of the petition.

Upon the petition coming on to be heard subsequently, the Court decided, under the circumstances, upon granting an order for the voluntary winding up of the company.

This was a motion on behalf of a creditor of the Northumberland and Durham District Banking Company, for an injunction to restrain Messrs. J. & F. Robson, who were also creditors of the company, from proceeding in an action commenced against the public officer of the company. The bank was established under a deed of settlement, dated the 1st of July 1836, and the business was carried on from that time until the 26th of November 1857, when the bank stopped payment. On the 30th of December the company was registered under the provisions of the Joint-Stock Companies Act, 20 & 21 Vict. c. 49, and at a meeting, held in January last, it was resolved, that the company should be wound up, and a petition was presented to the Court for that purpose.

Before the petition came on for hearing the action which it was now sought to restrain was brought against the company.

Mr. Toller and Mr. Thring appeared in support of the motion, and

Mr. Hallett opposed the motion, on the ground principally that the company could

not be legally registered after having stopped payment.

The following statutes were cited—19 & 20 Vict. c. 47, and 20 & 21 Vict. c. 14, being the Joint-Stock Companies Acts of 1856 and 1857, and 20 & 21 Vict. c. 49, being the Joint-Stock Banking Companies Act, 1857.

KINDERSLEY, V.C.—These winding-up acts are very numerous, and they are so framed as to require considerable care in construing them. Under the original acts of 1848 and 1849 the policy of the legislature was very obvious. Without such acts there could be no winding up of joint-stock companies, except by a suit in equity to which all the shareholders must have been parties. The result was, that in the attempts to wind up these companies the number of necessary parties rendered any reasonable result impracticable, and there was, therefore, a failure of justice in administering the rights and equities of partners and shareholders *inter se*. The object of the legislature in the winding-up acts was to prevent that, and to give another, and it was hoped a simpler, mode of winding up a company. It was not intended to interfere with the rights of creditors any further than they would be by a suit, and the only interference (and that was but a temporary one) was, that a creditor was not allowed to commence or go on with an action until he had first brought into the Master's office his claim, and laid before the Master such proofs as he was able to shew in support of it; and then, whether the Master allowed or disallowed the claim, the creditor was at liberty to go on without any restriction in his action against the company at large or against any individual shareholder. By the later acts a new policy was introduced, as it was found that it would be very desirable not to confine the operation of the acts to the rights and remedies of the shareholders *inter se*, but to introduce something analogous to an administration suit, or rather, perhaps, to a bankruptcy or insolvency, than to anything else. Accordingly, whereas under the former acts no one but a shareholder could present a petition, now a creditor might apply as well as a shareholder,

or, as in the present instance, a creditor and shareholder might join in one petition. There was another policy, which was this : the winding up under compulsory orders involved much controversy, and it was considered expedient to enable a company to be wound up voluntarily, subject to certain restrictions provided for by the acts, and to the discretion of the Court. In this case there have been applications by petition on behalf of two persons—one a shareholder and the other a creditor, praying for a winding-up order, either compulsory or, in the alternative, a voluntary order. Besides these petitions, there has been also a third application by a creditor, with a similar prayer. It is clear that the Court must assume that the result of these applications will be, either that there will be a compulsory or voluntary winding up, or that there will be no order made. There is now a motion by a creditor under the 84th section of the act of 1856, which is incorporated in the act of 1857, asking for an injunction to restrain another creditor, who has commenced an action, from proceeding with that action. I gather from what has been stated that there is no reasonable question, but that the plaintiff in this action is a creditor, and that there is no doubt as to the amount claimed. It appears to me that I ought not to interfere with the right of a creditor more than is necessary for the general benefit of the creditors at large, nor to allow him to go on merely for the purpose of creating expenses and obtaining a greater preference than his diligence entitles him to. But then comes this question—whether the Court has jurisdiction? Now the act of 1857 incorporated the act of 1856, which, therefore, applies to companies registered under the act of 1857. This company, after suspending payment, and in that sense ceasing to carry on business, became registered under this act, and was within the terms of it. It has been argued that the registration ought to be considered invalid by reason of such registration having taken place after suspension of payment, but that appears to me not to be a matter within my jurisdiction, inasmuch as I am bound by the registrar's certificate. I would not, however, be understood to raise any question as to whether, in a case of

fraud, this Court would not interfere; but I only say that, under the circumstances of this particular case, I do not think I can go into the question of the validity of the registration. By the 84th section of the act of 1856, it is enacted, that the Court may, at any time after the presentation of a petition for winding up a company, and either before or after making an order for winding up the same, upon the application by motion of any creditor or contributory of such company, restrain further proceedings in any action or suit against the company. Now, by the terms of the act, it is clear that the legislature meant such a case as the present; but, at the same time it gave the Court a discretion. What, then, was the purpose and object of this section? What did the legislature mean that the Judge should take into consideration, when called upon to exercise his discretion? I think it must have been intended that the Court should bear in mind that the acts provided for an administration by a creditor, and not only a winding up, and that the power must be exercised for the purpose of working out the actual administration of the assets by analogy to the ordinary equities which are administered by this Court. In an ordinary administration suit, the Court will step in to restrain an action, and is not stopped by the legal right of a creditor, because equity requires in some cases that such a right should be interfered with. The 116th section of the act of 1856 provides that registration of any company shall not prejudice any right which previously to such registration had accrued to any creditor against the company, but every such creditor should be entitled to all such remedies as he would have been entitled to in case such registration had not taken place. That is simply to say, that a mere registration shall not interfere to prevent an action. It does not, however, interfere with the right of this Court to stay the action if it should see reason to do so. There is no doubt, therefore, of the jurisdiction, or of the grounds upon which it should be exercised. The question then is, how those grounds are to be applied to the present case? Here there are petitions pending, for which it must be assumed there is some necessity.

If no order should be made, of course the Court ought not to have interfered, but to have abstained from prejudicing the legal right of a creditor; and the Court ought not *primâ facie* to interfere with him further than is necessary to stay execution until the result of the petitions is known. If the Court does not interfere further, then the consequence will be, that the action will be tried, and expenses will be incurred which may be useless; and as it appears that these petitions will come on in about a fortnight's time, and no other creditors therefore could by a judgment succeed in getting priority over the judgment which may be obtained by this creditor, he cannot be damnified by being restrained from going on any further until the petitions are disposed of. The only doubt is, whether all proceedings ought to be stayed, or only execution. If the former course be taken, the expense of the trial will not be incurred; and if the latter, that expenditure will not be prevented. I think the better course is to stay proceedings in the action till further order, with liberty to the creditor to appear upon the petitions for winding up. This order to be accompanied by an undertaking on behalf of the company and their public officer to submit to judgment at such time and in such manner as the Court may direct.

Feb. 12.—This case now came before the Court upon two petitions, praying a compulsory, or, in the alternative, a voluntary winding up of the company. It appeared that at a general meeting of the shareholders, which took place on the 22nd of January 1858, a resolution was come to that there should be a voluntary winding up of the company, under the powers conferred by the act 20 & 21 Vict. c. 49.

The COURT decided, after argument, that the voluntary winding up would be more advantageous to the company, and made an order accordingly, subject to the following restrictions:—First, that the liquidators should not bring any action or institute any suit, against either shareholders or debtors, without the leave of the Court; secondly, that the liquidators should not compound, compromise or release any debt or claim as between the

shareholders and the company, or the creditors and debtors, above 2,000*l.*, except under the sanction of the Court; and, thirdly, that the creditors should, if they thought proper, appoint a committee to superintend the carrying the order into effect, this Court giving every facility by access to books, accounts, &c. for that purpose.

LOKDS JUSTICES.
March 19, 20,
24, 25;
April 19.

In re THE NORTHUMBERLAND AND DURHAM DISTRICT BANKING COMPANY AND THE JOINT-STOCK BANKING COMPANIES ACT, 1857.

Joint-Stock Companies Acts, 1856 and 1857—Registration after Suspension of Payment—Voluntary and Compulsory Winding-up—Banking Companies Act, 7 Geo. 4. c. 46.—Joint-Stock Banking Companies Act, 1857, 20 & 21 Vict. c. 49.

A banking company was established in July 1836, under the statute 7 Geo. 4. c. 46. It was provided by the deed of settlement that a portion of the profits should form a guarantee fund, and that if the company should lose the whole of the guarantee fund and one-quarter of the paid-up capital, a meeting should be called, which, by a majority might declare the company dissolved. On the 26th of November 1857 the company stopped payment, and on the 26th of December following a meeting was held, when it was resolved to register, the company under the statute 20 & 21 Vict. c. 49, and this was done on the 30th of the same month. On the 22nd of January 1858, at a meeting, the directors reported that the whole of the guarantee fund was lost, and, as they believed, the whole paid-up capital, and the dissolution of the company was agreed to, and liquidators were appointed to wind up the company voluntarily, under the statute 19 & 20 Vict. c. 47. A petition was presented by creditors of the company, praying that a compulsory winding up should be ordered, when one of the Vice Chancellors made an order for the continuance of the voluntary winding up with various restrictions, and decided that the certificate of registration having been obtained, he had no jurisdiction to interfere:—Held, upon appeal

(Lord Justice Knight Bruce dissenting), *that the registration after suspension of payment was valid, but (both Judges agreeing) that a compulsory winding-up should be ordered, with liberty to adopt any proceedings in the voluntary winding up.*

This was an appeal from an order of Vice Chancellor Kindersley, the substance of which is stated at the close of the report (*ante*, p. 354). The petition on which the order was made was presented by two creditors of the company, Mr. George Milner and Mr. William Isaac Cookson, and the petition of appeal was by three other creditors, Mr. John Shield, jun., Mr. Thomas Spencer and Mr. Michael Spencer. The Northumberland and Durham District Banking Company was established at Newcastle-upon-Tyne, on the 1st of July 1836 (under the Banking Companies Act, 7 Geo. 4. c. 46.), by a deed of settlement of that date, by which, amongst other things, the capital was fixed at 500,000*l.*, in 50,000 shares of 10*l.* each (afterwards increased to 66,775 shares), nearly the whole of which, amounting to 667,750*l.*, was paid up. The deed contained two provisions necessary to be stated: one, that a stated proportion of the profits of the concern, at the discretion of the directors, should form a guarantee fund; and the other (section 102. of the deed), that whenever the losses of the company should have exhausted this fund, and also one-fourth part of the capital of the company actually paid up, the directors should call a special meeting of the shareholders, and submit to them a full and true statement of the affairs of the association, and if required so to do by a majority of the meeting, the chairman should declare the company dissolved. The business was continued until the 26th of November 1857—a number of branch offices having been opened, the head office being at Newcastle-upon-Tyne—on which day the bank stopped payment. Soon after, that is on the 22nd of December 1857, a petition was presented under the Winding-up Acts of 1848 and 1849, by Mr. Bourne, a shareholder, praying the winding up of the affairs of the bank; but this petition was withdrawn, and no further proceedings taken upon it. Four days after the presentation

of this petition a meeting of shareholders was called by the directors, when it was resolved that the company should be registered under the provisions of the Joint-Stock Banking Companies Act, 20 & 21 Vict. c. 49, and this was done on the 30th of the same month, before which time, however, Messrs. T. and M. Spencer had brought actions against the company, and they and Mr. Shield had served notices on the company, requiring payment, which, however, never was made. On the 22nd of January 1858 a meeting of shareholders was held, when the directors presented a report, which was read, stating that the whole guarantee fund had been exhausted, and that the directors believed that the whole paid-up capital of the company had been lost. Resolutions were then passed, the chairman of the company being present, that the company should be, and it was declared to be dissolved, and that the company's affairs should be wound up voluntarily under the act of 1857, 20 & 21 Vict. c. 49. Liquidators were then elected, namely, Mr. John Fogg Elliott and Mr. William Bainbridge, creditors, and Mr. Joseph Fairs, a shareholder, to proceed with the winding up. On the 18th of January 1858, that is, four days before the meeting at which the dissolution of the company was declared, and the voluntary winding up resolved upon, Mr. Milner, who was a contributory, and Mr. Cookson, who was a creditor, presented a petition, entitled in the act 20 & 21 Vict. c. 49, which contained (amongst others) the following allegations:—"That there were among the shareholders many debtors to the company to a large amount, whose dealings and transactions with the company required the fullest and strictest investigation, and that it would be impossible for the creditors, without access to the books of the company, to discover the particulars of such dealings; that, amongst other debts due to the company, there was one amounting to 750,000*l.* due from the Derwent Iron Company, one of the partners in which company, namely, Matthew Robert Bigge, was a director of the banking company, and that the said Derwent Iron Company were the lessees of mines under Jonathan Richardson, another of the directors of the banking company;

that Bigge was, as the petitioners believed, indebted to the company to the amount of 200,000*l.*, and that others of the directors, or late directors, and officers were indebted in large amounts to the bank at the time when it stopped payment; that a call had been made by the directors since stopping payment, and that the directors, as the petitioners believed, had allowed several shareholders to pay the amount claimed under the call, by transferring their credits against the banking company to the account of the bank; and the petitioners submitted that, until the creditors of the company were paid in full, such a course of administration was improper; that the petitioners had been informed that some of the shareholders had been buying up the deposit-notes of the company at a considerable discount, in order to set off the same at their full value against the calls, and that such set-off had been allowed; that the petitioners had no confidence in the voluntary winding up, and did not believe that the dealings and transactions of the company and of the directors and shareholders would be properly investigated, or the interests of themselves and the general creditors protected, otherwise than under an order for compulsory winding up the said company altogether by the Court; which was prayed."

In opposition to the petition many affidavits were filed, the most material of which was that of the liquidators, who swore that, since the suspension of payment, the debts and liabilities of the company had been reduced in amount by upwards of two millions sterling; that by a call of 5*l.* per share made by them, they had got in a sum of 112,000*l.*; that they had realized large sums on account of the assets of the company; and that they intended with the least possible delay to submit a scheme for the settlement of the affairs of the company; they alleged that they were acting quite independently of the directors, and were guided only by the interest of the creditors; that they had in no instance accepted cheques upon the company as payment of calls, and that they had not written off any sum for the claims of the company, either upon creditors or shareholders.

Among the affidavits were also some

from creditors of large amounts, approving of the voluntary winding up. The Vice Chancellor Kindersley granted an injunction to restrain the action which had been brought against the company, and made the order before referred to, which was to continue the voluntary winding up, with certain modifications, set out at length in the judgment; whereupon Messrs. Shield and T. & M. Spencer appealed. The argument was of a very voluminous character, but may be sufficiently indicated by the following summary.

Mr. Glasse and *Mr. W. D. Lewis*, for the appellants, argued that no registration could be legally made of a company which was insolvent, as was this company; a company, moreover, as to which a petition for winding up had been presented before the registration took place. By the stoppage of its payments on the 26th of November 1857, it was no longer a banking company within the meaning of the Joint-Stock Banking Companies Act, 1857, at the time it was registered on the 30th of the same month. The act of registration, if it were supported, as it had virtually been by the Vice Chancellor, had the effect of very materially altering the relative position of the company and the creditors, a course wholly inconsistent with justice, and against the intention of the legislature, and contrary to the principle of the decisions at law. Unless the registration were held to be good, the company would fall under the provisions of the old Winding-up Acts, 1848 and 1849. The registration of the company was not compulsory, for the statute under which it was formed, namely, 7 Geo. 4. c. 46, was not even mentioned in it, and, therefore, this act of the shareholders was purely gratuitous, and done without the slightest regard to the interests of the creditors, whose rights, however, were saved by the 105th section of the 19 & 20 Vict. c. 47; for it is thereby enacted, that the voluntary winding up of a company should not prejudice the right of any creditor to institute proceedings for the purpose of having the same wound up by the Court. That the interests of the creditors were more fully protected by a compulsory than by a voluntary winding up, was plain from a com-

parison of the clauses giving powers to official liquidators with those conferred upon liquidators elected under a voluntary winding up; the beneficial effect of which would be rendered nugatory if the Court should hold that the registration was valid, or, even if it did not so hold, should determine that the voluntary winding up should proceed in preference to the winding up under its own controul.

Mr. Baily and *Mr. G. M. Giffard*, for Messrs. Milner & Cookson, contended that the interference with the rights of creditors was no more than was effected daily by the law of bankruptcy in giving protection to debtors; nor was the complaint of the registration after the stoppage of payment of greater weight, for nothing in the act of 1857, c. 14, could prevent the company from registering the day before it stopped, although it might then have lost as much as it had in this case. In fact, the company was not dissolved until January 1858, and it was not unlikely that it might, between the time of registration and the period of dissolution, have resumed its business, as was actually the case with the Wolverhampton bank. This company not being established under the 8 Vict. c. 113. or the 10 Vict. c. 75, it was not incumbent upon the members to register before the 1st of January 1858, but being formed under the 7 Geo. 4. c. 46, the time of its registration was optional, as was the fact of the registration itself. With regard to the objection that when registered this was not a "banking company" within the meaning of the acts, nothing could be more fallacious, for if it was a company at all, it was a banking company; and that it still had existence was plain, for by the deed of settlement it was declared to exist for the purpose of winding up its affairs. So far from creditors being damnified by the late acts of parliament, they were placed in a far better position, whether under voluntary or compulsory winding up, than they were by the old Winding-up Acts, for now they could take part in the proceedings, which before they could not.

Mr. Toller and *Mr. Thring*, for the company, insisted that the company was still a banking company, although it had suspended its payments, and could sue by

its proper officer; and, indeed, so great were the benefits conferred by the acts of 1856 and 1857, that it ought to be permitted to register for the mere purpose of its being wound up. That the registration was considered good at law was plain, for to actions brought against it the registration was pleaded by permission of Mr. Baron Bramwell, and nothing further was heard of the actions. In the case of *Ex parte Phillips, in re the London and Westminster Insurance Company* (1), it was held that a company continued to exist, there being a fund to be divided. The following cases were also cited:—

Fletcher v. Crosbie, 9 Mee. & W. 252; s. c. 11 Law J. Rep. (N.S.) Exch. 16.

Davidson v. Cooper, 11 Ibid. 778; s. c. 13 Ibid. 343; 12 Law J. Rep. (N.S.) Exch. 467; 13 Ibid. 276.

Mr. Anderson and *Mr. T. C. Thompson*, for Sunderland creditors, supported the order of the Vice Chancellor.

Mr. Selwyn, for the liquidators.

Mr. J. N. Higgins, for shareholders not appealing, was refused a hearing.

Mr. Glasse, in reply, cited *Roe v. Fuller* (2).

LORD JUSTICE TURNER. — This is an appeal from an order of Kindersley, V.C., which was made in the matter of the Joint-Stock Banking Companies Act of 1857, and in the matter of the Northumberland and Durham District Banking Company. The order was made upon the petition of George Milner, a contributory of the company, and William Isaac Cookson, a creditor of the company. The petition of Messrs. Milner and Cookson prayed: "That an order absolute might be made for winding up the company by the Court, under the provisions of the Joint-Stock Banking Companies Act, 1857, and that all actions and suits against the company might be restrained by the injunction of the Court, or that the voluntary winding up, which was resolved upon at the meeting of the company, might be allowed to continue, subject to the supervision of the Court,

(1) 3 De Gex & Sm. 3.

(2) 21 Law J. Rep. (N.S.) Exch. 104.

with liberty for any creditor or contributory of the company to apply to the Court, or until some further order should be made." The order which Kindersley, V.C. made upon this petition was as follows:—"This Court doth order that so much of the said petition as prays that an order absolute may be made for winding up the said company by the Court, under the provisions of the Joint-Stock Banking Companies Act, 1857, stand over; and this Court doth approve of the voluntary winding up of the Northumberland and Durham District Banking Company in the petition mentioned, and doth order that such voluntary winding up do continue. But the liquidators under the said voluntary winding up are not to act under the 17th section of the Joint-Stock Companies Act, 1857, nor to compromise or compound any claim against any shareholder, or representative of a shareholder, either in respect of any call or debt, without the leave of this Court, nor to compromise the debt of any other person to the amount of 2,000*l.* or upwards, without the leave of this Court; and it is ordered that the costs of the petitioners, and of the said banking company, of this application, be paid out of the estate of the said company; and the creditors, contributories and liquidators, and all other parties interested, are to be at liberty to apply to the Court as they may be advised."

The appeal before us is by some of the creditors of the company, who state, by their petition, several matters relating to the management of the company, and also state that they have commenced actions for the purpose of recovering debts which were due to them from the company. The appeal involves two questions: first, whether any order ought to have been made upon this petition; and, secondly, if any ought to have been made, whether the order should not have been for winding up the company by the Court, under the provisions of the Joint-Stock Banking Companies Act of 1857, and not for continuing the voluntary winding up which had been agreed upon at a meeting of the shareholders. The first of the questions—whether any order ought to have been made—depends upon whether the company was properly subject to the provisions of

the Joint-Stock Banking Companies Act of 1857; for this petition was not intitled under the general Winding-up Acts, but was intitled only under the Joint-Stock Banking Companies Act of 1857; and, therefore, as the petition stood, whatever might have been done in the management of it, unless the case fell within the Banking Companies Act of 1857, there was no jurisdiction to make the order. Now there is no dispute as to the facts upon which this question depends. This company was formed in the month of July 1856, under the act of 7 Geo. 4. c. 46. It stopped payment on the 26th of November 1857; on the 26th of December 1857 there was a meeting of the shareholders, at which it was resolved to register the company under the Joint-Stock Banking Companies Act of 1857; and on the 30th of December it was registered accordingly. The question is, whether this registration brings the company within the provisions of this act, and consequently of the Joint-Stock Companies Acts, 1856 and 1857, which are incorporated in the Joint-Stock Banking Companies Act. It is to be observed, in the first place, that this is not a company which was required to be registered by the provisions of the Joint-Stock Banking Companies Act, for it was not a company formed either under the 8 Vict. c. 113, or under the 10 Vict. c. 75, and it is of companies formed under those acts only that the legislature has rendered it imperative that there should be a registration, requiring that all banking companies which had been formed under either of those acts should be registered before the 1st of January 1858. If, however, this company, though not required to be registered under the provisions of the act, was authorized to be so registered, there can, I think, be no doubt that the provisions of the act must be applied to the company, though it is singular and remarkable that there is not to be found in the Joint-Stock Banking Companies Act, so far as I have examined it, any express provision that companies so registered shall be subject to the provisions, either of that act, or of the acts which are incorporated with it. I think, however, that if authorized to be registered by the provisions of the act it must necessarily become subject

to the provisions of the act; and it would become subject to them in this mode: The Joint-Stock Companies Act, 1856, excluded banking companies from its operation. By section 2, banking companies and insurance companies were excluded from the operation of the Joint-Stock Companies Act. The Joint-Stock Banking Companies Act of 1857 repealed that exclusion as to banking companies. By the effect of that repeal, therefore, banking companies would be subject to the Joint-Stock Companies Act, if the matter had rested there; but then, by section 18, it is provided that "the Joint-Stock Companies Acts, 1856 and 1857, shall not apply to any banking company, legally carrying on the business of banking previously to the passing of this act, and not hereby required to be registered, until such time as such company registers itself under this act in pursuance of the power hereby given in that behalf"; so that it is not to become subject to the provisions of the act until it registers; and from that, I think, the inference is necessary, that when it does register it does become subject to the provisions of the Joint-Stock Companies Acts of 1856 and 1857. The 11th section confirms this view, for by the 11th section of the act companies which are to be wound up can be wound up only under the provisions of the Joint-Stock Companies Act. The section says:—"The following acts (and it then enumerates several acts) shall not apply to companies registered under this act, or under the acts incorporated herewith, or either of them; and all companies so registered shall be wound up in manner directed by the said incorporated acts." Therefore, it is clear that no registered company could be wound up otherwise than under the provisions of the Joint-Stock Companies Acts, 1856 and 1857. Now, I may here notice an argument which was urged on the part of the respondents, that we have nothing in this case to do with the question whether this company was authorized to be registered or not; that it was sufficient that the company was in fact registered, and that the certificate of registration is rendered, by the 115th section of the Joint-Stock Companies Act, 1856, conclusive. I notice this argument only

for the purpose of laying it entirely out of the case. If this company was not authorized to be registered, I take it to be quite clear that the certificate of registration can be of no avail. The question, therefore, is, whether, under the circumstances which I have mentioned, of this company having stopped payment in November 1857, it could be validly registered under this act in December 1857, after the stoppage. This depends, I think, on the 6th section of the act, which enacts, that "any banking company, consisting of seven or more persons, having a capital of fixed amount, and divided into shares also of fixed amount, legally carrying on the business of banking previously to the passing of this act, and not being a company hereby required to be registered, may, at any time hereafter, with the assent of a majority of such of its shareholders as may have been present in person, or, in cases where proxies are allowed by the regulations of the company, by proxy, at some general meeting summoned for the purpose, register itself as a company other than a limited company under this act, and when so registered all such provisions contained in any act of parliament, letters patent, or deed of settlement constituting or regulating the company, as are inconsistent with the Joint-Stock Companies Acts, 1856 and 1857, or with this act, shall no longer apply to the company so registered; but such registration shall not take away or affect any powers previously enjoyed by such company of banking, issuing notes payable on demand, or of doing any other thing." There are here, therefore, four several requisites to registration under the act. The company to be registered must be a banking company, whatever that may mean; next, it must be a company having a capital of fixed amount, and divided into shares of fixed amount; it must be a company which legally carried on the business of banking previously to the passing of the act, and there must be the resolution of the shareholders which the 6th section of the act requires. As to the two latter of these requisitions there is no dispute: there was the resolution required, and this company carried on the business of banking, not only previously to, but at the time of the passing of the act of parliament. So

that it becomes unnecessary to consider the question what would have been the effect if there had been a stoppage of the company before the act passed or came into operation; and I do not mean to enter into the consideration of that question. It is sufficient for the present case to say that this company not only carried on business previously to the passing of the act, but carried on that business immediately previous to the passing of the act, and at the time of the passing of the act, which renders it unnecessary to consider what would have been the effect if there had been a cessation of the business at any time before the passing of the act of parliament. What we have to consider here is, whether at the time of this registration this was a "banking company having a capital of fixed amount, and divided into shares of fixed amount." Now, first, then, was this body a company at all at the time of the registration of the company? And if it was then a company, was it, within the meaning of this act, a banking company? Now, that it was a company cannot, I think, be doubted. By the deed of settlement, article 1, it is provided that "the several persons, parties to these presents, all of whom are distinguished by the title of proprietors, and the several other persons who, for the time being, shall become and be proprietors of shares in the capital of the company, shall constitute and form an association, or public joint-stock banking co-partnership, to be called, and shall be and are called, 'The Northumberland and Durham District Banking Company,' and that they, the parties, shall and will from time to time, so long as they shall continue and remain members thereof, promote the interests of the company, and the said company shall have continuance until the same shall be dissolved under or in pursuance of the provisions in that behalf hereinafter contained." And then by article 102. of the deed the dissolution of the company is provided for in the event of its having lost one-fourth of its capital, and a meeting having been called of the shareholders, and those shareholders having passed a resolution that the company shall be dissolved. Now, no such meeting as is mentioned in the 102nd section of the company's

deed had been held at the time of the registration of this company, and the company, therefore, then subsisted undissolved. It is difficult, I think, to say that, if it subsisted as a company, it could subsist otherwise than as a banking company; but still the question must be, whether it subsisted as a banking company—not in the general sense which may be attached to those words, but within the meaning of this act of parliament—whether it was subsisting as a banking company within the meaning of the Joint-Stock Banking Companies Act, 1857; and that must depend upon the sense in which the words "banking company" are used in the act of 1857, whether they are used as descriptive of the general character of the companies to be affected by the act, or as indicative of the character which the companies to be affected by the act are to fill, at the time when the registration takes place.

The case before us, I think, resolves itself into that point; and upon the best consideration which I have been able to give to the subject, I think that the words "banking company," as used in this act, are used in the former sense, and not in the latter sense; that they are used as descriptive of the general character of the companies to be affected by the act, and not as indicative of the character which any particular company is to fill at the time when the registration takes place. These words, "banking company," are used not merely in this section, but in other sections of the act also. They are used in this particular section with reference to companies legally carrying on business previously to the passing of this act, and without reference, therefore, in this section to the business being carried on at the time of the registration. They are used in the 12th section with reference to companies to be formed hereafter; they are used in the 4th section with reference to companies formed under the acts which are there referred to, of the 8 Vict. and of the 10 Vict. Now supposing that one of the companies referred to in that 4th section—a company formed under the 8 or 10 Vict.—had stopped payment after the passing of the act, but before the 1st of January 1858—because it was on the 1st of January 1858 that the com-

panies falling within that section were required to be registered—and put the case that one of the companies which was required to be registered had stopped payment after that act had passed, but before the 1st of January 1858; surely it could never have been held that that company was not bound to register, notwithstanding the stoppage, because the act is expressed that all companies formed under that act shall register on or before the 1st of January 1858. But if those companies were bound to register, upon what ground could they be so bound, unless they were banking companies within the meaning of the act, though they had ceased, or for a time suspended, the carrying on of their business as bankers? We have here, therefore, a case in which a company, having ceased to carry on the business of banking—ceased in the sense of having temporarily suspended its business, having stopped payment—in which a company so circumstanced would nevertheless be included in the term “banking company,” and I do not see my way to put a different or a less extended construction upon the words “banking company” in the sixth section, than that which, in my judgment, they necessarily bear in the 4th section. Taking, therefore, this case upon the language of the act, so far as respects “banking companies,” I think that at the time of this registration, this company, though it had suspended its payments, was a “banking company” within the meaning of the act. Then, was it a company having capital of fixed amount, and divided into shares of fixed amount? I am of opinion that it was, for I think these words are also descriptive of the company. They do not refer to the state and condition of the company at the time of registration, but refer to the state and condition of the company at the time of its constitution or formation. Now this was plainly what was intended by the legislature, for whatever might be said as to the first member of the sentence, having a capital of fixed amount, as importing that there was to be that capital of fixed amount at the time when that registration was to be made—whatever might be said upon that subject with reference to the first member of this sentence, “having a capital of fixed

amount,” the other member of the sentence, “divided into shares of fixed amount,” must be determined by the constitution of the company, and not by its condition at the time of registration; and if one member of the sentence thus refers to the original constitution of the company, I think the other member of the same sentence ought also to be so referred. It is argued for the appellants that the latter part of the 6th section shews that the 6th section was intended to apply only to companies actually carrying on business, because the latter part of the 6th section says this: “But such registration shall not take away or affect any powers previously enjoyed by such company of banking, issuing notes payable on demand, or of doing any other thing.” Therefore, it seems, they look to a continuing company, because the powers of the company of carrying on business are not to be interfered with. But the answer to this argument is, that, though no doubt the section does apply to companies actually and actively carrying on business at the time of the registration, it does not follow that it does not also apply to others which may, at the time of the registration, have suspended their payments, and as to which it might in many cases be equally important, and indeed necessary, to preserve their powers. The appellants also relied on the language of the recital in the act of parliament, and upon the heading of the clauses which preceded the third section of the act, the recital being, “whereas it is expedient to amend the laws relating to copartnerships and companies carrying on the business of banking, and hereinafter included under the term ‘banking companies,’” and the heading of the sections of the act, subsequent to the second, being “registration of existing banking companies;” so that the appellants say that this act was to apply only to existing banking companies, and that these words, “carrying on the business of banking,” in the recital, shew that the legislature contemplated only companies actively carrying on that business; but the heading of this third section plainly refers to the time of the passing of the act: it has nothing whatever to do with the time of registration, and that argument, therefore,

is of no avail. With reference to the argument derived from the recital, I think it would be a strained and narrow construction, if a possible construction, of this act, to limit the words "banking company," in the operative parts of the act, to companies actually carrying on business, by force merely of the loose language of that recital, even if the recital necessarily bore the construction which is contended for on the part of the appellants. But it does not seem to me that the recital does necessarily bear that construction. The recital is: "It is expedient to amend the law relating to copartnerships and companies carrying on the business of banking, and hereinafter included under the term banking companies." Now, there are two constructions which may be put upon these words: either it means copartnerships and companies carrying on the business of banking, and which are hereinafter included under the term "banking companies;" or it may mean copartnerships and companies carrying on the business of banking, and other copartnerships and companies hereinafter included under the term "banking companies." If the former be the meaning—if it means copartnerships and companies carrying on the business of banking, and which copartnerships and companies are hereinafter included under the term "banking companies"—the fact of the companies carrying on the business being included, would import no negative upon other banking companies being included also. And if it means the latter, partnerships and companies carrying on the business of banking and other copartnerships and companies hereinafter included under the term "banking companies," then the words "banking companies" are left quite at large and wholly unexplained, and must take their construction from the other parts of the act, and from the ordinary interpretation which attaches to them. It seems to me, therefore, that the recital does not carry out the argument which was deduced from it on the part of the appellants. The point, however, which was most relied on on the part of the appellants, was the change which the registration operates in the position of the creditors—and no doubt the position of the creditors is in some

respects changed; but the change in their position is by no means so great as it was represented to be on the part of the appellants; for if this case be not within the Joint-Stock Companies Act of 1857, it would in any event be within the Winding-up Acts of 1848 and 1849, and then, if within those acts, it would be within the amended Winding-up Act of the 20 & 21 Vict. c. 78. Most marvellous it is that the legislature should have placed the law in this position, that, there being the acts of 1848 and 1849 for winding up companies, a new act is passed in 1856 which has for its object the registration of companies, and also the winding up of companies. That act is amended in 1857; banking companies are introduced into it by the operation of another act passed in the year 1857; so that there is a complete system of winding up under the act of 1856, into which banking companies are introduced by the act of 1857, and yet the old Winding-up Acts of 1848 and 1849 are not only left standing, but actually amended by the act passed in the same year, 1857: so that, in truth, we have two series of Winding-up Acts passed by the legislature in the same year. I feel great difficulty arising from that state of circumstances. But at all events, with reference to the rights of the creditors, if they are not met by the difficulties which arise upon the act of 1857—I mean by the Joint-Stock Banking Companies Act—they are met by the difficulties which occur upon the Winding-up Amendment Act, 20 & 21 Vict. c. 78, which varies the position of the creditors scarcely, if at all, less than the acts which we are now considering. I find the same powers given by the one act as by the other, of enabling the Court to enjoin creditors from proceeding with their actions at law; and in many respects the acts are of the same operation. Indeed in some respects the acts which we are considering—the Joint-Stock Banking Companies Acts—seem to me to extend the remedies, or at least may well be thought to extend the remedies, which are given to creditors. To whatever extent, however, the position of the creditors is changed, it is changed by the legislature, and if changed as to companies actually carrying on business at the time of registration, I do not see

my way to say that it was not intended to be changed as to other companies which at that time were suspending payment. The scope and purpose of these acts seem to me to furnish additional reason for holding this company to have come within them, for these Joint-Stock Companies Acts of 1856 and 1857 are not acts which are passed merely for the purpose of regulating the management of the business of continuing companies, but they are passed for the purpose of providing better remedies for the winding up of the companies; and it does not follow that because a company may not be a continuing company, and may not therefore require resort to those provisions of 1856 and 1857, which apply to the management of continuing business—it does not follow, but that all those companies may not the less require resort to the regulations of the act for the purpose of being wound up under the provisions of that part of the act which applies to the winding up. Upon the whole, therefore, my opinion is, that this case falls within the Joint-Stock Banking Companies Act, 1857, notwithstanding the company had stopped payment before it was registered under the act; and that the Court, therefore, had power to make the order which has been made in this case, and that the case is properly governed by the provisions of that act. The question then arises, whether the order which the Court ought to have made upon this occasion should have been an order for the compulsory winding up of the company by the Court, or the order which was in fact made—an order to continue the voluntary winding up of the company. On this point some of the affidavits which have been filed, and which I have perused, may have some bearing; a great portion of them undoubtedly have no bearing upon any point which we have now to consider; some of them may have some bearing, but I think it quite unnecessary to comment upon them. When this case was before us on the last occasion, we desired to be furnished with answers to the following questions by the liquidators. I will read them from the report which the liquidators have been good enough to make to us, and which embodies the questions which were put to them, as I think, very accurately and very pre-

cisely: first, the real state of the assets; secondly, what has been collected; thirdly, what is expected to be collected; fourthly, within what time; fifthly, the state of the liabilities of the company, how far secured and unsecured; and sixthly, the scheme by which the liquidators propose to wind up the company. Now, in consequence of those questions being put, we have been furnished with a report, which has been made by Mr. Coleman, an accountant who has been employed on the part of the liquidators for the purpose of considering the state of this company, and upon that report I find this observation: "In reporting to you the result of my investigation, I must observe, that the extremely limited time (namely, eight days) would of itself preclude the possibility of entering into details; but in addition to this, I may observe, that the irregular, imperfect and vague mode in which the books of the establishment have been kept, and the utter ignorance in which the clerks were also kept as to the most important portion of the business, namely, the bills of exchange and debts on loans, have tended very much to increase the difficulties of ascertaining that information which was absolutely necessary to guide my judgment in arriving at or estimating the value of the assets." Then he proceeds to state what the amount of the liabilities of the bank is, and they amount in the whole to the enormous sum of 2,255,200*l.*, and that without taking into account interest upon the deposit and other debts. Then he tells us what is the character of the debts as to their respective amounts, both debts on deposit and debts on current accounts. Then he proceeds to the state of the assets of the concern, and he says there are two creditors only who hold security, with claims amounting to 161,536*l.*, that is, with reference to the debts. These securities he estimates as likely to cover those debts, but without yielding any surplus. He says the assets of the bank, exclusive of the Derwent Iron Works, may be taken as follows, and then he enumerates the different assets, amounting to 1,064,000*l.* Then he says that the Derwent Iron Company are indebted to the bank on account current in 753,166*l.* The liabilities on bills discounted for the company direct, or

for their agents, are 194,000*l.*, which makes a total of debt and liability in respect of the Derwent Iron Company of 947,922*l.*, very nearly a million of money due from the Derwent Iron Company. Then he says, it is "impossible at present to define the value of these works, as it will be necessary first to make an investigation, and ascertain how the very large sums of money which have been obtained from the bank have been expended or lost." He says there is cash in hand at the bankers to the amount of 77,000*l.* He says that "so much latitude has been allowed by the bank to their customers, that the advances made, and which are now due, are extremely disproportionate to the immediate means of the debtors; indeed, viewing the assets *en masse*, and considering that they are all in this kingdom, they require more judgment and time in realization than any like matters which have ever come under his notice." Then he gives the estimated values of the securities held by the bank, which amount to 412,000*l.*, the debts now due amounting to somewhere about a million, if I recollect rightly. Then he says, that in estimating the realization of the assets, it is impossible to fix a definite period when they can be realized, more particularly with reference to the collieries and the Derwent Iron Company's debt; and he says that the result of his investigation is, that the total liabilities which rank on the bank are 2,255,200*l.*; that the assets amount to 1,064,000*l.*, leaving the deficiency to be provided for of 1,191,118*l.*, and making the total loss which has been sustained by the bank pretty nearly two millions of money. Then he makes this important observation: "I have noticed some transactions of the directors between the time of the suspension and the appointment of the liquidators that will require special investigation and rectification; for, as they now stand, they are preferences detrimental to the present creditors." Then he says that it is evident that the *pro rata* contributions levied on the shares will not meet the amount required, unless some few of the shareholders are sufficiently wealthy to bear the brunt of the deficiency of the majority. Then he says that it will be necessary to institute an examination into the proceedings and transactions of

the bank since 1847, so as to shew clearly by what means and in what manner the present disastrous result has occurred. There is also, in addition to this very lamentable account which Mr. Coleman has furnished, a report from the liquidators themselves; and it is due to these gentlemen to state that, by whomsoever they were appointed, they appear to me, as well as I can judge of this report, to have exercised a fair, *bona fide* and independent judgment upon the questions which were sent for their consideration by the Court; and I think that great credit is due to them for the report which they have made. I do not go through it. I think it is unnecessary to occupy time by going into the details of it, but I refer to the conclusion to which they have come; and they say: "In conclusion we respectfully beg leave to propose, first, that an order for compulsory winding up should now be pronounced, adopting all proceedings up to this time, or all excepting our appointment, we being perfectly willing to retire from the office of liquidators if the Court should think it desirable; secondly, that a large call should at once be made and enforced, unless the shareholders make some proposition acceptable to the creditors, and so guaranteed as to be rendered safe of accomplishment, in time as well as in amount; thirdly, that the sanction of the Court and of the creditors be at once given to settling with creditors under 50*l.*, and also under 100*l.*; fourthly, that the limitation in the order of Vice Chancellor Kindersley, as to compromises with debtors, should be altered." Now, upon this there can be no doubt whatever that, whether it was or was not proper in the first instance to order a voluntary winding up of the company, it is now proper, and now necessary, that an order should be made for a compulsory winding up of this company; because, upon the face of the facts which are there stated, we have before us this—that there have been preferences made by the directors, and that there are transactions requiring investigation, and there are provisions which apply to a compulsory winding-up which are not within the powers which the act gives to liquidators under a voluntary winding up. It appears, too, that there are very large calls which must necessarily

be made, and I do not know that under the provisions of the act, the liquidators, under a voluntary winding up, have any power to proceed for the recovery of those calls otherwise than by action, and better and more available powers exist for the purpose of enforcing those calls under a compulsory winding-up. I have no doubt, therefore, that there must now be an order for winding up this company by the Court; and it is immaterial, therefore, to consider whether we should have concurred in the order which was made by the Vice Chancellor if the state of facts which now presents itself had not existed. But as this case goes very much into the marrow of cases of this description, I think it may be right to state the view which, speaking for myself, I have taken in considering the question whether there should be a voluntary or a compulsory winding up. I think that in cases of this enormous magnitude, where such vast interests are at stake—where the most ample powers which the law has given must be required to be exercised—where there have been transactions justifying, if not requiring, investigation—where it may be doubtful whether the property of the shareholders will answer the liabilities—where there is danger to the creditors of the shareholders escaping from their liabilities—in all such cases my very clear and decided opinion is, that, having regard to the powers which may be put in force under a winding up by the Court, and which cannot be exercised in the case of a voluntary winding up, a winding up by the Court ought to be preferred to a voluntary winding up; and I think that the legislature not having thought proper to provide that the majority of creditors should have the power to bind the minority in the choice of proceedings—a provision which the legislature had thought proper to introduce into the Bankrupt Acts and some other acts, but which it has not thought proper to introduce into this act—I think that, having regard to the absence of any such provision, I should not be disposed to give any decided weight to the opinion of the majority of the creditors against the minority of the creditors, upon the question as to the choice of proceedings, without being fully satisfied, not merely

by the votes or voices of the majority, but by the facts of the case, that there would be secured to the minority the full dividend which they might obtain if the course of proceeding which they desired was determined to be adopted. I make these observations because they possibly may have some importance in future cases; they do not apply to, or bear on, the present case, for in the present case there is no doubt. In my judgment, the order which must now be made must be this: an order for the winding up of this company by the Court, with liberty, if my learned Brother thinks fit, to the Judge to whose court the matter is attached to adopt all or any of the proceedings under the voluntary winding up, as he may think just.

LORD JUSTICE KNIGHT BRUCE.—The meeting at which the registration in question in the present case, was resolved on, took place after—and, indeed, was not even summoned or called before—the company so registered had stopped payment, had closed its doors, had publicly announced its insolvency, and had finally ceased to transact business. Of course, therefore, all this had happened before the registration, and that registration was accordingly, in my opinion, an act which, whether to be described or not to be described as fraudulent, was void; for the 6th section of the statute of 1857, c. 49, as I read and understand that section, was not intended to apply to any company which, though carrying on business as a banking company at the time of the enactment, should not be likewise doing so at the time of registration. An opposite view of the enactment must necessarily, in my judgment, attribute to the legislature such an amount of carelessness as, uncompelled, I am unwilling to think possible. The language of the statute does not, as I conceive, require us to construe it in such a manner. On the contrary, to understand the expression “banking company,” in the section, as I understand it, appears to me to put a construction of an ordinary and of a strictly correct kind, as well as one *rei gerendæ aptiorem*, on the language used. Thinking the registration here good for nothing, I must hold that this company, or late company, was not properly the subject of what is called a volun-

tary winding up; but had I understood the phraseology of the legislature otherwise, I should still have considered the particular circumstances before us as rendering that course inconvenient and inexpedient: so that my learned Brother and myself arrive substantially at the same conclusion.

L.C. } *Ex parte* CARL ROBERT
Jan. 18, 28. } VON FRANTZIUS.

Practice—Petition of Right.

Where, upon an application to confirm an inquisition upon a petition of right, the Crown required time to make answer thereto, the Court declined, upon extending the time, to preclude the Attorney General from demurring.

Jan. 18. — *Mr. Archibald* applied for the appointment of a time to confirm the inquisition in this case, which is reported in 26 *Law J. Rep.* (N.S.) Chanc. 797.

The LORD CHANCELLOR ordered that the inquisition should be confirmed, unless cause were shewn before the 28th inst.

Jan. 28. — *Mr. Archibald* asked that the rule for confirmation of the inquisition should now be made absolute.

Mr. Wickens, for the Attorney General, desired that a month's time should be given, in order that he might make answer to the inquisition.

Mr. Archibald suggested that if this time were given, the Attorney General ought not to be allowed to demur; and he referred to *Viscount Canterbury v. the Attorney General* (1).

The LORD CHANCELLOR said, that he must give time to demur, as the facts were now for the first time stated. The Crown ought to have the opportunity to dispute the state of facts, or, acknowledging them, to demur.

WOOD, V.C. }
Jan. 26. } DENIS v. ROCHUSSEN.

Practice—Amendment—Interrogatories.

A plaintiff having let the time go by for filing interrogatories does not by amending his bill become entitled afterwards to file them to the whole bill. The proper course is to apply to the Court for an extension of time.

The bill in this case was filed on the 25th of May 1857, and was afterwards amended, but no interrogatories were filed. On the 8th of September the defendant put in a voluntary answer; the bill was re-amended on the 19th of September, and interrogatories to the whole bill were filed on the 1st of October. The defendant answered such of the interrogatories as were founded upon the re-amendments, but declined further to answer the interrogatories, on the ground that the time for filing them had elapsed. The case now came on upon exceptions to the answer.

Mr. Rolt and *Mr. Baggallay*, for the exceptions.

Mr. Daniel and *Mr. Keene*, for the defendant.

WOOD, V.C., without calling on the defendant's counsel, said that a plaintiff was entitled under the present practice to use his discretion as to filing interrogatories when he filed his original bill, but he did not by amending his bill become entitled to file them after the time had elapsed. If anything appeared upon a voluntary answer which made it necessary to file interrogatories, the Court might be induced to extend the time, and the proper course to pursue was to make application for that purpose, but it could not be held that wherever an amendment of any kind was made the plaintiff was entitled as of course to interrogate to the whole bill. The exceptions must be overruled, with costs.

WOOD, V.C.
BRAMWELL, B.

and

WATSON, B.
1857.

June 27.

1858.

Feb. 13, Mar. 1.

MONYPENNY v. MONY-
PENNY.

*Marriage Settlement — Rent-charge —
Covenant—Recital.*

*By the settlement made on the marriage of R. J. M. with S. D. it was recited that, upon the treaty for the said marriage P. M. proposed and agreed to secure, in manner and subject as hereinafter expressed, to S. D. after the decease of the survivor of them, the said P. M. and R. J. M., an annual sum or yearly rent-charge for her jointure, to be issuing and payable out of the manors and other hereditaments thereafter charged therewith, and of or to which the said P. M. was seised or entitled in fee-simple. By the operative part of the deed P. M., in consideration of the intended marriage, gave, granted, bargained, sold and confirmed unto S. D. and her assigns, in case the marriage should take effect and she should survive P. M. and R. J. M., an annual sum or yearly rent-charge of 300*l.*, to be charged and chargeable upon, and yearly issuing and payable out of all and singular the manors or reputed manors of M. N. and R., and also all that mansion-house called M. in the same county, and also all and singular the messuages, &c., in the several parishes of R., &c., in the county of K., of or to which he, the said P. M., or any person in trust for him was or were seised or entitled for an estate of inheritance at law or in equity, subject, as to such of the hereditaments as were charged therewith, to a mortgage for a term of 2,000 years; and by the same deed P. M. covenanted, granted and agreed with S. D. that so often as the annuity should be unpaid for twenty-one days, she should have power, subject as aforesaid, to enter and distrain upon the manors, &c. charged therewith; and for further securing the annuity P. M. granted, bargained, sold, demised and confirmed to the trustees the manors, &c. thereby charged therewith for a term of 100 years. P. M. and R. J. M. died, leaving S. D. surviving. It having been subsequently determined that*

P. M. had only a life-interest in the estates charged with the annuity, it was held, by Bramwell, B. and Watson, B. that there was no covenant in the settlement on which S. D. or the trustees could maintain an action; and by Wood, V.C. that there being no covenant, she could have no special or separate equity against the estate of P. M.

By the settlement, made on the marriage of Robert Joseph Monypenny with Susannah Dearden, and dated the 10th of June 1835, to which settlement the Rev. Phillips Monypenny, the uncle of R. J. Monypenny was a party, after reciting amongst other things as follows—"And whereas, upon the treaty for the said intended marriage the said Phillips Monypenny proposed and agreed to secure, in manner and subject as hereinafter is expressed, to the said Susannah Dearden, after the decease of the survivor of them, the said Phillips Monypenny and Robert Joseph Monypenny, in case she should survive them, an annual sum or yearly rent-charge for her jointure, to be issuing and payable out of the manors and other hereditaments hereinafter charged therewith, and of or to which the said P. Monypenny is seised or entitled in fee-simple" the said P. Monypenny, in consideration of the said intended marriage, gave, granted, bargained, sold and confirmed unto the said Susannah Dearden and her assigns, in case the said intended marriage should take effect, and she should survive both of them, the said P. Monypenny and R. J. Monypenny, an annual sum or yearly rent-charge of 300*l.*, to be charged and chargeable upon, and yearly issuing and payable out of all and singular the manors or reputed manors of Maytham, Nether Forsham and Rensham, in the county of Kent, and also all that mansion-house called Maytham Hall, in the same county, and also all and singular the messuages, lands, tenements and hereditaments in the several parishes of Rolvenden, Tenterden, Benenden, Sandhurst, Newenden, St. Mary in Wittersham and Stone in the Isle of Oxney, in the said county of Kent, of or to which he, the said P. Monypenny, or any person in trust for him, was or were seised or entitled for an estate of inheritance at law or in equity, and to be charged and

chargeable upon, and yearly issuing and payable out of all and singular rights, members and appurtenances, to the same manors, hereditaments and premises belonging or in anywise appertaining, to hold, in case the said intended marriage should take effect, and she the said Susannah Dearden should survive both of them, the said P. Monypenny and R. J. Monypenny; but nevertheless, subject and without prejudice as to such of the said hereditaments as were charged therewith to a mortgage for a term of 2,000 years, made to Charles Dawson, Esq., by an indenture bearing date the 31st of August 1833, for securing 2,428*l.* 10*s.* and interest; and also subject and without prejudice as to all the said manors and other hereditaments to such annual sum or yearly rent-charge or annual sums or yearly rent-charges as he, the said P. Monypenny, had already charged, or should or might thereafter charge by his last will and testament or any codicil or codicils thereto, or in any other manner, in favour and during the widowhood or life of his present wife, Charlotte Monypenny, and to all powers, &c. for securing the same, unto the said Susannah Dearden and her assigns, for and during her natural life, in part of her jointure, by equal quarterly payments, without any deduction or abatement whatsoever for or in respect of any taxes, charges, rates, assessments or impositions, parliamentary, parochial or otherwise, or any other matter, cause or thing whatsoever; the first quarterly payment to be made on such of the quarterly days as should first happen after the decease of the survivor of them, the said P. Monypenny and R. J. Monypenny. And by the same indenture, P. Monypenny, for himself his heirs and assigns, covenanted, granted and agreed with Susannah Dearden, her executors, administrators and assigns, that in case and so often as the said annual sum or yearly rent-charge of 300*l.*, or any part thereof, should at any time or times be behind and unpaid for twenty-one days after any of the days on which the same ought to be paid, then and so often it should be lawful for the said Susannah Dearden, her executors, administrators and assigns, but subject and without prejudice as aforesaid, to enter into and

distrain upon the manors, hereditaments and premises thereby charged with the payment, or any of them or any part thereof, and to dispose of the distress and distresses then and there found according to law, as in the case of distress for rent reserved on common leases for years, to the intent that thereby the said Susannah Dearden, her executors, administrators and assigns, might be fully paid and satisfied the said annual sum or yearly rent-charge of 300*l.*, and every part thereof, and all costs, charges and expenses attending the recovery of the same; and also that in case and so often as the same annual sum or yearly rent-charge of 300*l.* or any part thereof should at any time or times be behind or unpaid for forty days next after the same should become due and payable as aforesaid, then and so often, although no formal demand should have been made thereof, it should be lawful for the said Susannah Dearden, her executors, administrators and assigns, but subject and without prejudice as aforesaid, to enter into and upon the manors, hereditaments and premises thereby charged with the said annual sum, or any of them or any part thereof, and to have, hold and enjoy the same, and receive the rents, issues and profits thereof, to and for her and their own use and benefit, until she or they should therewith or thereby, or otherwise, be fully paid and satisfied the said annual sum and every part thereof, and all such arrears thereof as should grow due during such time as she or they should by virtue of such entry or entries be in possession of the said manor, &c. or any part thereof, together with all such sums of money, costs, charges and expenses whatsoever, which should be sustained or occasioned by the non-payment or recovery thereof, and such possession, when taken, should be without impeachment for waste; and in pursuance and further performance of the agreement on the part of the said P. Monypenny, and for the better securing to the said S. Dearden, her executors, &c., the due payment of the said annual sum thereinbefore charged or intended so to be, and in consideration of 10*s.*, P. Monypenny granted, bargained, sold, demised and confirmed to the trustees of the settlement, all and singular the manors, &c.

thereby charged as aforesaid with the payment of the said annual sum, but subject and without prejudice as thereinbefore mentioned, and also subject to and charged with the said annual sum, for one hundred years, if the marriage should take effect, and S. Dearden should survive both P. Monypenny and R. J. Monypenny, from the decease of the survivor of them, upon trust to permit the person or persons for the time being entitled to the said manors, &c. in remainder or reversion immediately expectant on the determination of the term to receive the rents, &c., until the said annual sum should, or some part thereof should, be in arrear for the space of sixty days, and in case and so often as the same should be so in arrear upon trust out of the rents, &c., or by demising, leasing, mortgaging or selling the same manors, &c., or any part thereof, for all or any part of the term, or by bringing actions against the tenants for the recovery of the rents, &c., to raise and pay the said S. Dearden, her executors, administrators and assigns, all such arrears, with costs.

The marriage took place shortly after the execution of the settlement.

P. Monypenny, by his will, dated the 26th of August 1839, devised the estates charged with the annuity (subject to the mortgage and also to the rent-charge of 300*l.* charged thereon by the marriage settlement) to the use of trustees for 500 years, upon trust to raise sufficient monies for the payment of his debts (except any debts secured by mortgage, which were to be exclusively paid and borne by the hereditaments charged therewith), and to apply the money so raised in exoneration of his personal estate, and subject to the said term and to the trusts thereof, to the use of R. J. Monypenny for life, with remainder to the use of R. P. D. Monypenny, the son of R. J. Monypenny, for life, with remainders over.

R. J. Monypenny died in September 1842, and Susannah Monypenny, in right of her son, continued in the occupation of the Maytham Hall estate until the year 1851, when she quitted the occupation in pursuance of a decree of the Court in the suit of *Monypenny v. Dering* (1), by which

it was determined that P. Monypenny took only a life interest in the estate charged; but she never received any part of the annuity of 300*l.*

The suit of *Monypenny v. Monypenny* was instituted for the administration of the estate of the testator, P. Monypenny; and under the decree in the cause, Susannah Monypenny carried in a claim for her annuity under the marriage settlement.

This claim was reserved for the consideration of the Court on the cause coming on for further consideration, and the Vice Chancellor directed the matter to stand over for the purpose of obtaining the assistance of two Common Law Judges upon the question whether there was any covenant contained in the settlement which would bind the estate of P. Monypenny.

The question was now argued before the Vice Chancellor, assisted by Bramwell, B., and Watson, B.

Mr. Daniel and *Mr. C. C. Berkeley* appeared for Mrs. Monypenny.

Mr. Roll, *Mr. Baggallay* and *Mr. Honeyman*, of the Common Law bar, for the executor.

Mr. Willcock and *Mr. Wickens*, for the residuary legatees.

Mr. C. Hall, for other defendants.

Mr. Daniel was heard in reply.

The following authorities were cited:—

Randall v. Lynch, 12 East, 179.

Glegg v. Glegg, 4 Bro. P.C. 614.

Style v. Hearing, Cro. Jac. 73.

Probert v. Morgan, 1 Atk. 440.

Monypenny v. Mascall, 2 Coll. 213.

Howell v. Richards, 11 East, 633.

Corbet v. Corbet, 1 Sim. & S. 612;

s. c. 2 Law J. Rep. Chanc. 108.

Swan v. Stransham, Dyer, 257 a.

Smith d. Dormer v. Parkhurst, 3 Atk.

135; s. c. Willes, 327.

Hassell v. Gouthwaite, Willes, 500.

Sprint v. Hicks, Bulst. part 2, 148.

Mathew v. Blackmore, 1 Hurl. & N.

762; s. c. 26 Law J. Rep. (n.s.)

Exch. 150.

Moore v. Magrath, Cowp. 9.

Walsh v. Trevanion, 15 Q.B. Rep. 733;

s. c. 19 Law J. Rep. (n.s.) Q.B. 458.

Parkes v. Smith, Ibid. 297; s. c. 19

Law J. Rep. (n.s.) Q.B. 405.

Colmore v. Tyndall, 2 You. & Jer. 605.

(1) 7 Hare, 568; s. c. 2 De Gex, M. & G. 145; 20 Law J. Rep. (n.s.) Chanc. 153; 22 Ibid. 313.

Lewis v. Rees, 3 Kay & J. 132; s. c. 26 Law J. Rep. (N.S.) Chanc. 101.

Money v. Jorden, 15 Beav. 372; s. c. 2 De Gex, M. & G. 318; 21 Law J. Rep. (N.S.) Chanc. 531, 893; 5 H.L. Cas. 185; 23 Law J. Rep. (N.S.) Chanc. 865.

Cholmondeley v. Clinton, 2 J. & W. 1. 1 Com. Dig. 620, tit. 'Grant,' 'Annuity.'

3 *Ibid.* 288, tit. 'Covenant.'

3 *Cruise Dig.* 207.

Co. Lit. 141a, 144 b, 146 a, 219, 220. *Roll. Abr.* 226.

Bro. Abr. 322, tit. 'Grant.'

1 *Wms. Saund.* 322, n.

2 *Black. Com.* 304.

Feb. 13. — BRAMWELL, B. delivered the written opinion of himself and Watson, B., as follows:— In this case the rent-charge being secured on or issuing out of land of a portion of which the grantor was seised, and to which the grantee has had recourse, the grantee has no power to treat it as an annuity and sue for it as such. It is conceded, therefore, that the only question is, is there a covenant in the marriage settlement on which the grantee or the trustees of the term could maintain an action in the events which have occurred? Now, this is not a question of intention; that is to say, we are not to speculate on the existence of any intention in the grantor's mind, and decide the case as we believe that he had or had not the intention to covenant as alleged; but we are to ascertain the meaning of the words used to determine the intention expressed, and decide accordingly. Now, it is said the terms used in the deed are terms of art, which have a definite legal meaning, and must be construed accordingly. But assuming that to be so, it is certain that the context may shew that they are not used in this sense. The word "son" has a definite legal meaning, viz., legitimate son, but if in a deed it appeared that a person was speaking of his illegitimate children, it is clear the word "son" might mean an illegitimate son. This premised, we now proceed to examine the deed, and the matters relied on by Mrs. Monypenny. We think that as she is a purchaser for valuable consideration, the deed ought to have the same

construction as though she had given an equivalent money value for the annuity.

Now, we think that the recital of the agreement to grant the annuity would, if read by itself, be a recital that the grantor was seised in fee of or otherwise entitled to the lands to be charged. It is doubtful whether the words in the grant, "of or to which the said P. Monypenny, or any person in trust for him, is seised or entitled for an estate of inheritance at law or in equity," apply to the manors of Maytham, Nether Forsham and Rensham, and the mansion, or only to "all and singular the messuages, &c. in the parishes of Rolvenden, &c., in the county of Kent," thereby identifying them. Assuming, however, this doubt resolved in favour of the plaintiff, then, by the recital and grant together, it is recited that the grantor has an estate, or is otherwise entitled in fee simple, in certain named lands; these he affects to charge, and also charges all other lands in certain parishes, in which he has a legal or equitable estate of inheritance. But the recital would not operate by itself as a covenant by the grantor. It is not an undertaking or agreement by him that anything has happened or exists or shall happen; it is a statement of a fact, is the language of both parties, and, treated as an estoppel, binds both—the grantee as much as the grantor—to deny his seisin. Nor would the mere words, "give, grant, bargain and sell," as applied to the creation of an annuity, operate as a covenant, because alone they merely assert a power to give or create an annuity. Nor do we think that the words used in the creation of the power to distrain, extensive as they are, "covenants, grants, and agrees that it shall be lawful when the rent-charge is in arrear, for the grantee to distrain on the premises," are an express covenant that he shall have power to do so. We think that "covenants" and "agrees" mean no more than "grants." So far, therefore, we think there is no covenant. But the grantor gives, grants, bargains and sells a rent-charge to be charged and chargeable upon, and yearly issuing and payable out of certain named lands, and all others of which the grantor may be seised or entitled to an estate of inheritance; and he covenants, grants and agrees, that when the rent-charge is in arrear, it shall be lawful for

her to distrain on the premises thereby charged, and also that it shall be lawful for her to enter. He afterwards bargains, sells, and demises the premises to the trustees to secure the annuity. This imports the power to do what he assumes to do, whether because seised in fee or otherwise entitled, as much in this grant of annuity charged on and issuing out of the lands, and in this grant of a power of distress on these lands as *demisi, dedi* or *concessi*, or bargain and sell, give and grant, assume the power to do what those words purport to do. Here the grantor assumes the power to grant this annuity out of certain lands, and charges them with it. Then it is said, why is there not as much an implied covenant for title to do so in this case as in those where the words used were those above mentioned? If the words "of which he or some person in trust for him is seised of an estate of inheritance at law or in equity," apply to the named premises, why, as those are the grantor's words, are they not a covenant by him, which covenant is broken? To shew that these words, "bargain, sell and demise," are words of covenant for title, *Com. Dig.* tit. 'Covenant,' A, 4, *Hobart*, 12, are referred to. The covenant for further assurance relating to other land does not affect the question. But such a covenant as is contended for is a covenant in law, if at all, and a covenant that the grantor has a legal estate—for there cannot be a covenant implied from such words that the covenantor has an equitable estate. Then if by the deed it appeared that the estate the grantor had and charged was an equitable estate, surely there would be an implied covenant by the words "give, grant and demise." Such a construction would make the deed run thus:—"Whereas I am seised of an equitable estate in certain lands, out of which I grant an annuity, and covenant I am seised in fee of a legal estate therein." In like manner, if the recital shewed that the grantor did not know or affirm whether his estate was legal or equitable, it would be unreasonable to imply a covenant which supposed he had a legal estate. Now here the recital is, that the grantor is seised or otherwise entitled to the named estates. This would undoubtedly operate to charge such of these tenements as he had an equit-

able interest in. That the recital is not of a legal estate merely, is confirmed by his afterwards charging all lands of or in which he has any legal or equitable interest; indeed, it is by no means clear, as we have said, that those words do not apply to the named estates as well as all others. Then is it reasonable or possible to imply a covenant which would involve the necessity of the estates charged being legal estates, when it is manifest the grantor in the same deed supposes his interest in the estate charged may be equitable only? We think not. The plaintiff's construction makes the deed run thus:—"I am seised in fee at law or in equity, I don't know or say which, of certain estates out of which I grant an annuity with which I charge those estates; I also covenant I am seised in fee of a legal estate therein." This cannot be. We think, therefore, there is no covenant in this deed for title or quiet enjoyment. That opinion renders it unnecessary to consider the other question, viz., whether the grantor being dead any action could be maintained. We wish to repeat, we disclaim acting on what may be guessed to be the grantor's intention. He probably did not intend to covenant, nor did the grantee probably suppose there was a covenant;—not, however, because they intended the contrary, but because they did not anticipate the case that has arisen, and so had no intention on the subject. This would not prevent the effect of words in themselves efficacious to create a covenant; but for the reasons we have given, we think the words here create no covenant.

March 1.—WOOD, V.C. said it would be pushing the doctrine in *Money v. Jorden* a great deal too far to apply it in such a case as this. In that case, irrevocable engagements were entered into upon the faith of representations made before marriage. Here there was nothing on the face of the deed but this recital.—[His Honour read it.]—Unless there was a covenant there was no special or separate equity. The learned Barons had decided that there was no covenant, and he could not give the plaintiff any higher rights than those she would have at law.

LORDS JUSTICES. }
March 9, 12, 13, 19. } POOLEY v. QUILTER.

Bankruptcy—Purchase of Claim by an Assignee.

A. G. P., a creditor of H, a bankrupt, sold his dividend up to 8s. in the pound, to W, a solicitor, who had been employed by H. before his bankruptcy. A. G. P. having discovered that W. was, as to one moiety, a purchaser as trustee for Q, the acting creditors' assignee (who with his partners were employed as accountants under the bankruptcy), filed a bill to set aside the sale, and to have an account taken, but the bill was dismissed by one of the Vice Chancellors, as against W, so far as the purchase was on his own account, but his Honour directed an issue to try whether A. G. P. was aware that the purchase was made partly on behalf of Q, the assignee:—Held, on appeal, reversing this decision, that the sale must be set aside and accounts on both sides be taken.

Purchases by assignees of bankrupts of claims on the estate are contrary to public policy and to the policy of the Bankrupt Law.

Even a fair, open, bona fide purchase by an assignee cannot be upheld for the benefit of the estate, if the vendor questions it. Per Lord Justice Turner.

This was an appeal presented by Mr. Alexander Gopsell Pooley, the plaintiff, against a decree of Vice Chancellor Kindersley, reported *ante*, p. 180, where the facts are detailed, as they are, also, in the judgment.

The Vice Chancellor having held that an issue must be directed as to part of the transactions in dispute, the plaintiff appealed from the whole decree.

Mr. Glasse and Mr. De Gex, for the appellant.

Mr. Swanston and Mr. G. M. Giffard, for Mr. Quilter.

Mr. Baily and Mr. Wickens, for Mr. Whidborne.

Mr. Shapter, for Mr. Brunskill's representatives.

Mr. Glasse was heard in reply.

The authorities cited on the appeal were

the same as were relied upon in the Court below.

March 19.—**LORD JUSTICE KNIGHT BRUCE.**—In the month of March 1853 Mr. Hennet, who was a trader in extensive business as a railway contractor and otherwise, was adjudicated a bankrupt, owning, I believe, at the time a considerable property of various kinds, but also largely indebted. Assignees under the bankruptcy were chosen and appointed in April 1853. Afterwards, in November of that year, in April 1854, and in May 1854 respectively, the plaintiff, who was one of the bankrupt's creditors, executed the first, and signed the others of these instruments—a deed, dated the 1st of November 1853, expressed to be made between the plaintiff, described as of London, iron-merchant, of the one part, and the defendant John Whidborne, of Teignmouth, in the county of Devon, Esq., of the other part; and it recited that, "Whereas the said Alexander Gopsell Pooley, the plaintiff, one of the creditors of George Hennet, of Duke Street, Westminster, having also establishments in divers other places, railway contractor, shipowner, engineer, timber-merchant, lime-burner and coal-merchant, a bankrupt, is entitled to prove under the bankruptcy of the said George Hennet, to the amount of 23,443*l.* 11*s.* 2*d.*, which is admitted to be proveable upon the said estate; and whereas no dividend hath yet been paid upon the said estate; and whereas the said parties hereto anticipate, or have reason to believe, that there will be a dividend or dividends payable under the said bankruptcy, exceeding 8*s.* in the pound; and whereas the said Alexander Gopsell Pooley hath agreed with the said John Whidborne to sell to him the said debt of 23,443*l.* 11*s.* 2*d.*, subject, nevertheless, to the said John Whidborne repaying to him, the said Alexander Gopsell Pooley, all sum and sums of money as hereinafter mentioned, that may be payable by way of dividends thereon, exceeding and after payment of the said dividend of 8*s.* in the pound, when and as the said John Whidborne may receive the same under the said bankruptcy by virtue of the assignment hereinafter contained."

Now, this indenture witnesseth that, in consideration of the sum of 7,000*l.*, paid by Mr. Whidborne to Mr. Pooley at the time of the execution, the receipt of which is acknowledged in the usual way, the said Alexander Gopsell Pooley grants, bargains and sells in the usual way, to Mr. Whidborne "all that the said sum of 23,443*l.* 11*s.* 2*d.*, being the said debt due and owing to him the said Alexander Pooley from the said George Hennet, and admitted to be proveable as hereinbefore mentioned against the said estate; and also all dividend and dividends, sum and sums of money to become due and payable for the same, and all the estate of the said A. G. Pooley," and so on, and all powers, to hold to Mr. Whidborne in the usual way, subject to the provisos after contained in reference to the excess of dividend afterwards to become payable on the said bankrupt's estate over and exceeding 8*s.* in the pound on the said debt. Then there is the usual power of attorney, the usual forms are gone through, and there is that provision to which reference was made for restoring the surplus beyond 8*s.* in the pound. To that instrument there was, as it has been admitted, annexed, although now accidentally dissevered or separated from it, a paper in these terms, signed, as I have said, by Mr. Pooley, to this effect:—"Memorandum, that, although it is stated by the within deed that the consideration sum of 7,000*l.* was paid at or before the sealing and delivery of the within indenture, yet it is hereby declared by the said Alexander Gopsell Pooley and the said John Henry Mackenzie, on behalf of the said John Whidborne, that such consideration-money was not so paid, and that the whole amount thereof remains unpaid; and it is agreed by and between the within-named parties, that on proof of the said debt of 23,443*l.* 11*s.* 2*d.* by the said A. G. Pooley against the estate of the said George Hennet being admitted by the Commissioner under the bankruptcy against George Hennet, and on the same being admitted on the file of the proceedings under such bankruptcy, the said consideration-money of 7,000*l.* shall be paid by the said John Whidborne to the said Alexander Gopsell Pooley, and the within assignment and the

bills therein referred to handed over to the said John Whidborne, or as he shall direct." The next instrument, as I have said, was in April 1854, dated the 3rd of that month, between Mr. Pooley, described here as a bill-broker, of the one part, and John Whidborne, of Teignmouth, Devon, of the other part, whereby, in consideration of 812*l.* 10*s.* to Alexander G. Pooley in hand paid by the said John Whidborne before execution thereof, as Alexander Pooley acknowledges, he, the said Alexander Pooley, doth thereby agree to sell and assign to the said John Whidborne the whole of his remaining right and interest of and in the debt or sum of 23,000*l.* and a fraction, proved by the said Alexander Pooley under the bankruptcy of the said George Hennet, over and above the dividend of 8*s.* in the pound, by an indenture of assignment dated blank, and made between the said Alexander Pooley of the one part, and the said John Whidborne of the other part, mentioned, and of and in all future dividend or dividends henceforth to be declared in respect of the said debt of 23,443*l.* 11*s.* 2*d.*; and the said Alexander Pooley further agreed to execute to the said John Whidborne, at his expense, any further deed as counsel might advise to be necessary for the better assigning to him the said right and interest of the said Alexander Pooley thereby agreed to be sold, and all necessary powers for receiving and giving discharges for the same; and there is a receipt for the purchase-money added. The last of the three instruments is a memorandum of agreement, dated the 26th of May 1854, made between Alexander Gopsell Pooley of the one part, and John Whidborne of the other part, whereby, "in consideration of 300*l.* sterling to the said Alexander Pooley in hand paid by the said John Whidborne, the receipt of which is acknowledged, Alexander Pooley doth agree to sell and assign to the said John Whidborne the debt or sum of 750*l.* due to Alexander Pooley from George Hennet, the bankrupt, under and by virtue of a bill of exchange for 750*l.*, dated the 3rd of February 1853, drawn by Hennet upon, and accepted by, Hennet, and duly indorsed to Alexander Pooley, which said debt is to be proved by the

said Alexander Pooley under the bankruptcy of the said George Hennet, together with all dividend and dividends to be payable upon and in respect of the said debt, and Alexander Pooley agrees to execute a proper deed for the purpose, and authorize the official assignee under the bankruptcy to pay over to John Whidborne all dividend and dividends to become payable upon or in respect of the said debt of 750*l*." The defendant, Mr. Whidborne, mentioned in these documents, signed or executed the first by an agent or attorney, his partner Mr. Mackenzie, and also by the same Mr. Mackenzie signed the memorandum annexed to it. Mr. Whidborne is, and then was, a solicitor, and I believe a banker likewise. The proof of the plaintiff's greater debt, 23,000*l*. and a fraction, was made under the bankruptcy on the 11th of November 1853, the day on which the first dividend of 2*s*. 6*d*. in the pound was declared in the bankruptcy. The smaller debt was not yet proved under it. The three sums mentioned in the three instruments of sale as the prices contracted to be paid to the plaintiff, were paid to him in the years 1853 and 1854; but the dividends declared on the proof having been such as to render the first, if not both the first and second, of the purchases profitable, the bill in the present cause was filed in October 1856 for the purpose of being relieved from the three sales. It appears that each of the purchases was made by Mr. Whidborne on the behalf and on the account and for the benefit of himself and the defendant Mr. Quilter, and this with Mr. Quilter's privity and consent from the beginning. It appears also that, as respects Mr. Whidborne's share as distinguished from Mr. Quilter's share in the first purchase, Mr. Whidborne bought on the behalf and on the account of himself and of Mr. Brunskill, now deceased, whose executors are amongst the defendants and claim title accordingly. The purchase-mones paid as already mentioned to the plaintiff were so paid with the money of himself and Mr. Brunskill, or one of them, as to the 7,000*l*., and with the money of Messrs. Quilter and Whidborne, or one of them, as to the rest. Mr. Whidborne, though not, I believe, employed under the bank-

ruptcy, had been the solicitor or one of the solicitors of Mr. Hennet before his failure. Mr. Brunskill, a tradesman or retired tradesman, appears to have acted in the matter of the first purchase wholly by and through Mr. Whidborne; and it is clear that if Mr. Whidborne cannot maintain that purchase so far as he, Mr. Whidborne, was beneficially interested in it, neither can he do so on behalf of the executors of Mr. Brunskill, nor can those executors, to the extent of Mr. Brunskill's interest, or for any purpose, maintain it. The plaintiff's claim for relief against the sales is founded mainly or alone on the connexion of Mr. Whidborne with Mr. Quilter, whom the 16th paragraph of the bill describes in these terms:—"The said William Quilter carries on with Mr. William Ball, the business of accountants, under the firm of Quilter & Ball, and the said firm had been employed by the said George Hennet in his affairs previously to his bankruptcy, and subsequently thereto were employed by the assignees under the said bankruptcy to take the accounts thereunder, and by means of such employment of his said firm, and by reason of his said office as assignee, the said William Quilter had means of knowing the state of the assets of the said bankrupt, and the probable amount of the dividends which would be declared under the said bankruptcy far superior to those possessed by the plaintiff." It is shewn by the materials before us, or it is a just inference from them, that the statements in that paragraph are substantially correct. The words "said office of assignee" contained in it are explained by other parts of the bill, the truth being that Mr. Quilter is one of the creditors' assignees under the bankruptcy, was so originally, and has been so continually since his appointment in April 1853. Of course, therefore, it was impossible for Mr. Quilter faithfully to acquire by purchase for his own advantage any interest in the debts so sold, as already stated, in November 1853, April 1854, and May 1854, or in part thereof; and the plaintiff having, in the summer of 1856, exhibited uneasiness in the shape of a lawyer's letter, not of the gentlest kind, Mr. Quilter became convinced that retention for himself was impracticable; but he ap-

pears to have thought it the best course to let the estate under the bankruptcy have, if possible, the benefits of his profits so obtained. He had accordingly conceded, or professed to concede, them to the assignees in that character, though admitting, as he does, that it was for his own private account, and with a view to his own private advantage that he joined in each purchase. His co-assignees, who are also defendants, having accepted the concession, they and all the other defendants resist the demand of the plaintiff, and unite in saying that he has no ground of complaint, nor any title to relief. The dispute substantially narrows itself to a dispute between Mr. Quilter and the plaintiff, because Mr. Whidborne, with the privity and concurrence contemporaneously of Mr. Quilter, made the purchase on the behalf and on the account of both of them; Mr. Whidborne did not acquire, nor has he with regard to the whole or any portion of the benefit of the purchases, any better title against the plaintiff than Mr. Quilter would have acquired or had, if Mr. Whidborne, with the privity and consent originally and throughout of Mr. Quilter, had acted originally and throughout the whole transaction as his agent merely, under his instructions solely, and on his account altogether. Is then the plaintiff entitled to relief against Mr. Quilter? That question must, in my opinion, be answered in the affirmative. As assignee he was and is a trustee for the creditors, of whom the plaintiff was one. The purchases, which were in effect purchases of portions of a trust-fund variously constituted, and of no certain amount, under the management and administration of trustees for the benefit of numerous persons, were made by one of those trustees from one of those persons. To say nothing of considerations of public policy, a purchase of this description can, at least, not be maintained by an assignee against a creditor, without proof that before the sale the assignee had communicated to the creditor all the information in the possession or reach of the assignee concerning the state and the amount of assets, and the likelihood or chance of their realization both as to time and otherwise, and the extent of the demands on them, and the prospect as to

dividends. Mr. Quilter, in the present instance, is not shewn to have done so, and I consider it a just inference from the materials before us, that he had all along important knowledge and means of calculation and grounds of expectation respecting the assets, which the plaintiff had not. It is said for the defendants that the plaintiff was aware from the beginning that he was dealing substantially with Mr. Quilter, and not alone with Mr. Whidborne, or with Messrs. Whidborne and Brunskill. That circumstance, if true, I consider as of no moment, nor do I agree in the view of the bill taken by the defendants, who insist—erroneously, as I conceive—that it puts the plaintiff's case wholly on his alleged ignorance, when he made the sales, that Mr. Quilter was a purchaser. The defendants also contend that the suit was instituted too late, and that the sales of 1854 amounted to a confirmation of that of 1853. Neither to this, however, can I accede. There was not, I think, on the part of the plaintiff any intention to confirm the sale of 1853, nor is it proved that in 1854 he was aware of his rights in that respect. Nothing but a special state of circumstances could render a suit instituted in October 1856 for the purpose of setting aside sales made in November 1853, and in April and May 1854, too late, and there is no such state of circumstances, as I conceive, here. Nor is there, I think, the least ground for the argument that anything said by Lord Eldon in the cases cited at the bar from *Vesey's Reports*, or in any one of them, is inconsistent with the plaintiff's title to relief. Before concluding, I think it right to read two other documents in evidence: one, a letter of the 25th of October 1853, from Mr. Quilter to Mr. Whidborne, in these terms:—

"Dear Sir,—I send, on the other side, copy of a letter which I have this day received from Mr. A. G. Pooley, in which he offers to sell his proof for 23,443*l.* 1*l.* 2*d.* on the estate of Hennet, at and for the sum of 7,000*l.*, about 6*s.* in the pound, provided he receives all above 8*s.* If you think this proposition worth your accepting on similar terms with those of George Hudson, come to town with 2,500*l.*, and telegraph early to-morrow whether,

and when, I am to expect you. Cannan and I—that is, the official assignee—Cannan and I have abandoned all idea of coming into Devonshire this week. I am yours truly, (Signed) William Quilter."

The other is a paper signed by Messrs. Whidborne and Quilter, in November 1853, which is thus worded:—"London, 15th of November 1853," four days after the declaration of the dividend:—

"This is to declare that the undersigned, John Whidborne, of Teignmouth, in the county of Devon, and William Quilter, of Coleman Street, London, have entered upon and embarked in the following transactions, on the terms and conditions hereinafter stated, that is to say: we have purchased on joint account the respective debts proved against the estate of George Hennet, the bankrupt, by George Hudson, M.P."—which I suppose means Member of Parliament—"and A. G. Pooley; and it is agreed that the said John Whidborne finds the purchase-money for the same, as set forth in the several assignments, and is to be allowed interest thereon after the rate of 5*l.* per cent. per annum, during the time he is under advance, and finally, upon the result being ascertained, the profit or loss shall be divided into moieties, and the same either be paid or received by the said John Whidborne accordingly. We have also purchased further debts under the said estate of George Hennet, proved by William Fawn, William Russell and James Warwick Woolridge, respectively, which are also on joint account, in equal proportions. The several purchase-moneys for each have been provided by us equally, and we are consequently entitled to share all dividends arising therefrom according to the conditions set forth in the several assignments. Dated this 15th of November 1853. (Signed) John Whidborne, William Quilter." This document relates, of course, amongst other things, to the first purchase now in question; nor will I refrain from expressing the great surprise and regret which I feel that a solicitor of the court, especially one who had been the bankrupt's solicitor, and an assignee in bankruptcy, especially one who had been an agent of the bankrupt, should have permitted themselves to be engaged in such transactions as those which that paper

records. I think myself bound judicially to express my strong disapprobation of it. Mr. Quilter, who is not of the legal profession, as Mr. Whidborne is, says, in a letter to the plaintiff's solicitor on the 21st of July 1856, "had the transaction turned out a disadvantageous one for the purchaser, which was not improbable when it was entered into, I should, of course, have had to bear one-half of the loss; but I am, nevertheless advised that, so far as I am concerned, the profits which it has happened to produce do not belong to me, but to the estate. Having been so advised, I have felt it my duty at once to communicate the facts to the official assignee, and to offer to account for every farthing of the gain arising from my share of the transaction. This I should have done much earlier, or rather I should never have been concerned in the transaction, had I been aware of the state of the law on the subject; but until I consulted counsel in consequence of your letter, I really did not know how it stood." Some people may think this alleged ignorance of law a palliation; men may, however, be honest without being lawyers, and there are doings from which instinct, without learning, may make them recoil. That Mr. Quilter will give up, if he has not already given up, to the estate in the bankruptcy or otherwise, all his gains, if any, from the other operations mentioned in the paper of the 15th of November 1853, and will, at his own cost, retire from this assigneeship, if he has not already done so, I take of course for granted; but being connected, as I have been, with the administration of justice in bankruptcy, I will add a recommendation to him, in the event of his appointment to another assigneeship, to pause before accepting it, and if he should accept it, and be then a member of a firm of accountants, not to be tempted into allowing the firm to be the paid accountants in the bankruptcy, even though with a determination to give up the emolument to the estate, as I suppose in the present instance has been done. The purchases now in dispute must be set aside; the dividends received must be refunded with interest; but Messrs. Whidborne and Quilter and the executors of Mr. Brunskill will be allowed with interest the purchase-

money paid by them on the three transactions. All the defendants must be charged with the plaintiff's costs of the appeal as well as the other costs of the suit. The Court has not power to do more in this case.

LORD JUSTICE TURNER.—This is an appeal from a decree of Vice Chancellor Kindersley. My learned Brother has gone so fully through the facts of the case that it would be quite a waste of time to recapitulate them. The decree dismissed the bill with costs as against the defendants, the executors of Brunskill, who was concerned in the first of these transactions, and also as against the defendant Whidborne, who was concerned in all the transactions, so far as the bill sought to affect his beneficial interest under the assignment and agreements which my learned Brother has referred to; and then the decree proceeded to direct an issue, whether at the time when the plaintiff executed the assignment on the 1st of November 1853 of the dividend of 8s. in the pound on the debt proved, or to be proved, under the commission, whether, at that time, the plaintiff A. G. Pooley believed, or had sufficient reason to believe, that the defendant Quilter was beneficially interested in the purchase of the dividends assigned by that indenture; and like issues were directed as to the purchases under the agreement of April 1854, and under the agreement of May 1854. This decree, therefore, treats these purchases as valid so far as the interest of Mr. Brunskill and of Mr. Whidborne are concerned, and it makes the plaintiff's title to relief, as to the defendant Mr. Quilter's share of the purchases, dependent upon whether the plaintiff, at the time when these purchases were completed, believed, or, to adopt the language of the issues, had sufficient reason to believe that the defendant Mr. Quilter was beneficially interested in the purchases. After giving this case very full and anxious consideration, I find myself wholly unable to agree with either of the views thus set forth by the decree. The title of the defendant Mr. Whidborne and the representatives of Mr. Brunskill, is derived through the medium and by the instrumentality of the defendant Mr. Quilter. He was the agent through whom

they purchased, and they must, as it seems to me, be affected by his acts and conduct. If these purchases are invalidated as to him by reason of his acts and conduct, they must, I think, be equally invalidated as to the other defendants. No rule, as I conceive, is better settled, than that even innocent parties cannot support a title founded upon the fraud of others. The whole question, therefore, as I view it, is, how this case stands as between the plaintiff and the defendant Mr. Quilter. This defendant is an assignee under the bankruptcy. It was admitted, on his part, that he could not hold the purchase for his own benefit, but it is insisted by him, and by the other assignees, that his purchase enured for the benefit of the estate, and several cases decided by Lord Eldon were cited in support of that proposition. It does not appear, however, that in any of those cases there was any claim on the part of the creditors from whom the debts had been purchased; and the cases therefore established no more than this, that where creditors under a bankruptcy from whom debts have been purchased do not claim, the estate takes the benefit of the purchase. The question we have to decide, however, is, how the matter stands where the creditors do claim. How it would stand in the case of a fair, open, *bond fide* purchase by an assignee, without fraud or concealment, and with full information communicated to the creditor, it is not, I think, for reasons which I shall presently give, necessary for us to determine; but I have no hesitation in saying that, in my opinion, the purchase could not even in such a case be upheld for the benefit of the estate. I think it against the policy of the Bankrupt Law to permit such transactions. Assignees of bankrupts are indeed entrusted with great powers, but they have also important duties to discharge. They are trustees for all the creditors, bound to divide the estate equally between them: are they to be permitted to speculate for the benefit of some, and to the prejudice of others? If they can purchase one debt, they may purchase all the debts. Suppose, then, the case of all the debts purchased by the assignees, and the estate more than sufficient to pay the purchase-moneys; it is admitted that the assignees

could not hold the surplus. Is it according to the Bankrupt Law that the surplus so derived by the purchase of the debts of the creditors should go to the bankrupt? I apprehend most clearly not. What the Bankrupt Law contemplates is, a division of all the estate amongst all the creditors, and not an acquisition of property by the bankrupt through the medium of purchases made from them. I think, therefore, that these purchases could not have been supported, even if they had been made fairly, openly and *bonâ fide*, and without fraud or concealment. But what is the case before us? Not only was the defendant Quilter assignee under the bankruptcy, but his partner (Mr. Ball) was the accountant, and Mr. Whidborne, his co-contractor, had been the bankrupt's solicitor up to the time of his bankruptcy. These parties, therefore, had full means of knowing the state of the bankrupt's assets, the amount of his debts, the probable amount of the dividends, and the probable time when the dividends would be paid. At least it was the duty of the defendant Quilter to give the plaintiff all information as to all these particulars; for, whatever else may be said of dealings between trustees and *cestuis que trust*, this at all events is perfectly clear—that a trustee cannot maintain a purchase from his *cestui que trust* unless he has put him on an equal footing with himself. Now, did the defendant Quilter give the plaintiff this information? All that I find stated in the answer, or in the evidence upon the subject, is this—that he was ready and willing to give, and did give, to the creditors, and particularly to the plaintiff, all the information in his power upon the subject of the estate of the bankrupt; but not one word is said as to the time, or any information given as to the time when the dividends would be likely to be paid, which was a most essential element in these purchases, more especially in the first of them. Yet it was upon these defendants to allege and to prove a case upon which this purchase could be supported. Something was said in the course of the argument upon the nature of the trust reposed in assignees; but Lord Eldon has said in many cases, and, as I humbly conceive, most truly said, that the rules of the Court

which apply to ordinary trustees, apply with still greater force to assignees. What the defendant mainly relied on, however, was this—that the plaintiff knew that the defendant (Mr. Quilter) was beneficially interested in these purchases, and that with that knowledge he had confirmed them, or at least the earliest of them. I looked, therefore, with some care into the evidence upon this subject, the proof of which plainly rests upon the defendants: and so far from the evidence supporting these allegations on the part of the defendants, it seems to me to point to directly the opposite conclusion. That the plaintiff originally offered to sell his debt to the defendant (Mr. Quilter), I see no reason to doubt; but when we come to the purchase in question, we find this upon the evidence: the defendant Mr. Quilter had told the plaintiff that he knew of a person who would purchase the debt. We then find that in the plaintiff's letter to Mr. Quilter, which has been referred to by my learned Brother—I think it is dated the 25th of October 1853—in that letter offering to sell, which it is to be observed was written according to Mr. Quilter's confession upon his own suggestion, no mention is made of Mr. Quilter himself becoming a purchaser, and that neither in the assignment, nor in either of the agreements, is Mr. Quilter's name in any manner referred to. If these were honest purchases on the part of the defendants Mr. Quilter and Mr. Whidborne, all that I can say upon the subject is, that they have been most unfortunately carried into effect. In my judgment, assuming the question of knowledge pointed at by the issues to have been material (which I do not think it was), there was no sufficient evidence on the part of the defendants to warrant that part of the decree which directs an issue upon that part of the question. I agree, therefore, most fully in what my learned Brother has proposed; and I cannot part with this case without observing that I have viewed with the most sincere regret the revival of practices which I hoped had been long since discontinued, and I sincerely trust that this decree may lead to the more pure administration of the estates of bankrupts, and to the entire extinction of the system of trafficking in debts, which is dis-

graceful alike to the law of the country and to the parties who are concerned in it. I may add my extreme surprise at finding that the partner of the defendant Mr. Quilter, one of the assignees, is the accountant under this bankruptcy; and my surprise also at the very large sum—scarcely less than 1,000*l.*—which has been paid to the accountant out of this estate. There must be an account, therefore, of the sums which have been received in respect of the dividends, the purchase-monies, and interest upon them; payment of the balance; and all the defendants must be charged with the costs of the suit, including the costs of the appeal. Interest at 4*l.* per cent. on each side (1).

M.R. } *In re* THE STAFFORD
Nov. 24. } CHARITIES.

Charity — Grammar School — Trustees' Discretion — Jurisdiction — Scheme.

A grammar school founded and endowed by King Edward the Sixth is essentially a Church of England school, founded for Church of England purposes, and members of the Church of England alone will be appointed trustees. The Court is bound by the charter of foundation: it has no power to expand, curtail or diminish the purposes of the foundation. It will, therefore, leave the trustees, when authorized, to frame the rules and ordinances from time to time required for the government of the school; and so that the school is preserved in its integrity, it will not restrain them from making rules and ordinances to extend the general benefit of the foundation to persons not members of the Church of England.

By letters patent of the 4th year of his reign, His Majesty Edward the Sixth, "on the humble petition of the inhabitants and burgesses of the town of Stafford, in the county of Stafford, to us, for a grammar school there to be erected and established for the teaching and instruction of boys and youth, We, of our especial grace,

(1) The Lord Justice Knight Bruce desired Mr. Vizard, the Registrar in Bankruptcy, to forward a brief of the plaintiff's to Mr. Commissioner Fane for his perusal.

certain knowledge, and mere motion, do will, grant and ordain that from henceforth there may and shall be a grammar school in the said town of Stafford, which shall be called 'The Free Grammar School of King Edward the Sixth,' for the education, instruction and teaching of boys and youth in grammar, to endure for all future times, and that school of one master or teacher, and one under-master or under-teacher for ever to continue, we do by these presents erect, create, ordain and found." He then declared that the burgesses should be incorporated and have perpetual succession under the name of "The Burgesses of the Town of Stafford," and he vested in them divers lands and hereditaments, corporeal and incorporeal, for the maintenance of the school, and after declaring that they should have a common seal, the letters patent proceeded: "and further, of our own abundant grace, we have given and granted to the aforesaid burgesses and their successors full power and authority of naming and appointing the master and under-master of the school so often as the same school shall be void of a master or of an under-master, and that the same burgesses, with the advice of the bishop of the diocese for the time being, from time to time, shall make and may and shall be able to make statutes and ordinances in writing concerning and touching the ordering, governance and direction of the master, and of the under-master, and of the scholars of the school aforesaid, for the time being, and the stipends and salaries of the same master and under-master, and other things touching and concerning the same school, and the ordering, governance, preservation and disposition of the rents and revenues appointed and to be appointed for the support of the same school, which same statutes and ordinances so to be made, we will, grant, and by these presents command, shall be inviolably observed, from time to time, for ever."

There were nineteen other charities included in the petition now before the Court, all of which were unconnected with the grammar school, but some were for preaching sermons and for finding a master, &c. At the time of passing the Municipal Corporation Act (5 & 6

Will. 4. c. 76), these several charities were vested in the corporation of the borough of Stafford; but by an order of the Lord Chancellor, dated the 25th of November 1836, made in pursuance of the Corporation Act, seventeen persons, members of the Church of England, were appointed trustees of the grammar school and of the other charities; these, by death, removal and ceasing to attend, were reduced in number to six acting trustees. On the 16th of April 1857, an order was made upon a petition presented under the 52 Geo. 3. c. 101, in the matter of the Free Grammar School of King Edward the Sixth and of the other charities, discharging certain non-resident and non-acting trustees, and directing that new trustees be appointed of the said charities, or of such of them as the Court should think it desirable to appoint new trustees of, and in conjunction with the continuing trustees; and it was ordered that a scheme for the better management and government of the grammar school be settled. The gross income of the grammar school was represented as being 300*l.* a year. It was now proposed to appoint twelve new trustees; that six should be members of the Church of England, and that the remaining six should be members of dissenting bodies. It was conceded by all parties that the master and under-master must be members of the Church of England, and graduates of one of the Universities.

The scheme brought into court on behalf of the trustees proposed that "*the boys attending the said school shall be instructed in religion according to such statutes and ordinances as shall be made from time to time by the trustees and the Lord Bishop of Lichfield, pursuant to the powers contained in the said letters patent, and they shall also be carefully and diligently instructed in the Greek, Latin, French and English languages and literature, reading, writing, drawing, grammar, ancient and modern history, sacred and profane geography, arithmetic and mathematics, and the principles of natural philosophy, and also in such other languages, arts and sciences as the trustees, with the advice of the Lord Bishop of Lichfield, for the time being, shall think proper and direct.*" In lieu of the parts in *Italics*, it

was proposed to insert "Religious instruction shall be given by the head-master at such times as he shall think best, by reading and explaining the Holy Scriptures to all the boys, and also in the Liturgy and Catechism of the Church of England to such of the boys whose parents are in communion with that church, and to such other boys whose parents or the persons standing *in loco parentis* shall not object, by a notice in writing, to their receiving such instruction."

Two questions were now raised for the consideration of the Court: the one, whether it should be a necessary qualification for the office that a trustee should be a member of the Church of England; and the other, whether provision should be made in the scheme for religious instruction, and whether the children of parents who objected to their receiving such religious instruction should be exempt.

The Attorney General and *Mr. Wickens*, in support of the alteration in the scheme. —The proposition on behalf of the old trustees is, that the religious instruction of the school should be confined altogether to the doctrine of the Church of England; they say that it is exclusively a Church of England foundation, and that it is manifested by the circumstance that the trustees are to make rules and ordinances by the advice of the bishop of the diocese; that the school was founded at a time when there was no toleration of any other form of religious worship, and, consequently, that no other instruction could be given than that which was in conformity with the doctrine of the Church of England. In *The Attorney General v. the Sherborne Grammar School* (1), it was found that ordinances emanating from an internal authority within the school had for 200 years been promulgated limiting the character of the religious instruction to be given therein, but that such internal authority was subject to the visitatorial powers of the Lord Chancellor; the Court, therefore, considered that it could not adjudicate. An application was then made to the Lord Chancellor, but after some discussion a

(1) 18 Beav. 256; s. c. 24 Law J. Rep. (N.S.) Chanc. 74.

petition was presented to the Lord Chancellor as visitor, praying that the rules might be so altered that the children of dissenters might be enabled to participate in the benefits of the school. The governors of the school objected that he had no jurisdiction to make any order, but upon his Lordship's suggestion they voluntarily made a new statute, dispensing in favour of dissenters desiring it, with their compulsory attendance at church, and with their learning the Church Catechism, and upon this the Lord Chancellor declined to make any order; the exigency of the case, therefore, did not require his further interference, and the order was carried to an extent which made it unnecessary. The paramount object of this charity was, no doubt, the instruction of all the youths of Stafford, and if so that assists as a leading rule in the administration; and in the absence of condemnatory objections the doors ought to be opened to receive the children of all Christian persuasions: it is not one persuasion alone, but all that are recognized since the Toleration Act, 1 W. & M. c. 18. Suppose there was a provision that persons born in a particular town within a certain county should only be permitted to reside, and that a school was established whilst that law was in operation for the benefit of the children of the inhabitants of that town, it would be a school for the benefit of the children of the persons born in that particular county. Suppose that such law was afterwards abrogated, and that all persons, wheresoever born, were permitted thenceforward to dwell in that town, the charity would remain, but would you after the abrogation of that law be at liberty to say that the charity should be confined to or administered principally for the benefit of the children of the persons who were born in that county? That restriction done away with, that limitation effaced, the trust remains, the charity becomes a charity for all the children indiscriminately within the town, whether their parents were born within the originally favoured county or not. Apply that by analogy to the then case when England was bound to adopt the principles and doctrines of the Church of England alone. No dissent was tolerated: dissent was heresy, and heresy a crime; and, of course, the charity would not be founded

for those who were criminals. The charity was necessarily for members of the Church of England; but now that dissent is permitted and dissenters are placed on an equal footing, the charity, as it remains, must be for the benefit of the children of all the inhabitants of the town.

[The MASTER OF THE ROLLS.—Your argument would have great weight if any act of parliament had said, that Independents and Presbyterians were to be recognized as members of the Church of England.]

The letters patent say nothing about members of the Church of England. Had the foundation originally been for members of the Church of England the Court could not extend it; but here it is for the inhabitants of a town, and it is wanted to limit it by circumstances existing at the time of the foundation, but which by operation of law were extrinsic to the charter; that however which operated extrinsically upon the letters patent has been taken away, and the effect of that limitation can no longer exist. In *Foss v. Harbottle* (2), the Court would not deal with the regulation, or with the thing done by a company, which itself was subject to the controul of one of the meetings of the company, but it would refer it to what may be called a domestic tribunal. So in *The Attorney General v. the Sherborne School*, as the ordinances emanated from the proper authority, they so far concluded the question, but before the Court would apply the extrinsic jurisdiction of the Court to annul or vary those rules, it was considered right to refer them to the internal authority having the power to controul them. *The Attorney General v. the Sherborne School* is reported as if the Attorney General, appearing by the then Solicitor General (3), had been desirous of bringing on a case at variance with that of the relators. It is obvious, however, that if the Attorney General had entertained views different from those of the relators, it would have been his duty to take the information out of the hands of the relators. When, however, the cause was called on, the Court asked the Solicitor

(2) 2 Hare, 461, 492. See also *Mozley v. Alston*, 1 Phill. 790; s. c. 16 Law J. Rep. (N.S.) Chanc. 217.

(3) Sir Richard Bethell, counsel in the present case.

General whether he desired to bring forward a different case from that of the relators, and upon being told that there was no such intention, and as the relators' counsel desired to have the conduct of the argument, he felt it his duty not to take the case out of the hands of the relators.

[The MASTER OF THE ROLLS.—There must, then, have been a misapprehension.]

From the report it would seem as if the Attorney General had a case different from the case of the relators.

[The MASTER OF THE ROLLS.—A case distinct from the relators.]

It would seem to convey an impression that the Attorney General had a different view of the matter from that of the relators, and that he gave way to them. But, in the present case, before any statutes and ordinances can be made to be submitted to the visitor, there must be a governing body, and consequently the full number of the trustees must be appointed. Then let the governing body make the statutes and ordinances, and submit them to the visitatorial authority. In *Re the Chelmsford Grammar School* (4) Wood, V.C. certainly held that religious instruction was a necessary part of the education in a grammar school; and that where there was reason to believe that such instruction was originally intended to be according to the doctrines and principles of the Church of England, it must be according to those doctrines and principles; and the Court, therefore, refused to sanction the insertion of a clause in the scheme exempting scholars whose parents conscientiously objected thereto from receiving such instruction. Nothing, therefore, was in fact decided, and the effect would have been very different if there had been a direction to lay before the Court, or the visitor, the statutes and ordinances which the trustees might make. This was followed by *The Attorney General v. the Queen's Free School at Basingstoke* (5). It was taken to the Lords Justices, and they enjoined the master to read and explain the Scriptures to all the boys; but they restrained him from teaching the boys out of the Liturgy, and from teaching them the

Church Catechism, or the Articles of the Church of England, if their parents objected. This was followed by the cases of *In re the Grantham School* (6) and *In re the Morpeth School* (7), in both of which the masters were similarly enjoined. Every religious community, however, is jealous of the powers which are given to masters and teachers; for if enjoined to read and explain the Scriptures, they may implant in the mind of a child a particular view or impression, resulting from certain portions of Scriptures, diametrically opposite to the religious faith of the parent.

The MASTER OF THE ROLLS.—The case is similar to *The Attorney General v. the Sherborne Grammar School*. This is a Church of England School for Church of England purposes. I lament my inability to expand it to the circumstances of the time. I have neither power nor jurisdiction to alter the trusts of the charity; but I am bound to appoint trustees who are members of the Church of England, and to leave them to frame such regulations as they think fit for the purposes of the school.

Mr. Kenyon.—We have in the scheme adopted the words used in *Re the Chelmsford School*; and we propose that the scholars of the school should be carefully and diligently instructed in religion according to such statutes and ordinances as shall be made from time to time by the trustees and the Lord Bishop of Lichfield, pursuant to the powers contained in the letters patent. The only question adjourned from chambers is that relating to the grammar school. I am not instructed as to the nature of the other charities, but assuming that there are charities within the rule which your Honour would apply to indiscriminate bodies of trustees, I would say that, in this case, you would appoint for those having reference to the Church of England a different class of trustees from those you would appoint where the charities are not Church of England charities.

[The MASTER OF THE ROLLS.—Have I

(4) 1 Kay & J. 543; a.c. 24 Law J. Rep. (N.S.) Chanc. 742.

(5) Unreported.

(6) Unreported.

(7) Idem.

any jurisdiction to do that under the Municipal Corporation Act?]

It was recognized in *Re the Norwich Charities* (8), and the reference made to chambers in this case shewed it was not contemplated that it was necessary to appoint new trustees for all of them.

The MASTER OF THE ROLLS. — That would seem to be so. I do not, however, mean to say that instruction according to the doctrines of the Church of England shall be given in the school. The trustees may reasonably and properly extend the benefit of the instruction given, in grammar, to persons not members of the Church of England; I must, however, leave that to them. The visitor has power to modify the rules and ordinances from time to time as he may think fit. With regard to the trustees of the other charities, their appointment will be considered in chambers, and such charities as are for Church of England purposes, or relate to the preaching of sermons, may be given to the school trustees.

M.R. }
Jan. 27, 28. } MOORE v. MOORE.
In re MOZLEY.

Sheriff—Escape—Damages—Jurisdiction.

A writ of attachment was issued out of this court to enforce an order made for the payment of 1,228l. 7s. 1d. The sheriff arrested the prisoner, but subsequently allowed him to go at large, without bail, upon his promise to surrender when called on. This he neglected to do, and, without having been recaptured, he committed suicide. Upon an application against the sheriff,—Held, that an escape had been permitted; that this Court had jurisdiction to ascertain the amount of damages sustained; that the 5 & 6 Vict. c. 98. must be considered as controuling the practice of this Court; and that the sheriff's liability was the actual loss, and not the full sum for which the attachment issued.

(8) 2 Myl. & Cr. 275.

NEW SERIES, XXVII.—CHANC.

This was a motion that the sheriff of Derby might pay into the Bank of England a sum of 1,228l. 7s. 1d., together with the costs of a writ issued out of this court for the attachment of Henry Mozley for the contempt of an order to pay this sum into court.

On the 8th of July 1857, an order was made in this suit that H. Mozley, the defendant's solicitor, should, within seven days after service of the order, pay 1,228l. 7s. 1d. into the Bank to the credit of the cause. On the 6th of November 1857, an attachment was issued against H. Mozley for not obeying the order: it was made returnable on the 26th of November 1857. On the 9th of November 1857, the writ of attachment was lodged with the under-sheriff, and on the same day H. Mozley was taken under the writ; but upon his representing that he would make an arrangement for liquidating the amount, and that his liberty was necessary for so doing, he was allowed to go at large upon his undertaking to give bail or to render himself into custody when required so to do. On the 30th of November the under-sheriff was called upon to make a return to the writ. On the 2nd of December an officer was sent to Mr. Mozley to require him to render himself into custody. It was then arranged that Mr. Mozley should come to him at the King's Arms Hotel at three o'clock; but as he did not come, the officer went to Mr. Mozley's house, and arrived there about half-past three o'clock, and saw his clerk, who told him that Mr. Mozley was upstairs packing up his things, and, at the officer's request, the clerk informed Mr. Mozley that the officer was waiting, but as Mr. Mozley did not come down, the officer went upstairs and knocked at his bedroom-door, and asked to speak to him, to which he replied, "Speak through the door." The officer then said, "Nay, I cannot do that." Mr. Mozley then said, "Stop a moment," and almost at the same time there was a report of firearms. The officer then kicked in the pannel of the door; he saw Mr. Mozley still alive. The officer went down stairs and gave an alarm, without leaving the house, and after waiting several minutes he returned to the bedroom and found the

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surgeon and several persons with Mr. Mozley, who had died. The officer then left the house to communicate with the under-sheriff, but he afterwards returned with a bailiff, whom he left in the care of the body of the deceased until after an inquest had been held.

On the 7th of December 1857, an order was made requiring a return to the writ. The sheriff sent the following certificate:—"I hereby humbly certify and return that, under and by virtue of the within writ to me directed, I did attach the said Henry Mozley to answer the said writ, and that whilst the said Henry Mozley was in my custody under and by virtue of such writ he committed suicide, whereupon I cannot have him before the Queen, or her Court of Chancery, as by the within writ I am commanded."

It was also now alleged to have been ascertained that when the writ was lodged with the sheriff, and thenceforth until his death, H. Mozley was wholly insolvent, and utterly unable to pay the amount indorsed on the writ.

Mr. Lloyd and Mr. Martindale, for the plaintiffs. — The sheriff allowed the prisoner to escape, and he must be held responsible.

Frowd v. Lawrence, 1 J. & W. 655.

Bricknell v. Stamford, 1 Beav. 368.

Levett v. Letteney, Beames on Costs, 235.

Solly v. Greathead, Ibid.

Anonymous, 11 Ves. 170.

Mr. R. Palmer, Mr. Speed and Mr. Field, for the sheriff. — The debt was bailable, and the arrest under the attachment was in the nature of mesne process. The prisoner was in custody when he committed suicide; the recapture was complete. Mr. Mozley was living when the officer found him. The actual damages could only be ascertained at law by an action on the case. Mr. Mozley was wholly insolvent; the value of the custody was nothing, and it must be considered in analogy to a claim against executors who were unable to recover a debt of their testator. The plaintiffs therefore have sustained no actual loss. Unless loss was proved, they

could recover nothing. It was necessary to determine whether the plaintiffs were entitled to the debt or damages. The jurisdiction of this Court did not extend so far. It was necessary therefore to send a case to a court of law. —

Morris v. Hayward, 6 Taunt. 569.

Lewis v. Morland, 2 B. & Ald. 56.

Williams v. Mostyn, 4 Mee. & W. 145;
s. c. 7 Law J. Rep. (N.S.) Exch. 289.

Collard v. Hare, 5 Sim. 10; s. c. 1 Law J. Rep. (N.S.) Chanc. 180.

Hawkins v. Plomer, 2 W. Black. 1048.

Bonafous v. Walker, 2 Term Rep. 126.

13 Edw. 1. c. 11, *Westminster* 2.

1 Rich. 2. c. 12.

5 & 6 Vict. c. 98. s. 30.

Clifton v. Hooper, 6 Q.B. Rep. 468;
s. c. 14 Law J. Rep. (N.S.) Q.B. 1.

Arden v. Goodacre, 11 Com. B. Rep. 371;
s. c. 20 Law J. Rep. (N.S.) C.P. 184.

The Queen v. the Sheriff of Leicestershire, 11 Com. B. Rep. 367; s. c. 19 Law J. Rep. (N.S.) C.P. 320.

Russen v. Lucas, 1 Car. & P. 153; s. c. 1 Ry. & M. 26.

Grainger v. Hill, 4 Bing. N.C. 212;
s. c. 7 Law J. Rep. (N.S.) C.P. 85.

Roberts v. Ball, 3 Sm. & G. 168; s. c. 24 Law J. Rep. (N.S.) Chanc. 471.

Planck v. Anderson, 5 Term Rep. 37.
Tidd's Practice, 487, 8th edit.

Watson on the Office of Sheriff, 129.

Danby v. Lawson, 1 Eq. Ca. Abr. 351.

Dewes v. Beresford, 5 Sim. 531.

Mr. Lloyd, in reply. —

The MASTER OF THE ROLLS. — Mr. Mozley was clearly taken into custody on the 9th of November 1857, and on the same day again allowed to go at large without bail: that in law amounted to an escape. He was never recaptured. It was argued that the circumstances which occurred on the 2nd of December amounted to a recapture: it was, however, nothing of the sort. The under-sheriff had allowed Mr. Mozley to go at large, upon his promise that he would surrender himself when required; and had he done so, and died in custody, the plaintiffs could not have

complained. Mr. Mozley, however, broke his promise as much as if had absconded at night and gone out of the country. He committed the act when in a state of mind in which he was not conscious of what he was about. It was done for the purpose of avoiding the capture, and he took the most effectual means possible to prevent his being retaken into custody. The evidence therefore proved that he never was again in the custody of the officer, but that he was dead before the officer could approach him.

What amounts to a capture is very plain: it requires something like a touch, or something approaching to it, or a statement to the prisoner that he must consider himself in custody, and then, if the prisoner obeys and follows the officer according to his direction, it would amount to a capture. The sheriff therefore is clearly liable for an escape; but in what manner and to what extent remain to be considered. An action would certainly lie against him; it would no doubt be an action on the case for consequential damages sustained by reason of the escape of the prisoner. It is, however, not necessary to direct the motion to stand over, with liberty for the plaintiffs to bring such action as they may be advised, and to direct the defendant to make such admissions as the Court might consider necessary for fairly trying the question. The cases of *Levett v. Letteney* and *Solly v. Greathead* shew that this Court has jurisdiction to determine the question; it can also prevent the inconvenience of requiring admissions to preclude the practice of this Court and the reasonableness of that practice from being made a question in a court of law. This Court is quite as competent to ascertain the measure and amount of damage sustained; that is the only question which could be sent to law.

The extent of the liability is the damage actually sustained by the plaintiffs in consequence of the sheriff not having the custody of the prisoner. The reason why the Lord Chancellor, in *Levett v. Letteney* and *Solly v. Greathead*, thought fit to give the full amount of the debt due was, that according to the statutes and the construction they had received, the total amount of the debt would be recovered at law, and it would be impossible to say it was less

than the total amount actually due from the prisoner. It is not necessary to consider whether that is not a strained construction of the statutes 13 Edw. 1. stat. 1. c. 11. and the 1 Rich. 2. c. 12. They have received that construction in the courts of law, and it is binding both there and in equity. The 5 & 6 Vict. c. 98. s. 31. enacts, "that if any debtor in execution shall escape out of legal custody after the passing of this act, the sheriff, bailiff, or other person having the custody of such debtor shall be liable only to an action upon the case for damages sustained by the person or persons at whose suit such debtor was taken or imprisoned, and shall not be liable to any action of debt in consequence of such escape." That act does not apply to the Court of Chancery; but in such a case as the present it is sufficient to govern the rules and practice of this Court, as well as the rules and practice of the Courts of law. It does not enact that the Court of Chancery, having power previously, shall have no power to do anything in such a case as the present. It would consequently require express words to take away an existing jurisdiction of the Court of Chancery. If, therefore, the cases referred to were rightly decided, the Court of Chancery had jurisdiction before the passing of the 5 & 6 Vict. c. 98, and that act declares the manner in which, in the consideration of the legislature, it was fair and proper that the sheriff should be rendered liable for allowing a prisoner to escape, and the extent of this was the loss sustained by the escape of the prisoner out of custody. That is plainly the proper mode in which the plaintiffs ought to be remunerated or restored to their former position; and it ought to be the extent of the liability of the sheriff. It would put the parties exactly in the situation they would have been in if the prisoner had not effected his escape; it would have been the utmost that could have been got from him. It would have been well if the whole debt and the costs of the contempt could have been obtained; but if not, the only prejudice and injury the plaintiffs could sustain would extend to what could not have been obtained. It was argued that there would be both inconvenience and difficulty in ascertaining what would have been the

real value of the custody, and that the mere state of the property of the escaped prisoner would not be the measure of the damages, as the commiseration of his friends, the interference of relations and the like might have afforded means from which the plaintiffs might have derived an advantage which could not in such a case be well ascertained. I make no remarks on that; but the manner pointed out by the legislature at once defines both the reason and the equity of the thing. The Court must therefore adopt the course suggested by the act, and it ought not to be deterred by difficulties it may meet with in carrying its order into effect. When, therefore, it comes before me in chambers, I shall consider the escape proved, and that there was no justification for allowing it; that the sheriff is liable for the whole loss sustained; and that the act of his officer occasioned the loss, and that the sheriff is liable. He must therefore shew that Mr. Mozley, from the time he was taken into custody until the termination of his existence on the 2nd of December 1857, could not have discharged his debt by any reasonable means. If the plaintiffs are then unable to contradict that, or to define the extent to which that may go, they may still be at liberty to shew that other sources were open to Mr. Mozley, and they may point out from whence they would have arisen. I shall therefore refer it to chambers to ascertain what loss has been sustained by the plaintiffs by reason of Henry Mozley, deceased, having been permitted to escape from the custody of the sheriff on the 9th of November 1857, and having been permitted to remain out of such custody until his decease, on the 2nd of December 1857.

STUART, V.C. { AUSTIN v. THE VESTRY OF
Feb. 1. { THE PARISH OF ST. MARY,
LAMBETH.

Metropolis Local Management Act (18 & 19 Vict. c. 120. s. 76.)—Construction—Vestry Board, Power of—Drainage Pipes—Injunction.

The defendants, in exercise of the powers given to them by the 76th section of the

Metropolis Local Management Act, 18 & 19 Vict. c. 120, served the plaintiff with a notice requiring him, in the construction of the drainage to certain houses then building by him in their district, to use pipes of stone-ware of the best quality. The plaintiff proposed to use pipes of Aylesford manufacture as coming within the description of stone-ware mentioned in the notice. To this the defendants objected, who required pipes of Lambeth manufacture, or of manufacture similar to that of Lambeth, to be used, and they refused, unless this were complied with, to make an opening into the main sewer for the plaintiff's drainage. The plaintiff thereupon made the opening himself, and completed his drainage by means of Aylesford pipes:—Held, the evidence of scientific men as to the comparative merits of the two manufactures being conflicting, that the act gave the vestry the right to determine which of the two materials should be used; and the Court therefore refused a motion by the plaintiff for an injunction to restrain the defendants from entering upon the plaintiff's premises for the purpose of taking up the drainage works constructed by him with the Aylesford pipes.

The plaintiff, William Austin, being lessee for a long term of years of a piece of ground on the east side of Spring Grove, in the parish of St. Mary, Lambeth, had, previously to November 1857, erected four houses thereon in carcass. Being desirous of completing the houses, and making proper and sufficient drains, he, on the 26th of October 1857, called on Mr. M'Intosh, the defendants' surveyor of sewers, &c., and delivered to him a plan of the premises. Mr. M'Intosh approved of the plan, and, in reply to a request by the plaintiff that he would cause "the eye" to be put into the main sewer, he asked what pipes the plaintiff was going to use; but upon being told by the plaintiff that he intended to use the Aylesford pipes, he answered "In that case I will not put in the eye." The eye, it appeared, was the excavation to be made into the main sewer where the plaintiff's drain was to enter it.

On the 5th of November 1857 the plaintiff served the defendants with a formal notice for leave to lay a "glazed stone-ware pipe drain" from his houses to the

sewer; and on the same day Mr. M'Intosh said to the plaintiff, "I shall not give the leave asked for unless you pledge yourself to use stoneware pipes, and not Aylesford pipes." The plaintiff afterwards, through his solicitors, made another demand upon the vestry to the same effect.

On the 11th of December 1857, the plaintiff's solicitors received from the vestry clerk a letter in the following terms:—

"Vestry Offices, Kennington Green, S.
"Dec. 11th, 1857.

"The vestry of the parish of St. Mary, Lambeth.—Spring Grove Drainage Works.—Gentlemen,—I beg respectfully to forward to you an extract from a report adopted by the vestry at a vestry meeting held last evening:—'Resolved, that the application of William Austin, through Messrs. Barnard, to construct certain drains in Spring Grove, be granted, such drains to be constructed in accordance with the direction and order of the vestry, to the effect following:—that the materials used are in all cases to be of the best quality of their several kinds, and approved by the officer of the vestry; the bricks to be sound, hard and well-burnt stocks; the pipes to be stoneware of the best quality, and the bends and junctions to be of the most approved form and shape, and that the surveyor be empowered to carry out this instruction.'—I remain, &c., Thomas Roffey, clerk to the vestry."

On the 16th of December 1857, the defendants still refusing to make the eye into the sewer, the plaintiff, after giving notice to Mr. M'Intosh, himself opened the eye into the sewer, and afterwards completed the drain with Aylesford pipes. On the 24th of December 1857 the plaintiff was served with notice by the defendants that it was their intention "to take up so much of the said drainage as had been executed with pipes other than stoneware, and to re-construct the same with proper stoneware pipes, as required by the regulations of the vestry." The plaintiff thereupon filed the bill in this suit, alleging as above, and praying for an injunction to restrain the defendants, the vestry of the parish of St. Mary, Lambeth, their officers, servants, agents, workmen, and all other persons employed by them, from entering into or upon the piece of ground mentioned in the

bill, and the houses thereon, or any of them, or any part thereof, for the purpose of taking up the drainage works in the bill mentioned, or so much thereof as had been executed with pipes other than pipes called stoneware, and from interfering with the said drains, or doing any damage to the said premises, contrary to the provisions of the Metropolis Local Management Act.

The bill also alleged that the defendants, by pipes of stoneware of the best quality, meant pipes of Lambeth manufacture, and that several of the vestry of the parish of St. Mary, Lambeth, were themselves manufacturers of such drainage pipes. It alleged also that the Aylesford pipes were tougher, stronger, and less brittle than the Lambeth pipes; that the Aylesford pipes were used in the parish of Marylebone, in Buckingham Palace, in the city of London, and elsewhere, and that they were as much stoneware as the Lambeth pipes.

The case was now brought before the Court upon motion for an injunction in the terms of the prayer of the bill. The defendants, the vestry, professed to found and justify their proceedings complained of by the plaintiff, upon the powers conferred upon them by the 76th section of the Metropolis Local Management Act, 18 & 19 Vict. c. 120 (1).

(1) The enactment in the 76th section is as follows:—"Before beginning to lay or dig out the foundation of any new house or building within any such parish or district, or to rebuild any house or building therein, and also before making any drain for the purpose of draining, directly or indirectly, into any sewer under the jurisdiction of the vestry or board of or for any such parish or district, seven days' notice in writing shall be given to the vestry or board by the person intending to build or rebuild such house or building, or to make such drain; and every such foundation shall be laid at such level as will permit the drainage of such house or building in compliance with this Act, and as the vestry or board shall order, and every such drain shall be made in such direction, manner and form, and of such materials and workmanship, and with such branches thereto and other connected works and apparatus and water supply as hereinbefore mentioned, and as the vestry or board shall order, and the making of every such drain shall be under the survey and controul of the vestry or board; and the vestry or district board shall make their order in relation to the matters aforesaid, and cause the same to be notified to the person from whom such notice was received within seven days after the receipt of such notice, and in default of such notice, or if such house, building or drain, or branches thereto, or other connected works and

A considerable body of evidence, furnished by men of science, was adduced on both sides as to the comparative merits of the different manufactures, but this was for the most part directly conflicting. The nature of this evidence, and the principal arguments of counsel are noticed in the Vice Chancellor's judgment.

The questions to be determined were, first, whether the Aylesford pipes which the plaintiff had employed in his drainage were of a manufacture within the requirement of the order of the vestry that the plaintiff's pipes should be stoneware of the best quality; and, secondly, if this were answered in the affirmative, whether the vestry had nevertheless, under the terms of the act of parliament, power to enforce the use of pipes of a different manufacture.

Mr. Bacon and *Mr. Schomberg* appeared for the plaintiff.

Mr. Malins and *Mr. Speed*, for the defendant.

Mr. Schomberg replied.

STUART, V.C. — The question in this suit is, no doubt, one of very considerable importance, not only to the parties to the litigation, but to the public. The legislature has invested the vestry board, and those who have controul over those sanitary works, which are in a sense necessary for public purposes, with very extensive powers. It is very much to be regretted that in the exercise of those powers there should not, both on the part of those towards whom the powers are to be exercised by the vestry who are directed to construct the works, and by the vestry themselves in giving those directions, be that spirit of mutual forbearance and accommodation which is indispensable to the beneficial working of these legis-

apparatus and water supply, be begun, erected, made or provided in any respect contrary to any order of the vestry or board made and notified as aforesaid, or the provisions of this act, it shall be lawful for the vestry or board to cause such house or building to be demolished or altered, and to cause such drain or branches thereto and other connected works and apparatus and water supply to be re-laid, amended, or re-made, or, in the event of omission, added, as the case may require, and to recover the expenses thereof from the owner thereof in the manner hereinafter provided."

lative provisions. In the present case, the question resolves itself into a very narrow point. The plaintiff, being bound to construct, according to the directions of the vestry, the drainage of certain houses so as to be made of stoneware pipes of the best quality, insists that he has sufficiently complied, according to the exigencies of the act of parliament, with the order of the vestry. He says he has constructed the drainage with stoneware pipes of the description called Aylesford pipes. On the other hand, the vestry say that the Aylesford pipes are not stoneware pipes, and that there is not such a compliance with the order as, they insist, they have a right to enforce. The plaintiff has laid the drainage with these pipes, after full notice from the vestry that they were not of the quality which the vestry required. The vestry now carry it to the extreme point of insisting upon their right, under the act of parliament, to take up the pipes which the plaintiff has laid down, and, under their powers, conferred by the act of parliament, to construct the drains with those pipes which suit their own interpretation of the description they have given. Therefore, the plaintiff, very naturally thinking he has constructed a sufficient drainage with stoneware pipes, asks the Court to restrain the violence threatened by the vestry of tearing up the works which he has constructed, and of, as he says, arbitrarily, and of their own mere taste and caprice, substituting for them works constructed with pipes of a different description. According to the evidence of the plaintiff, the Aylesford pipe is an earthenware pipe, glazed with oxide of lead. According to the evidence on both sides, it is certain that the pipes called Lambeth pipes are pipes formed by a process which subjects them to a much higher degree of heat, and accordingly produces a pipe in which there is produced a state of vitrification, not perfect, as some of the witnesses say, but though imperfect, still a state of vitrification throughout the whole substance which is not to be found in what are called the Aylesford pipes. It seems impossible to say that a greater degree of hardness, the absence of porousness, and a better glaze are not material qualities in determining a preference as between two

sets of pipes. But with regard to the Lambeth pipes, the process by which these qualities, in themselves superior, are produced, is effected by a higher degree of heat, and therefore produces in the manufacture certain defects to which the Aylesford pipes are not liable.

The Aylesford pipes are said to be more tough, more smooth on the surface, and, from the less heat being employed, less apt to be bent and to have irregularity in their shape. Some of the Lambeth pipes are described in the evidence for the plaintiff not only to be imperfect in shape, but to assume, instead of a circular, an elliptical form, from the greater degree of heat used in the manufacture; all of which must be expected from the necessary chemical results of the materials used in both.

In favour of the plaintiff's case there is the important fact that public bodies, after a competition and an investigation of the specialities of both descriptions of pipes, have determined, after taking the evidence of scientific men, upon the use of the Aylesford pipes as the preferable material. That is amply borne out by the evidence.

The question, however, which the Court seems to me to have to determine in this case is, whether or not, supposing that the evidence were sufficient to shew that the Aylesford pipe is a stoneware pipe, and that it is a pipe of as good a quality as the Lambeth pipe,—whether or not, upon the true construction of the act of parliament, the vestry have not the power of choosing between two materials, as to the relative value of which there are conflicting opinions, and of determining for themselves which is the best. The very evidence of the plaintiff shews that to have been the course taken by other public bodies. The plaintiff insists that Islington Market is drained by the Aylesford pipes; that the district of Belgravia is drained by the Aylesford pipes; that the district of Marylebone, by the decision of the Marylebone vestry, is drained by the Aylesford pipes; but that only goes to shew, as part of the plaintiff's case, that there is a difference of opinion amongst public bodies, and that a choice has been exercised. Now, the whole scope of this bill is to prevent the exercise by the vestry of that right of choice, and

to force upon them the use of the Aylesford pipes, which certain other bodies appear to have chosen. It rather seems to me that, on the true construction of the act, the plaintiff is not entitled so to do. I think that where the vestry of Lambeth were justified in requiring stoneware pipes of the best quality, they have also a right to say, that they consider that pipe which is in the most highly vitrified state, which is proved to have the most glaze, most certain to resist the imbibing of the particles that pass through it. I think that, where the responsibility of the proper construction of sanitary works rests with the parish, the parish of Lambeth has a right to say, as they did say, to the plaintiff before he began his works, "the pipes which we mean to describe by the term 'stoneware pipes of the best quality' are not the Aylesford pipes, as to which there is a doubt whether they are stoneware at all; we mean that manufacture which is undoubtedly stoneware, which is most highly vitrified, which is the hardest substance; and we prefer it, and we insist on our right to prefer it." I think, under such circumstances, the right of preference must rest somewhere. I think the board, having the higher responsibility, had a right to exercise it here. I do not think they have exercised it arbitrarily or oppressively towards this gentleman, because he was told, before he began his drainage works, that an opening would not be made into the main drain for his sewage, unless he used pipes of that quality of stoneware which the defendants still insist on, and to the use of which the plaintiff objects. As to the other topics of discussion, it is said that some of the Lambeth vestry are themselves potters and have an interest in the use of this particular ware. That does not weigh with me at all, for this reason, that I do not find that these few out of the 120, who are said to be the entire body of the vestry, took any active part in these proceedings. But if they did, the question is not, whether the Lambeth stoneware pipes are to be used, but whether pipes of the Lambeth quality are to be used. The question is not, whether the plaintiff is bound to buy his pipes in Lambeth of Lambeth potters. He may get pipes of the more vitrified quality elsewhere than

in Lambeth. It is to the quality, not to the place, that I consider the order of the vestry to look ; and there is nothing in the order which requires stoneware pipes of the best quality to be bought of the Lambeth vestry, or of any other people in Lambeth at all. On the other hand, when these invidious topics were introduced, the defendants very fairly said that the plaintiff is an illiterate man, that, in fact, he is in the hands of the Aylesford Pottery Company. And there is a piece of evidence uncontradicted, which seems to shew, that if these odious topics (which are only introduced to prejudice, and are not the essence of, the case) are to be insisted on, there is quite as much to be objected to as to the plaintiff's case in that point of view as to the case on the other side. For Mr. Pilton, one of the witnesses for the plaintiff, is suggested to have given an indemnity to the plaintiff, who is an illiterate man, who, moreover, appears to be unable either to read or to write, and very likely, therefore, to be in the hands of some men of more considerable attainments than himself. But in disposing of this litigation it is unnecessary to have regard to those odious topics. The question is simply a question of law upon the construction of the act of parliament, to be disposed of in the way I have mentioned.

Injunction refused ; no order as to costs (2).

(2) April 18; the Lords Justices of Appeal dismissed a motion by way of appeal from the above decision, it having been admitted by the plaintiff's counsel in the course of the argument upon the appeal, that the plaintiff was suing, as he considered, not, at his own risk as to the costs of suit, but relying upon a parol promise of indemnity therefrom made to him by a manufacturer of Aylesford pipes. Their Lordships were of opinion that, having regard to this apparent taint of maintenance upon the proceedings, it would be improper to entertain an interlocutory application having for its object the reversal of the Vice Chancellor's decision. They directed, that the question of the costs of the appeal should be reserved, to be dealt with by the Vice Chancellor upon the hearing of the cause.

M.R. }
Jan. 21 ; } REYNOLDS v. WRIGHT.
Feb. 12. }

Lease for Lives—Special Occupants—Crown.

A devise was made to trustees and their heirs, upon trust for an illegitimate person and his heirs. Upon the death of the cestui que trust without heirs,—Held, under the 7 Will. 4. & 1 Vict. c. 26. s. 6, that a freehold lease for lives passed to the Crown under an administration taken out by the Solicitor of the Treasury ; and that the trustees and their heirs took no interest as special occupants in the property.

Elizabeth Shepherd, by her will, dated the 27th of February 1844, devised all the messuages or dwelling-houses, lands, tenements, hereditaments and real estate whatsoever and wheresoever, and whether freehold, copyhold, leasehold for lives or years, or of whatever tenure the same might be, which she was seized or possessed of or entitled to, either in possession, reversion, remainder or expectancy, with their several and respective appurtenances, unto and to the use of the defendants, Joseph John Wright and George William Wright, their heirs, sequels in right, executors, administrators and assigns for ever, according to the different tenures or natures thereof respectively, in trust for John Samuel Barron, his heirs, sequels in right, executors, administrators and assigns for ever ; and the testatrix appointed the defendants her executors, and died on the 7th of August 1844.

The testatrix was the owner of some freehold estate ; she was also absolutely entitled to the freehold lease of a farm called Hollikersides, held under a lease from the Bishop of Durham, dated the 27th of September 1832, by which the farm was granted and demised to her, her heirs and assigns, for the lives of three persons therein named, and the life of the longest liver of them, at a rent of 14s. On the death of the testatrix, J. S. Barron, who was illegitimate, entered into possession of the farm, and continued to hold it until the 8th of November 1856, when he died, without having been married. On the 9th of March 1857 letters of administration

were granted to the plaintiff, the Solicitor of the Treasury, on the nomination of Her Majesty, and, as administrator, he claimed the leasehold farm on behalf of the Crown.

The defendants, Messrs. Wright, claimed the farm for their own benefit, and on the 17th of December 1857 they served Hannah Lawson, who was in possession under the plaintiff, with a summons in ejectment to recover the possession. An appearance was entered to prevent judgment being signed, but there being no defence at law this bill was filed; and the Court was now asked for a perpetual injunction to restrain the defendants from prosecuting the action, and from taking any further proceedings to recover the premises. To this bill the defendants put in a demurrer for want of equity.

Mr. R. Palmer and *Mr. Haddan*, in support of the demurrer.—The estate was vested in the trustees and their heirs by the will of the testatrix; that was paramount to any right either of executors or administrators; the trustees, therefore, were entitled to proceed with the action of ejectment.

Atkinson v. Baker, 4 Term Rep. 229.

Wall v. Byrne, 2 Jo. & Lat. 118.

3 *Bac. Abr.* 191, tit. 'Estate for Life and Occupancy.'

Low v. Barron, 3 P. Wms. 262.

Campbell v. Sandys, 1 Sch. & Lef. 281.

Rawlinson v. the Duchess of Montague, 2 Vern. 667.

Jones v. Goodchild, 3 P. Wms. 32.

2 *Black. Com.* n. 260, Christian's edit., and see Kerr's edit. 251.

Zouch v. Forae, 7 East, 186.

Doe d. Lemprière v. Martin, 2 W. Black. 1148.

Westfaling v. Westfaling, 3 Atk. 460, 466.

Carpenter v. Dunsmure, 3 El. & B. 918.

29 *Car.* 2. c. 3.

3 *W. & M.* c. 14.

14 *Geo.* 2. c. 20. s. 9.

Ripley v. Waterworth, 7 Ves. 425.

Mr. Wickens, for the plaintiff.—This case depends upon the Statute of Wills; the plaintiff was the special occupant within

NEW SERIES, XXVII.—CHANG.

the will of the testatrix—*Doe d. Lewis v. Lewis* (1).

Mr. Palmer, in reply.

Feb. 12.—The MASTER OF THE ROLLS. The testatrix was seised of these lands for three lives: they were demised to her and her heirs; and the person entitled to the remainder is to be ascertained. First, then, is this the legal personal representative of J. S. Barron? secondly, are they the trustees of the will of the testatrix? or is it the original lessor? It was suggested, on the part of the legal personal representative of J. S. Barron, that, as the subject of the devise was freehold, copyhold and leasehold for lives and years, and as the words of limitation are, "heirs, sequels in right, executors, administrators and assigns," by referring each word in the limitation and succession to the successive subject-matter the word "heirs" applies to freehold; "sequels in right" to copyhold; and "executors and administrators" to leasehold for lives and for years; this, however, would be an improper and forced construction; the mode of construing all such words of limitation is to refer them, as they properly apply, to the various subjects of the gift.

Thus, if the testatrix's property consisted of leaseholds for lives, demised to her and her heirs, and the other leaseholds for lives demised to her and her executors, the word "heirs" would apply to the former, and the word "executors" to the latter class of leaseholds; and it cannot be that all the persons so specified in the limitations are to be treated as special occupants, pointed out by the testatrix to be substituted, one after the other, in case of the failure of the preceding one. In fact, the words "according to the different tenures and natures thereof" displace the argument raised; but, without that, the same construction ought to be placed on the will. A question might, no doubt, have arisen if the testatrix had possessed nothing but the leaseholds in question, and had simply devised them to "J. S. Barron, his

(1) 9 *Mee. & W.* 662; s. c. 11 *Law J. Rep.* (n.s.) *Exch.* 305.

heirs, executors, administrators and assigns ;" but that is not the case here, and the terms of the will do not obviate the necessity for disposing of the other question, which was the principal one argued. The point is neatly put in the note to the case of *Jones v. Goodchild*: "A church lease for three lives is granted to a bastard and his heirs, who dies without issue and intestate. What shall become of this lease; shall it go to the administrator of the bastard or to the Crown? Or does the limitation to the heirs make any difference? or is it a *casus omissus* out of the Statute of Frauds and Perjuries, and so remains liable to occupancy at common law? or, lastly, is the lessor entitled, the lease being determined, for that the premises being granted to the lessee and his heirs during three lives, and the lessee being dead without heir, the lessor may re-enter in the same manner as where a grant is to a man and the heirs of his body for three lives (in which case the heirs of the body take as special occupants), remainder over, and the grantee dies without issue during the three lives, the remainderman shall take." It is admitted that if Elizabeth Shepherd had died intestate, the leaseholds would have passed to her heirs, and not to her legal personal representatives. It is also admitted, as indeed it could not be denied, that if J. S. Barron had left an heir, he would have taken the property; but the question is whether, there being no heir, the legal personal representatives can claim the leaseholds, either as general occupants or under the terms of the statute. If this case had arisen before the 7 Will. 4. & 1 Vict. c. 26, a question of some interest would have had to be disposed of; but the question is settled by sect. 6. of that statute. The clause is in these words: "That if no disposition by will shall be made of any estate *pur autre vie* of a freehold nature, the same shall be chargeable in the hands of the heir, if it shall come to him by reason of special occupancy, as assets by descent, as in the case of freehold land in fee simple; and in case there shall be no special occupant of any estate *pur autre vie*, whether freehold or customary freehold, tenant right, customary or copyhold, or of any other tenure, and

whether a corporeal or incorporeal hereditament, it shall go to the executor or administrator of the party who had the estate thereof by virtue of the grant; and if the same shall come to the executor or administrator, either by reason of a special occupancy or by virtue of this act, it shall be assets in his hands, and shall go and be applied and distributed in the same manner as the personal estate of the testator or intestate." This appears to be applicable to the present case; J. S. Barron was seized of an estate *pur autre vie* to himself, his heirs and assigns, under the will of Elizabeth Shepherd. He has made no disposition of it by will. If he had left an heir the same would, to use the words of the statute, "be chargeable in the hands of that heir, as assets by descent, as in the case of freehold land in fee simple." Here, there being no heir, the second part of the section applies: "in case there shall be no special occupant of any estate *pur autre vie*, whether freehold or customary freehold, tenant right, customary or copyhold"—that is the case here—then "it shall go to the executors or administrators of the party that had the estate thereof by virtue of the grant." The word "party" is evidently used for "person," and the person who had the estate by virtue of the grant was the intestate, J. S. Barron, who derived it through Elizabeth Shepherd, and it must be treated in the same way as if he had made a will appointing executors, but had not disposed of this property, and had died without an heir, and intestate. If such had been the case, the real estate would then have gone to the executor by those words, and would have been assets in his hands, according to the latter words of the section. It is clear, therefore, that there being an administrator here, the words are governed by the statute, and therefore the administrator who has taken out administration, though by virtue of the grant of the Crown, stands in the same situation as the person entitled. I feel satisfied that the object of the framers of the statute was to meet such a case as this; the demurrer must, therefore, be overruled, and an injunction must be granted, as a matter of course.

WOOD, V. C. }
 March 2, 4. } ROBINSON v. PRESTON.

Tenancy in Common—Stock standing in Joint Names.

Where stock has been purchased, in the joint names of two, out of money standing to their joint account in the bank, it is not necessarily to be considered in equity as held in joint tenancy, but the origin of the money and the acts and intentions of the parties may be looked to, and a conclusion in favour of a tenancy in common drawn from the circumstances.

The distinction taken in equity between a purchase by two advancing equal shares of the purchase-money in their joint names, and a mortgage to them under the same circumstances, the first being considered to create a joint tenancy, and the other a tenancy in common, disapproved of.

Two sisters being tenants in common of real estates had money arising from the rents standing to their joint account in the bank. Part of the money was from time to time invested in the purchase of stock in the joint names, and part on mortgage, the mortgaged premises being conveyed to them as tenants in common. Each sister, by will, affected to dispose of her share of the stock :—Held, that they were entitled to the stock as tenants in common, and not as joint tenants.

The question which arose in this suit was, whether two sisters, Ann and Nanny Foster, were entitled to certain stock and monies standing in their joint names as tenants in common or as joint tenants. The two sisters were in the joint ownership and occupation of a dwelling-house containing household furniture and effects of considerable value, and were seized and possessed as tenants in common of freehold and leasehold hereditaments producing a yearly rental of 800*l.* and upwards. There were the sums of 1,500*l.* consols (which had been purchased in the joint names of Ann, Nanny and Alice Foster, long since deceased, and since transferred into the names of Ann and Nanny), 5,000*l.* new 3*l.* per cents., purchased at different times in the joint names of Ann and Nanny, 1,000*l.* invested

on mortgage, (the mortgaged estate being conveyed to Ann and Nanny as tenants in common and not as joint tenants, and the covenant of the mortgagor being for payment to them in equal moieties), 3,173*l.* 18*s.* 10*d.* cash standing in their joint names in the bank, and 572*l.* 10*s.* 2*d.* cash in the house. The 1,000*l.* mortgage money was drawn from the joint account at the bank where an account current was for many years kept in the joint names, and the balance of 3,173*l.* 18*s.* 10*d.* cash in the bank, consisted of interest and rents, dividends and other monies received from time to time for the use of Ann and Nanny Foster.

Ann Foster, by her will, dated the 8th of July 1854, gave all her real and personal estate to her sister Nanny for her life, with remainders over, and died on the 7th of March 1855. Nanny Foster was found lunatic by inquisition on the 23rd of November 1855, but in her will, dated the 2nd of July 1838, when she was of sound mind, the following passage occurred :—“I give and bequeath all my money, plate and linen, and my share of all money in the funds, and on other securities, and of the household furniture, wine, carriage and all other effects belonging jointly to my dear sister Ann Foster and myself unto my said sister Ann for her own use absolutely, but charged nevertheless with the payment of all my debts, funeral and testamentary expenses, and the legacy of 100*l.* which I bequeath to the trustees or treasurer for the time being of the general infirmary at Leeds. I also will and direct that as soon as conveniently may be after the decease of my sister Ann Foster, the sum of 350*l.* stock, part of my share of 1,500*l.* stock in the 3*l.* per cent. consolidated bank annuities now standing in the joint names of my sister and myself, shall be transferred into the names of John Geldart and John William Foster.”

Nanny Foster died on the 20th of February 1857, and the question arose between the respective representatives of her and her sister, whether the monies and stock standing in their joint names were held in joint tenancy so as to go by survivorship to Nanny, or in common, so that the executors of Ann would be entitled to a moiety.

The case was argued by—

Mr. Rolt and Mr. Prendergast, for the plaintiffs, the representatives of Ann Foster.

Mr. Willcock and Mr. Wickens, for the representatives of Nanny Foster.

The cases cited were—

Murless v. Franklin, 1 Swanst. 13.

Rider v. Kidder, 10 Ves. 360.

Jeans v. Cooke, ante, p. 202.

Harris v. Fergusson, 16 Sim. 308.

Freeman v. Tatham, 5 Hare, 329; s. c.

15 Law J. Rep. (N.S.) Chanc. 323.

Grey v. Grey, 2 Swanst. 594.

Collinson v. Collinson, 3 De Gex, M. & G. 409.

March 4.—WOOD, V.C., after stating the facts, said—If on the occasion of each purchase the money had been simply advanced by the two sisters equally, there would have been nothing unreasonable in supposing that the intention was to create a joint tenancy; on the contrary, it might be very reasonable to suppose, when we find each of them leaving the great bulk of her property to the other, that the intention was to save probate and legacy duty. But here the fund out of which these investments were made consisted of the savings of the rents of freehold estates which they held undoubtedly as tenants in common, and on the occasion of a mortgage being made, the mortgaged estate was expressly conveyed to them as tenants in common and not as joint tenants, and the covenant of the mortgagor was for payment to them in equal moieties. Such a provision was not necessary, because it is decided by an early case (1), by a distinction the reason of which is not very apparent, that though a purchase in joint names by two advancing equal shares of the purchase-money shall come to the survivor, yet where money is advanced by way of mortgage, although in equal shares and without words of severance, it shall be held to be a tenancy in common. But when we find that provision actually occurring, it makes the case much stronger as to that portion at

least. Another point in favour of the plaintiff's contention arises upon the will of Nanny Foster, the survivor, and strongly shews what her notion of her interest was. —[His Honour read the will.]—Nanny Foster, therefore, treats herself as having a share in the furniture and other effects, and she expressly refers to her share of the 1,500*l.* consols as property of which she can dispose at her death, (which she could not do if she had a joint interest,) because she charges it with her debts and gives sums of money out of the reversion after Ann's decease. The words "belonging jointly to my dear sister Ann Foster and myself," have been relied upon, but those same words apply to the money due on mortgage, which was clearly held in common, and I do not think, therefore, that the word "jointly" is sufficiently strong to countervail the clear intention of the testatrix upon the whole will, as to the way in which the property was to go and the rights which she supposed herself to have after the death of herself and her sister. There is an authority which has some bearing upon the first point I have mentioned, viz., the argument to be derived from the origin of these funds, which were derived from the rents of lands held by these ladies as tenants in common. I am not aware of any case actually decided as to money paid into a bank to a joint account, whether it would follow the rule as to mortgages or purchases, and I am not able to satisfy myself as to the reason of the distinction. The investment in this case is made by the bankers, who, finding the money in the joint names, naturally purchased the stock in the joint names. The case I refer to is *Edwards v. Fashion* (2), where a mortgagee gave all the residue of his personal estate, including the mortgage, to his two daughters, equally to be divided between them. The daughters afterwards purchased the equity of redemption to them and their heirs, and the question was, whether this was a joint tenancy or a tenancy in common, and it was held under the circumstances that there was no survivorship. Sir William Grant, speaking of that case in *Aveling v.*

(1) *Petty v. Styward*, 1 Chanc. Rep. 31; s. c. 1 Eq. Cas. Abr. 290.

(2) *Prec. in Chanc.* 332.

Knipe (3), says—"It is not stated, as a general principle, that articles of agreement must of necessity import a tenancy in common, when in words it is a joint tenancy. That case proceeds upon the ground, that the purchase was founded on the mortgage; and the daughters being tenants in common of the mortgage, they were held to be tenants in common of the equity of redemption likewise." In that case of *Aveling v. Knipe* he held that there was a joint tenancy, but at the same time he recognized the propriety of looking to the circumstances under which the purchase was made. The circumstances here are: first, the root from which the purchase-money was derived, which was real estate held in common; secondly, when they came to execute a deed, they expressly declared themselves entitled as tenants in common. The third point is perhaps the strongest of all, viz., that the lady who ultimately became the survivor, in her will, not only speaks of her share of the property and affects to dispose of it in favour of her sister charged with her debts; but further than that, she says that after the death of both, certain payments are to be made into the names of trustees. These three circumstances concurring have a force which any one of them separately might not perhaps have had. The case of *Harris v. Fergusson*, which was cited against this view, is very shortly reported in *Simons*; the Vice Chancellor seems to have concluded on the general doctrine that the first purchase was a joint tenancy, and then as there was no reason to suppose any different intention in the case of the second, he held that to be a joint tenancy also. Here, as far as the evidence goes, we find that whenever there was any occasion to indicate an intention, it was manifested in favour of a tenancy in common. *Harris v. Fergusson* is not unfavourable to a tenancy in common in the present case, but rather in favour of it, and the conclusion I come to on the whole therefore is, that it was a tenancy in common, and consequently the plaintiffs are entitled.

WOOD, V.C. } RENDALL v. THE CRYSTAL
March 26. } PALACE COMPANY.

Charter — Condition — Money Payment made directly or indirectly.

The C. P. Company was incorporated by royal charter, one of the conditions of which was, that no person should be admitted to the building or grounds on the Lord's-day, in consideration of any money payment, whether made directly or indirectly, unless the express sanction of the legislature should have been obtained. By a private act of parliament subsequently passed, power was given to the directors of the company to agree with any proprietor absolutely entitled to shares or stock in the company, for the conversion thereof into a ticket of admission into the building and grounds for such proprietor or his nominee for life or term of years as might be determined on, provided that nothing therein contained should invalidate the charter or relieve the company from any conditions contained therein, excepting in so far as the same were thereby expressly varied. In pursuance of this act, it was proposed to give in exchange for each share a ticket entitling the owner to a certain number of admissions, and which should be available on Sundays as well as other days:—Held, that such a proposal, if carried into effect, would be an infringement of the condition in the charter, and was not authorized by the act.

This was a demurrer to a bill, filed by the plaintiff, on behalf of himself and all other the shareholders in the Crystal Palace Company, seeking to restrain the company and the directors from giving effect to certain resolutions of the company which were passed at a general meeting. The bill set out the formation of the company and the charter of incorporation, which was expressed to be granted for the purposes in their deed of settlement mentioned, but subject nevertheless to the conditions, restrictions, regulations and provisions in the said deed and in the charter contained, so that the business of the company so incorporated might be carried on in all respects according to the terms and provisions of the deed, as far as the same were

in conformity with the laws of the realm, and not inconsistent with the charter. And it was declared that the charter was granted on the following, among other conditions: that no person should be admitted to the said building or grounds on the Lord's-day, in consideration of any money payment, whether made directly or indirectly, unless the express sanction of the legislature should have been obtained for admission on such consideration, and then only from the time warranted by the act of parliament.

By the Crystal Palace Company's Act, 1856, 19 & 20 Vict. c. cxvii, it was amongst other things enacted (section 11), that it should be lawful for the directors to agree with any proprietor absolutely entitled to shares or stock in the company for the conversion thereof, or of any part thereof, into a ticket of admission into the building and grounds of the company, for such proprietor, or the nominee of such proprietor, either for life or for such term of years as might be determined on, and subject to such conditions as might be agreed on. Provided always (section 14), that nothing therein contained should alter or invalidate the said deed of settlement or charter, or should relieve the company from any covenants or conditions contained therein respectively, excepting in so far as the said deed and charter were expressly varied by this act.

The directors of the company, in December 1857, circulated among the shareholders the directors' report, which contained the following passage:—"Reduction of capital, &c. In conformity with the strongly expressed wish of the shareholders at the last general meeting, that the directors should give their consideration to a plan for reducing the capital of the company, and for the admission of the shareholders to the Palace and grounds on Sunday afternoons, they have, in conjunction with Sir Joseph Paxton, from whom they have received most valuable suggestions, given their most serious and earnest consideration to these questions, and they beg to submit the following plan, which if adopted will, in their opinion, carry out these objects, while at the same time they believe, that on examination it will be

found to be free from most of the difficulties and objections which have attended other plans from time to time brought forward.—[It then set out the 11th section of the act, and proceeded.]—In conformity with the powers thus conferred, the directors propose, that in respect of every ordinary and preference share which shall be agreed to be extinguished in terms of the above clause, a ticket shall be issued to the proprietor of such share, entitling him to a certain number of gratuitous admissions to the Palace and grounds on all ordinary shilling days. The ticket to be issued in exchange for the share to be called a shareholder's ticket, to have the name of the proprietor impressed upon it, and to be prepared in such a form as will conveniently admit of the number of admissions in respect of which it is used being from time to time recorded upon it—for which purpose the ticket must be kept entire—and after the full number of admissions for which it is issued have been made use of, it will expire and be returned to the company: the ticket to be available without the necessity of the proprietor's personal presence. It may be lent, and may be used by a party of persons of any number at a time, provided the number does not exceed that of the admissions still due to the ticket. . . . It is thought that 60 admissions for an ordinary share, and 120 admissions for a preference share, will be a fair number to be adopted for the first issue. . . . Admission on Sundays.—The directors further recommend that a resolution of the board be passed, authorizing admission by these tickets to the Palace and grounds on Sunday afternoons, after half-past one o'clock, as a gratuitous privilege, and without any money payment to be made directly or indirectly to the company for such privilege; the number of persons admitted by each ticket being, however, recorded on it."

At the extraordinary general meeting of the shareholders, holden on the 17th of December 1857, this report was read, and a resolution was passed authorizing the board of directors to carry it into effect. An advertisement was then published in the *Times*, inviting applications from shareholders for the conversion of their shares

on these terms, and stating that it was intended to charge a fee of 2s. 6d. on each share surrendered, to cover registration and expenses of issue of tickets, beyond which there would be no charge. The plaintiff had all along objected to these proceedings, and now filed his bill, alleging that the admission of persons to the building or grounds on the Lord's-day, in the manner proposed, would occasion a forfeiture of the charter of incorporation, and praying that the defendants might be restrained from accepting the surrender of any shares or share in the said company, in exchange for tickets of admission, on the terms specified in the advertisement, and from issuing any tickets or ticket of admission on such terms, and from admitting any persons or person to the said building or grounds on the Lord's-day, in consideration of any money payment, whether made directly or indirectly, unless the express sanction of the legislature should have been obtained for admission on such consideration.

Mr. James and Mr. Hemming, in support of the demurrer, referred to—

21 *Geo. 3. c.* 49.

19 *Vict. c.* 118.

Belkis v. Burghall, 2 *Esp.* 722.

The Queen v. the Eastern Archipelago Company, 22 *Law J. Rep. (N.s.) Q.B.* 196.

Marks v. Benjamin, 5 *Mee. & W.* 565; *s. c.* 2 *Moo. & R.* 225; 9 *Law J. Rep. (N.s.) M.C.* 20.

The Solicitor General, Mr. Prendergast and Mr. Busk, for the plaintiffs, were not called upon to support the bill.

WOOD, V.C.—I have come to the conclusion that the demurrer cannot be sustained. I have not been asked on either side to call in the assistance of a common law Judge, and I do not think it is advisable to do so, because, no doubt, the parties can have that assistance elsewhere if it is desired. But the case depends simply upon this provision of the charter and the single section which has been referred to in the act of parliament. The charter is very simple in referring to the use of these grounds or buildings on the Lord's-day

for any money payment, and is expressly granted upon the condition that no person shall be admitted to the building or grounds on the Lord's-day in consideration of any money payment, whether made directly or indirectly, unless the express sanction of the legislature shall have been obtained for admission on such consideration, and then only from the time warranted by the act of parliament. It is exceedingly special; it does not reserve to the Crown the power of relaxing its right; it says that nothing short of an act of the legislature shall interfere with the right. I cannot take the view which is taken by the defendants that this is meant simply to import the provisions of the existing acts of parliament with reference to the observance of the Lord's-day, because if it had been so intended it would have been very simple to have said so. That is all that would have been necessary; and therefore a good many of those observations which turn upon the words "public entertainment" have no place here, and such observations as those that were made by Mr. Hemming have reference to where the entertainment is of a particular class; and in the decisions which have turned upon that, the Courts have held that, the words being "public entertainment," if you entertain a specified class, it does not fall within the penal enactment, and the act only provides for entertainment for the benefit of all who come and pay their money. That interpretation is given to the word "public," but there is no such word here. A single person would be within the provision. No doubt, if any person went down on a Sunday and were admitted by paying 1s. or 6d. or 1d., the charter would be gone. Then, what appears to be contemplated by the legislature in putting in the words "directly or indirectly" is this: it is not a money payment to be made *inter se* by other parties out of doors, but it is some money benefit resulting to the company from the admission of persons on the Sunday. Now, supposing there were no act of parliament, and supposing the company had the power, which the directors of a great many companies have, of buying up the shares for the benefit of the company, and the directors said to a shareholder, You have fifty or sixty shares—we find that

this clause is rather in our way with reference to the admission of persons on the Lord's-day, and if you are inclined to sell to us one of those shares on behalf of the whole company, if you will transfer that to us, we will give, not only to you, but to your friend or your nominee, an admission on so many days, including so many Sundays,—I apprehend that that would have been clearly within the provision. Whether it is to extend to all cases of money or money's worth, it is not worth stopping to inquire; but if you say, I will take a transfer of one of your shares to the directors on behalf of the company and admit you on the Lord's-day, I must say that that would be clearly and distinctly receiving indirectly a money payment. The share is not itself money, but it is money's worth and saleable in the market at a fixed price, and the payment, therefore, is in distinct terms made for the privilege of that admission; and it would be a very narrow construction of the charter to say that that is to be confined to actual cash and not to any shares whatever, including in such an argument shares in the public funds or the like. That not being the case, as I am told, in this deed of settlement, the directors having no such power, they apply to parliament, and they obtain a power of this description—they obtain a power by the 11th section of the act to convert the shares, that is part of the consideration for the shares, into a ticket of admission to the proprietor or his nominee, either for life or for such a term of years as may be determined upon. Then Mr. James says, upon that, if a person obtains a ticket of admission for his life, he would be entitled thereupon to claim his right on the Sunday as well as on any other day. But then you must couple this provision with the 14th provision of the act, which says, "Provided always and it is hereby declared, that nothing herein contained shall alter or invalidate the deed of settlement or the charter, or relieve the company from any covenant or condition contained therein, except in so far as the deed and charter are expressly varied by this act." Then the legislature having before them the charter, which says that no person shall go into the gardens on the Lord's-day for

money directly or indirectly paid, unless parliament itself think proper otherwise to enact, they, having that charter before them, do not think proper otherwise expressly to enact; but all that they do enact is as regards a ticket of admission, which is quite consistent with what hitherto the practice of the company must have been as far as regards tickets of admission of parties for money or money's worth before. That could only have applied to days which were not prohibited, therefore the existing tickets of admission being those which would apply only to days not prohibited, Parliament says, you shall be able to part with shares for tickets of admission. Why am I to assume that they mean anything else but the ordinary tickets of admission, which could not be parted with for the Lord's-day at all? Could the legislature have meant any other than the ordinary tickets of admission? And what am I to suppose when they have in their cognizance the charter, which says, unless the legislature expressly enact something to the contrary, nobody shall use on that day any ticket for which any payment has been made. Instead of making any such express enactment, all that the legislature does is simply to say tickets may be parted with for a share, and it also takes the precaution of saying that notwithstanding this has been said, we will not release the company from any conditions contained in this charter further than those from which we have expressly released them. One is driven back to the old consideration, whether or not the parting with a share which was saleable in the market, and on which future dividends will be or not payable, according to the prosperity of the undertaking, but parting in that way to the company with that share and obtaining thereupon a ticket, not only for yourself, who have ceased to be the proprietor, if you have only one share, but also for the benefit of such nominee as you may choose to appoint, is not in effect procuring a ticket of admission on the Lord's-day for money indirectly paid for the benefit of the company. If that is to be the effect of a ticket of admission, it seems to me, I confess, that the charter would be placed in that degree of peril that would entitle the shareholder to

say the company is not authorized to take this step, and I feel the less difficulty in determining the point because, as Mr. James says, if it is brought to a legal determination, that can only be done in a court of law, except by taking the opinion of the Judges beforehand for the assistance of this Court; and if an adverse decision is given at law the charter would be gone, and that would be a destruction of the whole property of the company. It seems, therefore, as far as I can form an opinion upon the true construction of this charter, the effect of the proposed proceeding would be a forfeiture; and therefore all I can do at present is to overrule the demurrer. I do not rely on the 2s. 6d., but overrule the demurrer on the broad ground.

the intermarriage of a widower and his deceased wife's sister, is an integral part of the English law and public policy, and has, therefore, a paramount effect, not to be evaded by having recourse to foreign laws, but binding upon all English subjects, in whatever country they may be.

William Leigh Brook, late of Meltham Hall, near Huddersfield, by his will, dated the 19th of September 1855, gave and bequeathed his real and personal estate in the following manner:—

"I give and bequeath to my eldest son, James William Brook, all that mansion-house called Meltham Hall, with gardener's house, ground and farmers' cottages and land adjacent to it, not to include my mill property of any description. I give and bequeath to my said son James William Brook, to my daughter Clara Jane Brook, to my reputed son Charles Armitage Brook, commonly so called, to my reputed daughter Charlotte Amelia Brook, commonly so called, and to my reputed daughter Sarah Helen Brook, commonly so called, the rest of my property, share and share alike, except that I give to my two sons aforesaid a double portion, that is to say, I give to my two sons two-sevenths each, and to my three daughters one-seventh each of the property hereby disposed of, the property of Meltham Hall being already appropriated to my eldest son, with reversion to my second and reputed son Charles Armitage Brook, commonly so called, in the event of my said eldest son James William Brook dying during his minority, which I hereby will and make; and further, in the event of both my sons aforesaid dying before they attain the age of twenty-one years, I then will that the property of Meltham Hall aforesaid be realized at the discretion of my trustees, hereinafter named, and the proceeds divided into portions, to be equally divided between the surviving sisters and reputed sisters who shall attain the age of twenty-one years. I wish to be paid to the Huddersfield Infirmary, free of legacy duty, the sum of 100*l*. In order to carry into effect the provisions of this my last will and testament, I appoint my brother Charles Brook the younger, John Armitage and Edward Armitage, my brothers-in-

STUART, V.C.
AND
CRESSWELL, J.
Nov. 20, 21, 24, 25;
Dec. 4.
1858.
April 17.

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Marriage abroad with deceased Wife's Sister — Legitimacy — Conflict of Laws — Statute 5 & 6 Will. 4. c. 54, Construction of.

In June 1850, a widower and his deceased wife's sister, both English subjects, having an English domicile, intermarried during a temporary residence in Denmark, and afterwards had issue of the marriage. The legitimacy of the children of the marriage was questioned by the Crown in a suit (instituted after the deaths of both parents) for the administration of the father's estate:—Held, that the marriage was null and void by the statute 5 & 6 Will. 4. c. 54, and the children, therefore, illegitimate, although by the law of Denmark the marriage of a widower with his deceased wife's sister is held to be a valid marriage.

A marriage valid according to the lex loci contractus, but violating, in respect of their personal capacity to contract the marriage, the lex domicilii of the contracting parties, held invalid by the law of the domicile.

Statute 5 & 6 Will. 4. c. 54, prohibiting
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law, sole trustees, with full power to realize and to act with the property I leave in all respects whatsoever as they shall think fit, in my said children and reputed children's interest."

The testator died at Cologne on the 19th of September 1855, leaving his five children named in the will him surviving.

Letters of administration, with the will annexed, were, on the 26th of December 1855, granted to the three trustees named in the will out of the Exchequer and Prerogative Court of York. They entered into the possession of both the real and personal estate of the testator, but, subsequently, alleging that difficulties had arisen with respect to the administration of the trusts of the will, they declined further to act as executors and trustees thereof, except with the sanction and under the indemnity of the Court.

The original bill in this suit was then filed, on the 8th of March 1856, praying (*inter alia*) that the will might be established and the trusts thereof carried into effect, and the property of the testator duly administered under the decree of the Court.

The plaintiffs in the suit were Clara Jane Brook, Charles Armitage Brook, Charlotte Amelia Brook and Sarah Helen Brook, all infants, by Joseph Taylor Armitage, their next friend. The defendants were Charles Brook the younger, John Armitage, Edward Armitage and James William Brook.

On the 31st of March 1856, before the cause was set down to be heard, the plaintiff Charles Armitage Brook died.

A bill of revivor and supplement was thereupon filed by the three surviving plaintiffs in the original suit against the defendants in the original suit and Her Majesty's Attorney General. It averred that the Attorney General, on the alleged ground that the late plaintiff, Charles Armitage Brook, was the issue of the second marriage of the testator, and that such marriage, being with the sister of the first wife of the testator, then deceased, was invalid, claimed, on behalf of the Crown, the real and personal estate of the late plaintiff, Charles Armitage Brook. The bill charged that the testator's second marriage was a good and valid marriage; that

even if it was not valid according to the law of England, yet, according to the law of Denmark, it was a good and valid marriage; and the bill prayed (*inter alia*) that the rights and interests of all parties in and to the testator's real and personal estate might be ascertained and declared by the decree of the Court.

At the hearing of the cause, in March 1857, the Court, by its decree, declared that the will of William Leigh Brook, the testator, was well proved, and that the same ought to be established, and the trusts thereof performed and carried into execution, and ordered that certain accounts and inquiries should be taken and made. By his certificate in answer to these inquiries, the chief clerk (*inter alia*) certified, first, that the testator, William Leigh Brook, was married to Emily Armitage on the 7th of June 1850, at the Lutheran Church at Wandsbeck, in the duchy of Holstein, in the kingdom of Denmark;—secondly, that the testator and Emily Armitage were respectively, up to and at the time of such marriage, and at the time of their respective deaths, domiciled in England, and that they had not any permanent residence in the country where they were married;—thirdly, that the marriage between the testator and Emily Armitage was a lawful marriage according to the law of the duchy of Holstein, and that, according to the same law, the children of such marriage were legitimate children;—fourthly, that Emily Armitage was the lawful sister of Charlotte, formerly Charlotte Armitage, the first wife of the testator;—fifthly, that the testator and Charlotte Armitage were married according to the rites and ceremonies of the Church of England, at Huddersfield, in the county of York, on the 20th of May 1840, and that such marriage was a lawful marriage;—sixthly, that the issue of the second marriage were, Charlotte Amelia Brook, born the 29th of April 1851, Sarah Helen Brook, born the 2nd of July 1852, and Charles Armitage Brook, born the 31st of March 1854;—and, seventhly, that Charles Armitage Brook died on the 31st of March 1856.

The certificate, so far as it referred to the validity of the testator's second marriage, professed to be founded upon the

evidence furnished by an affidavit, made on the 6th of October 1857, by Adolph Ulrich Hansen, of Wandsbeck, in the Duchy of Holstein, Lutheran pastor, who thereby deposed, first, that he was then, and also during and prior to the year 1850, the pastor or minister of the Lutheran Church at Wandsbeck aforesaid;—secondly, that on the 7th of June, in the year 1850, he performed the ceremony of marriage between William Leigh Brook, late of Meltham Hall, near Huddersfield, in the county of York, in England, and Emily Armitage, late of Milnsbridge House, near Huddersfield aforesaid, single woman, and that the said ceremony was duly performed and solemnized according to the rites and ceremonies of the Lutheran Church, and according to the laws of the said duchy;—thirdly, that previously to performing and celebrating the said marriage, he, the deponent, caused to be produced to him the necessary certificates and vouchers required by the law of the said duchy, and also investigated strictly and satisfied himself that there was no legal obstacle to the said marriage, and that all the necessary provisions and requisitions were duly fulfilled and performed on the occasion of such marriage, in accordance with the laws of the said duchy;—fourthly, that in his capacity as such minister as aforesaid, he, the deponent, had had occasion to study, and had studied and was well acquainted with the laws relating to marriage in the said duchy; and that the said marriage was legal and valid according to the laws of the said duchy, notwithstanding the said Emily Armitage being the sister of the previously deceased wife of the said William Leigh Brook, and notwithstanding that, in England, a man is not permitted to marry the sister of his deceased wife, and that the children born of such marriage would be recognized as legitimate in and by the Courts of law of the said duchy of Holstein.

The testator, it appeared, had survived his alleged second wife by two days.

The case now came on for further consideration.

The question for consideration was, whether the marriage of the testator with Emily Armitage (the sister of his pre-

viously deceased first wife), celebrated as above mentioned, was valid according to the law of England.

Upon the answer to this question depended the right to the property of the deceased plaintiff, C. A. Brook, which was claimed, on the one hand, by his surviving brothers and sisters, and on the other by the Attorney General on behalf of the Crown; and also the right of administration to his personal estate; and, lastly, the liability of the surviving children of that marriage to pay legacy duty after the rate of 1*l*. per cent. or of 10*l*. per cent. upon their shares of the personal estate of the testator.

Sir Fitzroy Kelly, Mr. Malins, and Mr. G. L. Russell, in support of the plaintiffs' case, contended that the marriage was valid. It clearly was so, unless it was a marriage which was prohibited and made unlawful by the statute 5 & 6 Will. 4. c. 54. (1). There was, however, nothing in the wording of that statute which took it out of the ordinary rule applicable to the construction of all statutes, viz. the rule that "*leges extra territorium non obli-*

(1) The words of the statute are as follows:—
"Whereas, marriages between persons within the prohibited degrees are voidable only by sentence of the ecclesiastical Court, pronounced during the lifetime of both the parties thereto, and it is unreasonable that the state and condition of the children of marriages between persons within the prohibited degrees of affinity should remain unsettled during so long a period, and it is fitting that all marriages which may hereafter be celebrated between persons within the prohibited degrees of consanguinity or affinity should be *ipso facto* void and not merely voidable: Be it therefore enacted, by, &c., That all marriages which shall have been celebrated before the passing of this act between persons being within the prohibited degrees of affinity, shall not hereafter be annulled for that cause by any sentence of the ecclesiastical Court, unless pronounced in a suit which shall be depending at the time of the passing of this act: Provided, that nothing hereinbefore enacted shall affect marriages between persons being within the prohibited degrees of consanguinity."

Section 2.—"And be it further enacted, That all marriages which shall hereafter be celebrated between persons within the prohibited degrees of consanguinity or affinity shall be absolutely null and void to all intents and purposes whatsoever."

Section 3.—"Provided always, and be it further enacted, That nothing in this act shall be construed to extend to that part of the United Kingdom called Scotland."

gant." The act did not furnish either express words or give rise to any necessary intendment shewing that it was to be operative beyond the boundaries of England, Wales and Ireland. The act therefore rendered such marriages unlawful only when solemnized in England, Wales or Ireland, and did not affect marriages solemnized in the colonies, nor, *à fortiori*, marriages solemnized in a foreign country. It was true, that in *The Sussex Peerage Case* (2), it was held, that the enactments of the Royal Marriage Act, 12 Geo. 3. c. 11, and the prohibition therein contained, attached to the individual, and followed him wherever he went. That decision was founded partly upon the policy, and partly upon the peculiar wording of the act, considerations having no application to the statute 5 & 6 Will. 4. c. 54, which contained no personal prohibition, but only declared that marriages within the prohibited degrees were to be void. The language of the act 36 Geo. 3. c. 52. s. 2, which imposed a legacy duty "on every legacy given by any will of any person," was at least equally comprehensive and general with that of the statute 5 & 6 Will. 4. c. 54, but had, nevertheless, been held to be territorial, and to apply only to wills and persons and personal estates in this country—*Arnold v. Arnold* (3). Moreover, the legislature, in other acts *in pari materia*, had used different and more comprehensive language than that to be found in the statute 5 & 6 Will. 4. c. 54. That was the case, not only in the Royal Marriage Act, 12 Geo. 3. c. 11, but also in the Marriage Act, 25 Hen. 8. c. 22. s. 4, and in the two Irish Marriage Acts, 4 Will. 3. c. 3. and 2 Anne, c. 6. It appearing, then, that the legislature, whenever it intended to bind its subjects personally, wherever they might be, used language expressly enunciating such intention, it could not but be inferred that the absence of similar language from the statute 5 & 6 Will. 4. c. 54. was intentional. There being, then, nothing in the act itself to make it other than a local act, confined in its operation to marriages celebrated within the limits of England, Wales and Ire-

land, the question arose, would such a marriage as the present, viz. a marriage in a foreign country, valid according to the laws of that country, but celebrated between English subjects having their domicile in England at the time, have been held prior to the act to have been invalid in England? Clearly not. The whole current of decisions bearing upon the point went to shew that in such cases the ecclesiastical Courts had always treated such marriages as being subject to the *lex loci contractus*, and therefore valid.—

Butler v. Freeman, 1 Amb. 301.

Crompton v. Bearcroft, Bull. N.P. 114.

Ruding v. Smith, 2 Hag. Cons. 371.

Herbert v. Herbert, Ibid. 263; s. c. 3 Phill. Ecc. Rep. 58.

Scrimshire v. Scrimshire, 2 Hag. Cons. 395.

Middleton v. Janverin, Ibid. 437.

Dalrymple v. Dalrymple, Ibid. 54.

Lacon v. Higgins, 3 Stark. 178.

Story's Conflict of Laws, s. 121.

True, there were exceptions to this rule, as in the case of incestuous marriages, and of marriages contrary to the policy and principles of the laws of England—*Story's Conflict of Laws*, ss. 86, 87. They submitted that under neither of these exceptions did this case come. It was to be observed, that the case under consideration was one of affinity, and not of consanguinity, between which jurists had always drawn a broad distinction. In most of the Protestant countries of Europe a marriage between a widower and a deceased wife's sister was not deemed unlawful; and in many of them, and also in most of the States of the North American Union, they were not only deemed lawful in a civil sense, but, in a moral and religious sense, lawful and even praiseworthy.—

Story's Conflict of Laws, s. 115.

Greenwood v. Curtis, 6 Mass. Rep. 378, 379.

Medway v. Needham, 16 Ibid. 157, 161.

And in Roman Catholic countries a dispensation might be obtained to enable persons so related to marry. Independently of the act under review, such a marriage was clearly not contrary either to the policy or to the principles of the law of this country.

(2) 11 Cl. & F. 85.

(3) 2 Myl. & Cr. 256; s. c. 6 Law J. Rep. (N.S.) Chanc. 218.

The fact that parties by going abroad to be married might avoid the consequences of the act, was no argument against the construction contended for; that practice having been constantly resorted to with success to escape the operation of the General Marriage Act of Geo. 2.—*Story's Conflict of Laws*, 123, 123 a, 124. In *Fenton v. Livingstone* (4), the Scotch Courts upheld the marriage of a man with his deceased wife's sister, and a contrary decision by the Courts in this country would give rise to the anomaly of such a marriage being lawful in Scotland, but unlawful in England or Ireland. Suppose, again, that the testator had not only duly contracted this second marriage in Holstein, and had children by it, but afterwards, during the life of his second wife, had contracted a marriage and had children in this country; then, according to the argument for the Crown, his children by the Holstein marriage would be legitimate there and illegitimate here, and, *vice versa*, his children by the subsequent marriage would be legitimate here and illegitimate there—a state of the law for which it was impossible to contend. Finally, the question in the case could never, but for the statute 5 & 6 Will. 4. c. 54, have arisen after the death of the parties by whom the marriage was contracted, so as to raise the question of legitimacy as against the children of the marriage.

Mr. Elmsley, *Mr. Cleasby* (of the common-law bar), and *Mr. Pemberton*, for the defendants Charles Brook the younger, John Armitage and Edward Armitage (the trustees under the will of the testator), and James William Brook, the eldest son and heir-at-law, in support of the plaintiffs' case.—They contended that, even if the act, 5 & 6 Will. 4. c. 54, could be held by inference to affect marriages of domiciled English subjects, though such marriages were solemnized abroad, this country would still be bound by the *comitas gentium* to respect the law of Holstein, by holding the marriage valid. Generally speaking, the validity of such a contract was to be decided by the law of the place where it

was made (5). If valid there, it was, *jure gentium*, held valid everywhere by tacit or implied consent. Thus, by the English law, contracts falling within the purview of the Statute of Frauds, were required to be in writing; and if such contracts, made in England by parol, were sought to be enforced elsewhere, they would be held void, although they would be held good if made in the place where they were sought to be enforced—*Story's Conflict of Laws*, s. 262. And so a contract for interest upon a loan of money, if valid at the place where the loan is made payable, was of universal obligation, even in places where a lower interest was prescribed by law—*Ibid.* 291. This comity the Courts of this country were bound to observe, unless it could be shewn that the country would be prejudiced by such comity, *i. e.* unless the contract under consideration were shewn to be against good morals or religion, or public right, or that it was opposed to the national policy or institutions—*Story's Conflict of Laws*, s. 87. That this could not be shewn appeared from the arguments previously urged, and from the First Report of the Commissioners appointed to inquire into the state and law of marriage—*First Report* (1848), pp. vi., vii. in the *Reports from Commissioners*, 1847, 1848, from which it appeared that such a marriage was entirely distinguishable from incest from consanguinity; and that the prohibition of it in England was a mere human ordinance, a matter of ecclesiastical discipline, to be imposed or relaxed as circumstances should render it expedient. This also appeared from—

Story's Conflict of Laws, ss. 97, 100, 103.

The Opinion of Lord Meadowbank, Fergusson's Reports of Marriage and Divorce Cases, App. p. 361, 362.

And the cases of—

Conway v. Beasley, 3 Hag. Ec. 639.

Warrender v. Warrender, 2 Cl. & F. 488; s. c. 9 Bligh, N.S. 89.

The King v. Lolley, 1 Russ. & R. Cr. C. 237.

(4) 18 Fraser's Court of Session Cases (1855), 365.

(5) Huber, "Prælectiones Juris Civilis," "De Conflictu Legum," b. 1. tit. 3. ss. 3, 8. et al. (ed. 1766).

And the American case of—

Greenwood v. Curtis, 6 Mass. Rep. 378.

Shedden v. Patrick, 5 Paton's App.

Cases, 194; s. c. 1 Macq. 535.

Doe d. Birtwhistle v. Vardill, 2 Cl. &

F. 571; s. c. 7 Ibid. 895, 918, 935;

9 Bligh, N.S. 32.

The operation of the act, however, there being nothing expressly to the contrary in it, was confined to the subjects of the Queen only whilst they are resident in England, Wales or Ireland, and must be construed by the Court so as to be limited territorially.—

Jefferys v. Boosey, 4 H.L. Cas. 815;

s. c. 24 Law J. Rep. (N.S.) Exch. 81.

Arnold v. Arnold, ubi supra.

The Attorney General v. Jackson, 8

Bligh, N.S. 15; s. c. nom. *The Attorney*

General v. Forbes, 2 Cl. & F. 48.

Moreover, it was clear that the recital in section 1. of the statute 5 & 6 Will. 4. c. 54. was to be taken as the measure of the extent of the act. The statute, therefore, must necessarily be confined in its operation to those marriages which at the date of passing it were voidable by the Ecclesiastical Law, i. e. to marriages solemnized within the jurisdiction of the ecclesiastical Courts. They cited also—

Munro v. Munro, 1 Rob. H.L. Cas. 493.

Doe d. Birtwhistle v. Vardill, 5 B. & C.

488; s. c. 4 Law J. Rep. K.B. 190;

on appeal, 2 Cl. & F. 571.

Story's Conflict of Laws, s. 20.

Thomson v. the Advocate General, 13

Sim. 153; s. c. on appeal, 12 Cl. &

F. 1.

The Attorney General, the Solicitor General and Mr. Wickens, for the Crown, argued that, by the statute 5 & 6 Will. 4. c. 54, the marriage in question, if solemnized in England would have been clearly void. This was, in fact, admitted on behalf of the plaintiffs, and it would appear that the testator himself, who spoke in his will of the children of his second marriage as his reputed children, had no faith in its validity, according to the laws of England, though it had been solemnized abroad. The question then was, would the Court recognize as valid a marriage

solemnized in Holstein between British subjects domiciled in England, but who, knowing that by the law of this country the marriage would be void, had gone to be married in Holstein for the avowed purpose of evading that law? They submitted that it would not, and for the following reasons: first, that the act 5 & 6 Will. 4. c. 54. was of universal obligation upon all British subjects who, at the time of their marriage, had England, Wales or Ireland for their domicile; secondly, that the statute was a personal statute, creating a personal disability, which attached upon every natural-born British subject in England, Wales or Ireland, and followed him everywhere, on the subject of the contract of marriage; and, thirdly, that being one of our established laws, we were not bound to accept the *lex loci contractus*, at least without qualification. Every state had a right to make laws for its own subjects, which should be binding on them everywhere, subject always to the qualification that the subjects might not set up their native law in opposition to the law of the country in which they might happen to be resident; but yet that the duty of obedience on the part of the subjects would attach to them on their return to their native country. The validity of the marriage in question had not been questioned in Denmark and pronounced valid by the Courts there, having at the time full information of the invalidity of such a marriage in England and of the fact that the parties had resorted to Holstein, *non animo morandi, sed animo revertendi*, and for the avowed purpose of evading the law of England. That not having been done, the *lex loci contractus* could have no application in the case. Personal statutes were, in the opinion of jurists of all nations, those statutes which have principally for their object the person, and are held to be of general obligation and force everywhere, as distinguished from real statutes, which have principally for their object property, and do not speak of persons, except in relation to property—*Story's Conflict of Laws*, ss. 13, 14, n. 2, 16. The statute 5 & 6 Will. 4. c. 54. was therefore clearly a personal statute and binding as such; and as the *jus* or *comitas gentium* had not, in this case, been extended to it by Den-

mark, so neither was it incumbent on the Courts of this country, by accepting the *lex loci contractus* out of comity, to recognize the validity of the marriage, notwithstanding the enactment of the statute. The *lex loci contractus*, moreover, applied only to the solemnities attending the celebration of the marriage, but did not prevail where either of the contracting parties was under a legal disability by the law of their domicil.—

Conway v. Beasley, 3 Hag. Ec. 639.

Story's Conflict of Laws, s. 86.

Burge's Commentaries on Colonial and Foreign Law, P. 1, c. 5. s. 1, p. 147.

Huber, Prælec. P. 2, lib. 1, tit. 3.

De Conflictu Legum, ss. 2, 3, 8, et seq. p. 538.

Warrender v. Warrender, 2 Cl. & F. 488; s. c. 9 Bligh, N.S. 89.

The English law had, moreover, condemned these marriages as incestuous—*The Queen v. Chadwick* (6). Enactments as to slavery, taxes and copyright, which had been referred to, were not *in pari materia*. In *Fenton v. Livingstone*, which had been relied on in support of the legitimacy of the deceased plaintiff, the child had a status of legitimacy, whereas, in the present case, the child had always had the status of illegitimacy. If in this case the Court should hold the deceased child to have been legitimate, it would nullify the provisions of the statute 5 & 6 Will. 4. c. 54.

Sir Fitzroy Kelly, in reply, contended that the *lex loci contractus* was binding everywhere, not only as regarded the solemnities with which the marriage was celebrated, but also as regarded the personal capacity to contract it.—

Male v. Roberts, 3 Esp. 163.

De la Vega v. Vianna, 1 B. & Ad. 284.

Story's Conflict of Laws, s. 103.

Ruding v. Smith, ubi supra.

Scrimshire v. Scrimshire, ubi supra.

Harford v. Morris, 2 Hag. Cons. 423.

Middleton v. Janverin, Ibid. 437.

The law of the domicil of the contracting parties regulating the consequences only.—

Munro v. Munro, 7 Cl. & F. 842.

Doe d. Birtwhistle v. Vardill, 2 Cl. & F. 571.

Calvin's case, 7 Rep. 1.

Moreover, the act was clearly territorial and confined to England, Ireland and Wales in its operation.

Dec. 4.—CRESSWELL, J.—In this case I have been called upon by Vice Chancellor Stuart to assist him by giving my opinion as to the validity or invalidity of a marriage solemnized near Altona, in the kingdom of Denmark, between William Leigh Brook and Emily Armitage, the sister of William Leigh Brook's former wife, then deceased. In answer to certain inquiries, the chief clerk of the Vice Chancellor certified as follows:—"That William Leigh Brook and Emily Armitage were respectively, up to and at the time of such marriage, and at the time of their respective deaths, domiciled in England, and that they had not any permanent residence in the country where they were married; that the marriage between William Leigh Brook and the said Emily Armitage was a lawful marriage according to the law of the duchy of Holstein, and that, according to the same law, the children of such marriage are legitimate children." Upon the latter part of the certificate it was observed, in argument, that it must be taken as a certificate that such marriages between Danish subjects are good, and not that the Danish Courts would hold them good when solemnized between the subjects of another country domiciled in that country, where such marriages are prohibited by law. The opinion which I have formed in this case renders it unnecessary to inquire into that matter; for, even assuming that in Denmark the marriage now in question would be held good, I think that by the law of England it was invalid, and the children of the parties to it illegitimate. The question depends upon the effect to be given to the statute 5 & 6 Will. 4. c. 54. By the 1st section it was enacted, "That all marriages which shall have been celebrated before the passing of this act between persons being within the prohibited degrees of affinity, shall not hereafter be annulled for that cause by any sentence of the Ecclesiastical Court, unless pronounced in a suit which shall be depending at the time

(6) 11 Q.B. Rep. 173; s. c. 17 Law J. Rep. (n.s.) M.C. 33.

of the passing of this act," &c. The 2nd section enacts, "That all marriages which shall hereafter be celebrated between persons within the prohibited degrees of consanguinity or affinity, shall be absolutely null and void to all intents and purposes whatsoever." Now, putting the narrowest construction on the words of this statute, it certainly had the effect of rendering absolutely void all such marriages between parties within the prohibited degrees as would, without the aid of the statute, have been voidable by the Ecclesiastical Court. The question to be considered then is, whether the marriage under consideration would have been so voidable? Had it been celebrated in England there can be no doubt that it would have been voidable. In *Sherwood v. Ray* (7) Baron Parke, in pronouncing the opinion of the Judicial Committee, used this language:—"That marriage, viz., between a widower and the deceased wife's sister, having been celebrated between persons within the Levitical degrees, and prohibited from intermarrying by Holy Scripture, as interpreted by the canon law and by the statute 25 Hen. 8, was unquestionably voidable during the lifetime of both, and might have been annulled by criminal proceedings or civil suit."

And this statement of the law was fully adopted by the Court of Queen's Bench in *The Queen v. Chadwick*. Indeed, this point was hardly disputed by the learned counsel who contended for the validity of this marriage. But they relied on the fact of the marriage having been celebrated in Denmark, where such marriages are held valid; and contended that by the law of nations, questions of this sort are to be decided according to the law of the country where the marriage takes place; and many cases, decided by most eminent persons, were cited, in which that principle was said to have been recognized, and to have received full effect. I forbear to enter into an examination of them at present, for in none of them was a marriage in question which was contrary to the law of God and Holy Scripture. In order to make the cases relied upon applicable to the present, it is necessary to shew that the same respect would be paid to the law

of a foreign country recognizing a marriage contrary to what we deem to be God's law. No such decision can be found. In the absence of any direct authority, writers on international law were resorted to, and many passages were read to the Court from *Mr. Justice Story's Commentaries on the Conflict of Laws*. In section 113, he says, "The general principle certainly is (as we have already seen) that between persons *sui juris*, marriage is to be decided by the law of the place where it is celebrated. If valid there, it is valid everywhere. It has a legal ubiquity of obligation. If invalid there, it is equally invalid everywhere." In section 113 a, he also says, "The most prominent, if not the only exceptions to the rule, are those marriages involving polygamy and incest; those positively prohibited by the public law of a country from motives of policy; and those celebrated in foreign countries by subjects entitling themselves, under special circumstances, to the benefit of the laws of their own country." Again, in section 114, he proceeds:—"In respect to the first exception, that of marriages involving polygamy and incest, Christianity is understood to prohibit polygamy and incest; and therefore no christian country would recognize polygamy or incestuous marriages. But when we speak of incestuous marriages, care must be taken to confine the doctrine to such cases as by the general consent of all Christendom are deemed incestuous." To this latter passage I cannot give my assent. How is a Judge, sitting in an English court of justice, called upon to decide whether a marriage be incestuous or not, to be guided in his decision? Surely, if the law of his own country has already settled what is incestuous or the contrary, by that he must be governed. Is he to inquire into the opinions of all other nations in which Christianity exists, and to adopt that rule which is ascertained to prevail amongst the greater number, and to say that it shall be acted upon in defiance of the law of his own country? This would, indeed, be enlarging the *comitas gentium* to an extent hitherto unheard of. For the purpose of deciding whether a marriage be incestuous or not, I feel bound to ascertain what is the law of England, and to give effect to it. Examining that law, I find that, according to many deci-

(7) 1 Moo. P.C. 395.

sions, such marriages are held to be prohibited by Holy Scripture; that they are within the degrees of affinity prohibited by God's law, and punishable as incestuous; and must therefore here be deemed to fall within the exception stated in *Story's Conflict of Laws*, s. 113, a, and not to be recognized in this Christian country. If that were otherwise, and we were bound by the *comitas gentium* to hold this a good marriage, this consequence would follow: an Englishman domiciled in this country, cohabiting with the sister of his deceased wife, whether he has celebrated a marriage with her or not, is deemed to be guilty of incest, and punishable by our ecclesiastical law; but by taking a short voyage to Denmark, and celebrating a marriage there, he would acquire the privilege of returning to this country and maintaining an intercourse, by our law deemed incestuous, with perfect impunity. These considerations satisfy me that the marriage would have been voidable before the statute 5 & 6 Will. 4. c. 54. was passed, and that, by force of that act, it was absolutely void to all intents and purposes. This opinion as to the voidable character of the marriage in question, although celebrated at Wandsbeck, makes it not absolutely necessary that I should express my opinion upon another question, which was discussed with much learning and ability, viz., whether the general expressions that have on various occasions fallen from the most eminent Judges in this country as to the validity of marriages here, if valid in the country where they were celebrated, are to be construed in the widest sense which can be ascribed to them according to the ordinary meaning of the English language, or whether they are to be limited and restrained by an implied proviso that such marriages are not contrary to the law of this country. Nevertheless, as it is a point which, if settled one way, would dispose of the case, although my opinion, already expressed, should be held to be erroneous, I think I ought not to avoid entering into the question; and I do so with the less hesitation, as my opinion on this very important subject will be open to review, and no doubt will be reviewed in this very case. Sir George Hay, in pronouncing judgment in *Harford v. Morris*, ex-

pressed an opinion that marriages of English subjects having an English domicile, celebrated in other countries, have been held valid, not merely because they would be valid according to the laws of those countries, but because they were not contrary to the law of England. In page 434 he says, "I do not say that foreign laws cannot be received in this court in cases where the Court of that country had a jurisdiction, or that this Court would not determine upon those laws in such a case. But I deny the *lex loci* universally to be a foundation for the jurisdiction, so as to impose an obligation on the Court to determine by those foreign laws." The judgment in that case was reversed, but upon grounds wholly irrespective of the opinion above cited. It, therefore, remains of such value as the reputation of the learned Judge by whom it was pronounced can give to it. And in *Warrender v. Warrender* (2 Cl. & F. 488) there are some passages in the judgment delivered by Lord Brougham, which throw much light on this question. In one place he says, "The general principle is denied by no one, that the *lex loci* is to be the governing rule in deciding upon the validity or invalidity of all personal contracts." In another place (*Ibid.* 530), he says, "A marriage good by the laws of one country is held good in all others where the question of its validity may arise. For the question always must be, 'Did the parties intend to contract marriage?' And if they did that which, in the place they were in, is deemed a marriage, they cannot reasonably, or sensibly, or safely be considered otherwise than as intending a marriage contract. The laws of each nation lay down the forms and solemnities, a compliance with which shall be deemed the only criterion of the intention to enter into the contract." The noble Lord, having used the general terms found in the first sentence quoted, by that which follows shews that he meant to apply them only to the forms and solemnities of constituting a marriage, and to the proof of the parties having made a contract; for he afterwards says, "I shall only stop here to remark, that the English jurisprudence, while it adopts this principle in words, would not perhaps be found very willing to act upon it throughout. Thus,

we should expect that the Spanish and Portuguese Courts would hold an English marriage avoidable between uncle and niece, or brother and sister-in-law, because it would clearly be avoidable in this country. But I strongly incline to think that our Courts would refuse to sanction, and would avoid by sentence, a marriage between those relatives contracted in the Peninsula under dispensation, although, beyond all doubt, such a marriage would there be valid by the *lex loci*, and incapable of being set aside by any proceedings in that country. But the rule extends, I apprehend, no further than to the ascertaining of the validity of the contract and the meaning of the parties; that is, the existence of the contract and its construction." The case of *The King v. Lolley*, although not directly in point, almost compels me (if it be good law) to adopt that opinion. The case was this: an Englishman married in England. He afterwards went to Scotland, and obtained a divorce there, which, according to the law of that country, dissolved the marriage. He then returned to England and married another woman, the first living, for which he was indicted, tried and convicted. The propriety of that conviction was argued, by very able counsel, before the twelve Judges, and, by their unanimous opinion, was held to be correct. The English Court, therefore, would not recognize the law of Scotland, because it was contrary to our own. But it may be said, that the matter there in question was the dissolution of the marriage, not the constitution of it. True; but had the constitution of a marriage been in question, and not the dissolution, the result must have been the same. By the 9 Geo. 4. c. 31. s. 22. it was enacted, "That if any person, being married, shall marry any other person during the life of the first husband or wife, whether the second marriage shall have taken place in England or elsewhere, every such offender shall be guilty of felony."

Now, suppose that after the Scotch divorce the man had married again in Scotland. That marriage would have been good there. Would it, therefore, have been good here? If it would, then the man might have returned to England with his second wife, and have had two lawful wives living

at the same time by marriages held to be valid by our own law. Some rather embarrassing questions would have arisen out of such a state of things. Would both wives have been dowable? If the second had had a son born, and the first had had a son born afterwards, which would have been heir to the father? And besides all these strange questions, the father would have been indictable and punishable as a felon, by the express words of the statute, for having contracted a marriage which by the laws of this country was perfectly legal and binding. In addition to these reasons for supposing that the learned persons who used the general expressions so frequently brought to our notice during the argument did not intend that they should have the widest sense of which the words are susceptible, there are some passages in Huber's *Prælectiones Juris Civilis* which shew that, in his opinion, the *comitas gentium* did not require so large an effect to be given to foreign law. In his chapter *De Conflictu Legum* he states, in section 2:—"1. *Leges cujusque imperii vim habent intra terminos ejusdem reipublicæ, omnesque ei subjectos obligant, nec ultra.* 2. *Pro subjectis imperio habendi sunt omnes qui intra terminos ejusdem reperiuntur, sive in perpetuum sive ad tempus ibi commorentur.* 3. *Rectores imperiorum id comiter agunt, ut jura cujusque populi, intra terminos ejus exercita, teneant ubique suam vim, quatenus nihil potestati aut juri alterius imperantis, ejusque civium præjudicetur.*" In section 8. he writes:—"Matrimonium pertinet etiam ad has regulas. Si licitum est eo loco ubi contractum et celebratum est, ubique validum erit effectumque habebit, sub eadem exceptione, præjudicii aliis non creandi; cui licet addere, si exempli nimis sit abominandi; ut si incestum juris gentium in secundo gradu contingeret alicubi esse permissum; quod vix est ut usu venire possit." Further on he writes:—"Brabantus uxore ductâ dispensatione Pontificis in gradu prohibito, si huc migret, tolerabitur; attamen si Frisius cum fratris filiâ se conferat in Brabantiam ibique nuptias celebret, huc reversus non videtur tolerandus; quia sic jus nostrum pessimis exemplis eluderetur;" and there are other passages to the same effect. John Voet,

Paul Voet, Sanchez, Gayll, and other jurists say that the validity of a marriage is to be decided by the laws of the country where it is celebrated; but they explain that their operation extends only to the formation of the contract and the form and ceremonial of the marriage.

I now proceed to examine some of the general dicta, that a marriage, valid by the law of the country where solemnized, is valid everywhere. The first case cited was *Roach v. Garvan* (8). The facts of the case are thus stated. Major Roach having two daughters, one born at Fort St. George in the East Indies, the other at St. ——— near it, sent them to France for their education and put them into a nunnery. Mr. Quain, one of the persons in whose care they were left, married the eldest, who was then about eleven years of age, to his son, not then seventeen. Their fortune was in the power of this Court. Quain petitioned for a decree for cohabitation with his wife. Another petition about guardianship and fortune was also before the Court. Lord Hardwicke said:—"As to the fact of the marriage, if good, the Court will take care that the husband makes a suitable provision, but the most material consideration is as to the validity thereof. It has been argued to be valid from being established by the sentence of a Court in France having proper jurisdiction. And it is true that if so it is conclusive, whether in a foreign Court or not, from the law of nations in such cases." There is nothing in that case to shew that, if the parties had been British subjects domiciled in England, and it had been contrary to our law, and the Courts of this country had been called upon to adjudicate with regard to it, they would have held it valid. The next case in order of time was *Scrimshire v. Scrimshire*. There two British subjects had been married in France. A suit was instituted here for restitution of conjugal rights. The validity of the marriage was denied, as being a foreign marriage not celebrated according to the laws of the country in which it was contracted; and a sentence of the parliament of Paris declaring the marriage null was also pleaded. Dealing with that question, Sir Edward

Simpson, in giving his judgment, said (9):—"The Court was of opinion then" (alluding to some earlier proceeding in the cause) "and still is, that a foreign sentence alone could not of itself be a bar to entering into a consideration of the question, whether this marriage between English subjects was good or not by the law of England." And in pages 408, 411, other expressions of similar import are to be found; but the question before the Court was, whether the contract had been made in a form binding by the law of France, and whether the marriage rites had been duly celebrated according to that law—no question of any violation of English law being involved in the discussion. The case of *Ruding v. Smith* was also cited on account of two passages in the judgment of Lord Stowell. One of them (10) runs thus:—"It is true, indeed, that English decisions have established this rule, that a foreign marriage valid according to the law of the place where celebrated is good everywhere else; but they have not *à converso* established that marriages of British subjects, not good according to the general law of the place where celebrated, are universally and under all possible circumstances to be regarded as invalid in England. It is, therefore, certainly to be advised that the safest course is always to be married according to the law of the country, for then no question can be stirred." But here, again, Lord Stowell was dealing with the marriage ceremonial, and not with any inquiry whether such a marriage was or was not a violation of the laws of this country. But the celebrated case of *Dalrymple v. Dalrymple* was mainly pressed upon our consideration on account of the passage in which Lord Stowell enunciated the principle on which that and similar cases should be decided. It is in 2 *Hag. Cons.*, 58, — "Being entertained (said the learned Judge) in an English Court, it must be adjudicated according to the principles of English law applicable to such a case. But the only principle applicable to such a case by the law of England is, that the validity of

(8) 1 Ves. sen. 157.

(9) 2 Hag. Cons. 398.

(10) Ibid. 390.

Miss Gordon's marriage rights must be tried by reference to the law of the country where, if they exist at all, they had their origin. Having furnished this principle, the law of England withdraws altogether, and leaves the legal question to the exclusive judgment of the law of Scotland." But what were the questions raised? Whether Capt. Dalrymple had entered into a contract of marriage, and whether that which took place between the parties constituted a marriage in fact according to the law of Scotland; and those were the two questions with which the learned Judge throughout his elaborate and learned judgment was dealing. It was not and could not be contended in that case that a contract of marriage made by a minor in Scotland was contrary to the law of England, nor that the sufficiency of the marriage ceremony was to be judged of by any other law than that of Scotland. It has been supposed that Scotch marriages, between minors, are contrary to the Marriage Act, 26 Geo. 2. c. 33, but that is a mistake, for the 18th section contains, *inter alia*, this proviso:—"That nothing in this act contained shall extend to that part of Great Britain called Scotland, &c., nor to any marriages solemnized beyond the seas." Why, then, should it be assumed that the learned Judge used the expressions relied on in a sense more extensive than was necessary for the decision of the case before him? Is it not more reasonable to suppose that he used them *secundum subjectam materiam*, to enunciate the principle upon which he was about to decide the questions involved in the case under consideration, and not with reference to another question which had not been, and could not then be, raised? I certainly am disposed to apply to them the same canon of construction which in fairness and candour should be applied to all judgments, rather than to assume that they were intended to have a larger meaning, in opposition to the writings of Huber, and extending far beyond the principles laid down by John and Paul Voet, by Sanchez, and by Gayll. The writings of these jurists were, no doubt, well known to Lord Stowell; and it is hardly to be supposed that he would have expressed an opinion at variance with theirs without condescend-

ing to notice their writings, and to explain his reasons for differing from them. I have found nothing to justify giving the more extensive meaning to the words of Lord Stowell, except some passages in Mr. Justice Story's work on the *Conflict of Laws*, and a decision cited by him from the reports of the Court of Massachusetts; and, perhaps, this greater force, given in one of the United States to the law of another at variance with its own, may be accounted for by the greater inclination that would naturally exist to give a larger scope to the *comitas gentium* between the different States of the Union, than could be expected to find place amongst nations wholly independent of and unconnected with each other. I have, therefore, come to the conclusion, that a marriage contracted by the subjects of a country, in which they are domiciled, in another country is not to be held valid, if by contracting it the laws of their own country are violated. Another question remains to be considered, viz., whether the second section of the statute 5 & 6 Will. 4. c. 54, taken by itself, is so framed as to be binding on all English subjects wherever they may be; or, in other words, whether it is personal, and accompanies the person of an English subject into foreign lands. It is in these words:—"Be it further enacted, that all marriages which shall hereafter be celebrated between persons within the prohibited degrees of consanguinity or affinity, shall be absolutely null and void to all intents and purposes whatsoever."

The words in their common and ordinary sense would extend to marriages wherever celebrated, otherwise some only, and not all, would be rendered void. It is a statute affecting persons, and may be read as if it had been, "If hereafter any persons, that is, British subjects, within the prohibited degrees, contract marriages, all such marriages shall be void." A law framed in such terms would attach upon the persons of British subjects, and accompany them to all parts of the world. Upon this point the decision of the House of Lords in the *Sussex Peerage case* appears to be conclusive. By the 12 Geo. 3. c. 11. s. 1, it was enacted, "That no descendant of the body of His late

Majesty King George 2. (other than, &c.) shall be capable of contracting matrimony without the previous consent of His Majesty, his heirs or successors (signified in a certain manner), and that every marriage or matrimonial contract of any such descendant, without such consent first had and obtained, shall be null and void to all intents and purposes whatsoever." In expressing the opinion of the Judges on the question referred to them, Tindal, C.J. (11 Cl. & F. 144.) says of this enactment, "The words of the statute itself appear to us to be free from ambiguity. The prohibitory words of it are general, 'That no one of the persons therein described shall be capable of contracting matrimony.' And again, 'That every marriage or matrimonial contract of any such person shall be null and void to all intents and purposes whatsoever.' The statute does not enact an incapacity to contract matrimony within one particular country and district or another, but to contract matrimony generally and in the abstract. It is an incapacity attaching itself to the person of A. B, which he carries with him wherever he goes." And further on he says, "The words employed are general, or, more properly, universal, and cannot be satisfied in their plain, literal, ordinary meaning, unless they are held to extend to all marriages, in whatever part of the world they may have been contracted or celebrated." The whole passage might have been written with reference to the enactment now under consideration. This statute does not enact any incapacity to contract matrimony within the prohibited degrees within one particular country and district or another, but to contract such marriage generally. The object of the statute was to put an end to all such marriages between English subjects for the future, and cannot be satisfied by any narrower construction. On this ground, therefore, as well as the other two urged by the counsel for the Crown, I am of opinion that the marriage celebrated between William Leigh Brook and Emily Armitage at Wandsbeck was void, and the children of those two persons illegitimate.

April 17.—STUART, V.C.—The late father and mother of the infant plaintiffs were both of them English subjects, and,

at the time of their marriage, were both of them domiciled in England. The marriage was solemnized during a temporary residence within the territories of the King of Denmark. If the marriage had been solemnized in England, as it was a marriage between a widower and the sister of his deceased wife, it is settled that, according to the law of England, it was null and void to all intents and purposes whatsoever. As to this I have no doubt. It was so settled by the decision of the Court of Queen's Bench in the case of *The Queen v. Chadwick*; and in hearing the present case I have had the great advantage of the assistance and advice of Mr. Justice Cresswell, who considers the law upon this point to be clear. The law of Denmark permits such marriages, and therefore the argument has principally turned on the right claimed for the issue of the marriage to have its validity determined according to the law of Denmark, as that of the country in which it was celebrated. The evidence of the Danish law, as stated in the chief clerk's certificate, is not quite satisfactory; but it may be assumed that the municipal law of Denmark, as regulating the rights of the people of Denmark, permits a marriage between a widower and the sister of his deceased wife. For the Crown, it is insisted that the statute 5 & 6 Will. 4. c. 54, which has enacted that all such marriages "shall be absolutely null and void to all intents and purposes whatsoever," binds all the subjects of the Crown of England, having their domicile in England, in whatever country the marriage may be contracted. On the other hand, it is contended, for the children of the marriage, that the statute has a mere local operation, only affects marriages celebrated in England or Ireland, and has no effect on such marriages contracted in Denmark, or in any other country by the laws of which they are permitted. They also contend that all questions as to the validity of the marriage are, by a general principle, to be decided according to the law of the country in which the contract is made; and they say that by the comity of nations the Courts of this country are bound to respect the laws of Denmark in this case and to judge of the validity of this marriage by those laws, and not by the

English law, as if it had been celebrated in England.

The first question, therefore, is as to the construction and effect of the statute 5 & 6 Will. 4. c. 54. Cresswell, J. has given me his opinion that the statute binds all English subjects, wherever they may be. This opinion he supports by the universality of the words, taken in their common and ordinary sense. He has also supported it by the authority of the Judges in the case of the *Sussex Peerage*, in construing the Royal Marriage Act, and by a reference to the scope and object of this statute itself. The more closely the matter is examined, the more clearly does it appear that this is the only true construction of the act. The purpose of the legislature was to annul for the future all marriages between persons within the prohibited degrees. Therefore, the words are, "that all marriages which shall hereafter be celebrated between persons within the prohibited degrees of consanguinity or affinity shall be absolutely null and void to all intents and purposes whatsoever." These words, clear and unambiguous, prevent the relation of husband and wife from subsisting between any subjects of the realm of England within the prohibited degrees. Scotland is expressly excepted from the operation of the act; but the words "all marriages" are not in any other respect qualified or restricted by anything in the context. Lord Coke says, 3 *Inst.* 76, "*Generalia verba sunt generaliter intelligenda.*" Unless the words mean all marriages, wheresoever celebrated, the ordinary sense and meaning of the word "all" is not given to it; for if marriages elsewhere celebrated are not included, the words "all marriages" must be read as meaning that some marriages are not included in the words "all marriages," which would be absurd. The object of the act is to prevent the relation of husband and wife from subsisting between certain persons who are subjects of the Crown of England, and domiciled in England. But that object would be defeated if, by any marriage celebrated anywhere between two subjects of the Crown of England and domiciled in England, this prohibited relation were allowed to subsist. As part of the municipal law of

England, this statute has its operation within the territory of England, upon all English subjects, and upon all marriages between English subjects who are within the prohibited degrees. The municipal laws of foreign countries are made to bind the subjects of foreign countries. If a law were passed in Denmark, or in any other foreign country, declaring that all marriages celebrated within its territories between English subjects who are within the degrees of affinity prohibited by the law of England should be valid marriages in England, and, although declared by an English act of parliament to be null and void to all intents and purposes, should, nevertheless, be deemed valid in England, such a law would have no force or effect in this country. It would be a law passed by a foreign State to alter the municipal law of England as to English subjects, and therefore would be merely nugatory and absurd. But the English statute, which enacts that all such marriages shall be null and void, and which prohibits the *status* of marriage between such persons, would be equally nugatory if such marriages, celebrated elsewhere than in England, should be held valid.

Persons within the prohibited degrees are by the act made incapable of contracting a marriage between themselves, because the act says that such a marriage shall be null and void. Therefore, the same observations which Tindal, C.J. made on the construction of the Royal Marriage Act are applicable to this act. It does not enact an incapacity to contract matrimony in any one particular country or district more than in any other. The existence of the affinity between the persons makes them incapable of entering into a valid contract of matrimony. This incapacity is personal, and being impressed upon the persons by the law of their own country, cannot be cast off or removed by mere change of place. It is a personal quality, which, according to Huber and other jurists, travels round everywhere with the persons, inseparable from them as their shadows—"Qualitas personalis certo loco alicui jure impressus, ubique circumferri et personam comitari, cum hoc effectû, ut ubivis locorum eo jure

quo tales personæ alibi gaudent vel subiectæ sunt, fruantur et subiciantur."

The result is, that the settled principles of construction require that a general and comprehensive interpretation should be given to this act, which contains words the most general and comprehensive. A confined and restricted interpretation is not warranted by the context, and would make the statute nugatory. Finally, the decision of the House of Lords in the *Sussex Peerage case*, and the reasons given to me by Cresswell, J., satisfy my mind that the marriage in this case, whether it was celebrated in Denmark or elsewhere, is, by the act of parliament, made null and void to all intents and purposes whatsoever. All the arguments founded on the Slave Trade Acts and the Legacy Duty Acts, and on the cases cited for the plaintiffs fail in their application to the construction of a statute, which enacts that the relation of husband and wife shall not subsist between persons related to each other in a certain degree.

The next question is whether, as this marriage was celebrated in Denmark, its validity in all respects is to be decided by the laws of Denmark?

As a general principle, the *lex loci* is to govern in all questions as to the validity or invalidity of personal contracts. This principle is founded on convenience. But it has been found necessary from a regard also to the higher considerations of duty as well as convenience, to make certain exceptions and qualifications in applying this principle. These exceptions are well defined by high authority, and rest on unquestionable grounds. Lord Mansfield, in the case of *Robinson v. Bland* (11), says, "*Lex loci contractus* admits of an exception where the parties, at the time of making the contract, had a view to a different country." Therefore, it has been held, that the law of the country in which the contract is to be performed is to have effect, rather than the law of the country in which the contract may happen to have been made. Huber, in his treatise *De Conflictu Legum*, sect. 10, says, "Non ita præcisè respiciendus est locus in quo contractus initus est, &c. Contraxisse unus-

quisque in eo loco intelligitur in quo ut solveret se obligavit." And the same writer says as to the marriage contract:—"Proinde et locus matrimonii contracti non tam est ubi contractus nuptialis initus, quam in quo contractantes matrimonium exercere voluerunt."

The French jurists are generally of opinion that the validity of a marriage must be decided according to the law of the place where it is celebrated, but with a clear exception in cases positively prohibited by their own law to their own subjects. The necessity of this exception arises from the obligation on each state to preserve its own institutions entire. Nations are bound duly to respect and recognize each other's laws. But each nation is bound by a much higher duty to enforce obedience to its own municipal laws, as regulating the rights of persons and of property among its own subjects. Therefore it is that so much weight is given to the law of the country in which the contract is to be performed. What seemed the most material of the authorities cited on behalf of the plaintiff, were the decisions on Lord Hardwicke's Marriage Act, one passage in the judgment of Sir William Scott in the case of *Dalrymple v. Dalrymple*, and an extract from Story's treatise. Cresswell, J. has already well disposed of what was read from Story's book. Indeed, in the 113th section, that writer admits the exception of marriages positively prohibited by the public law of a country from motives of policy.

As to the decisions on Lord Hardwicke's act, there is an express proviso in the act, that it shall not extend to marriages contracted in Scotland or beyond the seas. So far from that act containing any general or absolute prohibition and declaration of nullity as to all marriages contracted otherwise than according to its provisions, the prohibition and declaration in it are confined to marriages contracted in England without a compliance with the solemnities and consent which that act requires.

The words quoted from Sir William Scott's judgment in *Dalrymple v. Dalrymple*, have no reference to anything but the acts and solemnities necessary to bind the persons. The words are wholly inappli-

cable to cases where there is a positive legislative incapacity to contract at all. When Sir William Scott said, that the law of England leaves the question of the validity of a marriage to the decision of the law of the country in which the contract is made, he spoke as to the case before him, which was a question concerning a marriage contracted in Scotland *per verba de præsenti*, without any religious celebration, and therefore a question only as to the sufficiency of the acts and solemnities to constitute a valid contract of marriage. Mr. Burge, in his very valuable Commentaries (12), says, "A contract, however legal it may be in itself, cannot be enforced against property situated in a country, the laws of which prohibit such contract. The formalities established for authenticating and proving acts are those prescribed by the law of the place where the acts are passed; and if those have been observed, the acts are, as to their form, deemed valid in all places. The formalities which are attached to and inherent in the property, which is the subject of the contract, are those prescribed by the law of the country in which the property is situated." These propositions relate to contracts in general, but the vast importance of the marriage contract requires their application to it in a peculiar degree. It has been repeatedly decided in our courts that the law of the country, where a marriage happens to be celebrated, cannot prevail when it is opposed to the municipal institutions of the country of the domicile and allegiance of the contracting parties. Therefore, in the case of *Beasley v. Beasley* (13), the law of the country where the marriage was celebrated was held not to prevail, because one of the contracting parties was by the law of the country of his domicile incapacitated from entering into the contract. It was held, that this incapacity was not removed by a transient visit to another country, the laws of which did not incapacitate in such a case. In the case of *Warrender v. Warrender* the House of Lords decided that, although the marriage was contracted in England, yet, the husband being a domiciled Scotchman, and the marriage being with a view to a

permanent residence in Scotland, as the country of the husband and wife, the law of Scotland, and not the law of England, was to regulate; because, although the marriage was celebrated in England, Scotland was the country in which the contract was to be fulfilled. The law of England is wisely reluctant to admit any doctrine which is repugnant to the settled principles and policy of its own institutions. It is a settled principle of the law of England not to recognize or give effect to any contract illegal or immoral, or against public policy. This principle, so well established, is binding upon all English subjects, and imperative in all English courts of justice. The question of illegality, immorality, or contravention of public policy in such cases, is to be decided by the laws of England, and not by the laws of any foreign country. All the highest authorities among foreign jurists treat, as an exception from the principle of comity and respect due to foreign laws, the case of such foreign laws as interfere with the power and public policy of each state in its own municipal system. The parties to this marriage contract were subjects of the Crown of England bound by their allegiance and domicile to the law and constitution of England. In Denmark they continued still subjects of the Crown of England. In Denmark their *status* was that of aliens to the Crown of Denmark, and owing only a temporary obedience to the laws of Denmark, under which they had only a temporary protection. The law of England, which prohibits the marriage of a widower with the sister of his deceased wife, is an integral part of our law and public policy. Therefore, by the established principles of international law, it must have a paramount effect, and cannot be evaded by having resort to the laws of any foreign country. The law of England as to this matter is a personal law acting upon the persons of English subjects, and creating a personal incapacity which must accompany the persons into every country. "Quando lex in personam dirigitur respicienda est ad leges illius civitatis quæ personam habet subjectam." These are the words of Her-tius, and they state a principle recognized by the other jurists. As a question on the law of contract, the validity of the

(12) 1 Burge, 29.

(13) 3 Hag. Ec. 639.

contract of marriage, as to the capacity to contract, must depend on the law of the country in which the contract was to have its effect, and that country was, in this case, England. This is a case in which three circumstances concur, any one of which, according to the jurists, excludes the application of the *lex loci contractus*. It is a case in which the public policy of the law of England prohibits the contract; it is a case in which the law is personal in its nature, and must accompany the persons wherever they go; and it is, moreover, a case in which England was the country with a view to which, and in which, the marriage contract was to have its permanent effect. No resort to the laws of Denmark, or of any other foreign country, can give validity to such a contract where the law of England has made it null and void. It seems, therefore, the duty of this Court to declare that the marriage between the testator and Emily Armitage, the sister of his deceased wife, was not a valid marriage, but was null and void to all intents and purposes whatsoever, and that all the real and personal estate of Charles Armitage Brook, deceased, has become vested in the Crown.

[IN THE HOUSE OF LORDS.]

March 23. { BAKER v. BAKER, in re
BAKER'S ESTATE.

Will—Construction—Annuity—Corpus of Fund—Deficiency.

A testator directed his trustees, out of the produce of the sale of his estate, to invest "sufficient to realize the clear annual income or sum of 200l. a year," and to pay the same to his wife for her life or widowhood, and after her death or second marriage, if he should die without issue, to hold the capital in trust for other persons; and as to the residue of the property, after "raising thereout money sufficient to realize the annuity for his wife," in trust for other persons. The estate was insufficient to raise 200l. a year:—Held (reversing the decision of the Master of the Rolls, which had been sustained by Lord Justice Knight Bruce), that the widow was not entitled to have the deficiency made good out of the corpus of

the fund, and she was ordered to replace the stock which had been sold out under the order now reversed.

The question in this case arose upon the will of George Baker, by which the testator's brother Alfred was directed to stand possessed of the produce of the sale of the testator's property, on trust to invest in the stocks or on mortgage sufficient to realize the clear annual income or sum of 200l. which he was to pay to the testator's wife during her life or widowhood, and on her death or second marriage the trustee was to stand possessed of the fund in trust for himself and his brothers and sister; after raising sufficient to "realize the annuity for my wife," the trustee Baker was to stand possessed of the residue in trust for himself and his brothers and sister: provided that if the testator should die leaving children, the trusts for the brothers and sister were to be null and void, and the funds (invested and residuary) were to go to the children. There were no children. The property did not realize enough to produce an income of 200l. a year. The widow claimed to have the deficiency made good out of the *corpus* of the estate. The Master of the Rolls made an order in her favour. On appeal, the order was allowed to stand, as the Lords Justices differed in opinion (1). The trustee and legatees appealed against this order.

Sir R. Bethell and Mr. J. H. Palmer, for the appellants, cited

Foster v. Smith, 1 Phill. 629; s. c. 15 Law J. Rep. (N.S.) Chanc. 183.

Howe v. Lord Dartmouth, 7 Ves. 137.

Wright v. Callender, 2 De Gex, M. & G. 652; s. c. 21 Law J. Rep. (N.S.) Chanc. 787.

Davies v. Wattier, 1 Sim. & S. 463.

May v. Bennett, 1 Russ. 370.

Kendall v. Russell, 3 Sim. 424; s. c. 8 Law J. Rep. Chanc. 108.

Miller v. Huddleston, 3 Mac. & G. 513; s. c. 21 Law J. Rep. (N.S.) Chanc. 1.

Hindle v. Taylor, 20 Beav. 109; s. c. on appeal, 25 Law J. Rep. (N.S.) Chanc. 78.

(1) 25 Law J. Rep. (N.S.) Chanc. 76.

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Mr. Willcock and *Mr. Shebbeare*, for the respondents, commented on these cases, and cited in addition *Mills v. Drewitt* (2).

No reply was heard.

The LORD CHANCELLOR (Lord Chelmsford).—This case presents no matter of difficulty as to the construction of the will; and it is much to be regretted that a difference of opinion between the learned Judges should have occasioned so much expense. The testator was under a misapprehension with regard to the amount of his property; a fact which must be remembered in ascertaining his intention. He supposed that the sale of his property would produce a fund, the dividends from which would provide for the payment directed to be made to his widow, and he destined the fund itself after her death to go over to his brothers and sister. That having been his belief, your Lordships are now called upon to impose a new construction upon the testator, and to suppose that he had the intention to appropriate a portion of the *corpus* of the fund to the payment of this annual income whenever the dividends should become insufficient. This is a question between a tenant for life and a remainder-man, and, so considered, the authorities do not conflict with that construction, which appears to me, under the circumstances of the will, to be the correct one. A different construction would give rise to this strange result: that supposing the widow's life to continue for many years, the whole fund itself might become exhausted, and she might be finally left without any provision whatever. No answer was given in the argument to the difficulty suggested, supposing the produce of the testator's estate to be invested in mortgages, as to making up any deficiency of annual income by the sale of the mortgaged interest. That difficulty assists us in coming to a conclusion as to the construction of the will. The Master of the Rolls seems to have been fettered in his judgment in this case by the decision in *Wright v. Callender*. In the construction

of a particular will, little aid is to be obtained from decided cases, but with regard to *Wright v. Callender* there is a clear distinction between that case and the present. There the income to a certain amount was to be paid at all events; and on the death of the person who was entitled to that weekly sum it was to fall into the residue. There was to be no residue till the sum there given had been paid. Lord Cranworth there said:—"If there had been anything in the terms of that gift over, shewing that the testator intended the gift to be continued in its integrity during the life of the annuitant, and in that state to go over, the argument might be well founded." Here there is language to shew that such was the intention; the trustee is to stand possessed of the trust-mones, and out of the dividends arising therefrom to pay the 200*l.* a year; and on the death of the widow he is to hold the same monies, in trust for himself, his brothers and sister. The testator here did therefore intend to preserve the fund in its integrity. Under these circumstances, I shall propose to vary the decree of the Lords Justices, so far as it declares the widow entitled to an annuity of 200*l.* and to have the deficiency of the dividends made good out of the *corpus* of the fund.

LORD BROUGHAM entirely concurred. He should have come to the same decision as the Lords Justices did in *Wright v. Callender*, and he thought that case clearly distinguishable from the present. He could not say that he equally approved of the case of *May v. Bennett*, as to which, if he had had to decide it, he should not have come to the same conclusion at which Lord Gifford had there arrived. He had sometimes wished that for certain portions of wills there should be certain settled formulas to express the intention of a testator, though that observation applied perhaps only to those cases where questions arose respecting some principle or rule of law. Here it did not seem to him difficult to ascertain the meaning of the testator; and he was of opinion that that meaning which had been suggested by his noble and learned friend on the woolsack was that which their Lordships ought to adopt.

LORD CRANWORTH.—The question in all cases of this kind was, whether a sum at all events was to be annually paid out of the general estate or only the interest of a capital sum. The language of the particular will must furnish the answer to that question. He should have said that there was no room whatever for doubt in this case, were it not for the opinions of two learned Judges to the contrary, that the testator meant that the sum of 200*l.* a year was to come out of the dividends. The widow could take nothing but the dividends, and if the dividends did not produce 200*l.* a year, she could not have that sum. The case which had been mainly adverted to in the argument here was that of *Wright v. Callender*, and there it seemed to him quite plain that it was the intention of the testator that an investment should be made which, at all events, so long as one of his sons lived, should produce a weekly sum of 2*l.* When that object was exhausted the residue was given to the testator's other children. He had taken part in the decision of that case, and he still adhered to the opinion he had at the time formed upon it. But it was quite distinguishable from this case, and he therefore agreed in the proposal now made to vary the decree of the Court below.

LORD WENSLEYDALE entirely agreed with the noble and learned Lords who had preceded him. Adopting the ordinary rules of construction, there seemed to him no difficulty in coming to a conclusion as to the meaning of the testator. He adhered to the opinion he had expressed in the course of the last session, in the case of *Grey v. Pearson* (3), that it was of more importance in all these cases to adopt a principle of construction than to attempt to follow the authority of previous decisions where words resembling those under consideration had been used in other wills. In his opinion, the case of *Wright v. Callender* was distinguishable from the present on the grounds which had been stated; and as to the other cases which had been

cited in argument, it was quite immaterial to pronounce whether they had been rightly decided or not: but upon the present case he should not have entertained any doubt, had it not been for the opinion of the two learned Judges in the Court below. The will clearly contemplated the investment of a sum of money, from the dividends of which, and from them alone, the annual payment was to be made. The testator's estate had turned out to be insufficient for that purpose, but his intention was clear, and the dividends being insufficient to pay the 200*l.* annually, the widow must suffer a proportionate diminution.

It was finally ordered, that the widow should be declared entitled to the dividends of so much of the principal fund as should remain after the payment of costs and after replacing the principal stock which had been sold out under the order now reversed.

WOOD, V.C. }
March 24. } SWANZY v. SWANZY.

Practice—Security for Costs.

A defendant having applied for time to answer the plaintiff's bill is not thereby precluded from afterwards moving that the plaintiff may give security for costs, if subsequently to the application he discovers facts not appearing upon the face of the bill, which would have entitled him to make the application before taking any step in the cause.

Mr. C. T. Simpson moved, on behalf of the defendant in this cause, that the plaintiff might give security for costs. In the bill, which was filed on the 4th of January 1858, the plaintiff was described as "Catherine Swanzy, of Cape Coast Castle, on the Western Coast of Africa, at present residing at No. 45, Claverton Terrace, Rupert Street, Pimlico, in the county of Middlesex, widow."

On the 11th of March the defendant had applied for time to answer, and the question was, whether, having taken this active

(3) 6 H.L. Cas. 108; s. c. 26 Law J. Rep. (N.S.) Chanc. 473.

step in the cause, he was not too late in making the present application.

It appeared from the affidavits that, upon the occasion of the defendant applying for time to answer, he learned that the plaintiff was an African by birth, and unable to speak any other language than Fantee; that she had come to England for the purpose of asserting her rights, and wished to return to Africa as soon as her suit was disposed of. Thereupon inquiries were made at the address given in the bill, and it was ascertained that no Mrs. Swanzy lived there, or ever had lived there. On stating, however, that Mrs. Swanzy was a coloured lady, the defendant learned that a coloured lady, named Hughes, had lived there for about a week as a lodger, but was then gone, and her present address was not known. She was subsequently discovered to be living in Ovington Terrace, Brompton, as a weekly lodger.—

Ainslie v. Sims, 17 Beav. 57; s. c. 22 Law J. Rep. (N.S.) Chanc. 834.

Player v. Anderson, 15 Sim. 104; s. c. 15 Law J. Rep. (N.S.) Chanc. 189.

Marrow v. Wilson, 12 Beav. 497.

Mr. Erskine, for the plaintiff, contended that the application was too late. "If on the face of the bill the plaintiff appears to be beyond sea, or if at the time of filing the bill it appears you knew it, you may apply for security to answer costs; but advantage should be taken of it in the first instance before answer or time prayed to answer, otherwise it is waived"—*Meliorucchy v. Meliorucchy* (1).

Mr. Simpson replied.

WOOD, V.C.—No doubt, after a defendant has taken active steps in a cause with the knowledge of his right to have security for costs, it is too late to avail himself of a right which would have been of course at an earlier stage. The question here is, whether I ought to take the defendant necessarily to have known, when application for time to answer was first made, that he was entitled to this right, according to the authority of *Ainslie v. Sims*.

In that case the Master of the Rolls says, "The question does not depend on any technical rule, but I must see if the defendant has a fair and reasonable chance of finding the plaintiff to answer the process of the Court in case he should be wanted, and I am of opinion that he has not. I by no means say that if a foreigner were to come here and take up his abode and hire a house for a certain period he would be required to give security for costs. But here it is obvious from the affidavits, that the plaintiff, whose permanent residence, business and domicile is in Scotland, might have come and taken lodgings within the jurisdiction, for the express purpose of avoiding the necessity of giving security for costs." Here, it does not necessarily appear, upon the face of the bill, that the defendant is entitled to security for costs. If he had made inquiry, and coupled the result of that inquiry with the statement in the bill of permanent residence, and discovered that the residence was only for a limited period, no doubt he would have been entitled to come here and make this application; but if the facts on which you rest your right to security do not appear upon the face of the bill, you cannot come here except upon affidavit. The defendant says, when he made the application for time to answer he heard that the plaintiff intended to go away as soon as the matter was disposed of, and that put him upon inquiry, and I am not prepared to say that he was bound to make that inquiry before. Upon the facts as they originally stood at the filing of the bill, he would have been entitled to security for costs if he had come here at once; but now we have, in addition to those, the fact that the plaintiff has changed her quarters, and not only that, but she has also changed her name. The only doubt was, whether the defendant had waived his right by taking a step before he ascertained all this. I think the application for time ought not to prejudice this application. He comes here the moment he finds the difficulty, and I shall direct the plaintiff to give security for costs.

WOOD, V. C. }
 March 25, 26. } HUTCHINS v. OSBORNE.

Wills Act, 1 Vict. c. 26. s. 27.—General Bequest—Appointment.

By a marriage settlement leasehold premises were assigned, upon trust for the wife for life, with remainder as the husband should appoint generally, and in default of appointment, and subject thereto, if any, for the next-of-kin of the husband. The husband, by will, after certain specific and pecuniary legacies not affecting the property comprised in the settlement, gave all other his estate, property and effects, subject, as to such parts thereof as were comprised in the settlement, to the settlement and the trusts thereby declared, and which indenture he thereby ratified and confirmed in all respects, to his wife absolutely:—Held, that this operated as an execution of the power of appointment.

By the settlement made on the marriage of John Hutchins with Maria Ward, dated the 15th of July 1836, certain leasehold messuages, being Nos. 3, 4, 5, and 6, Carter Street, Walworth, belonging to John Hutchins, were assigned by him to trustees, upon trust, after the solemnization of the marriage, to pay the rents thereof to Maria Ward, for her life for her separate use, and from and after her decease upon trust for such person or persons, for such estates and interest, and in such manner and form, and to and for such ends, intents and purposes in all respects as he, the said John Hutchins, should by any deed or instrument in writing, or by his last will and testament in writing to be by him legally executed, direct, limit or appoint, give or bequeath the same, and in the mean time, and until or in default thereof, and subject thereto, if any, upon trust for such person and persons as under the Statute for Distribution of Intestates' Estates might be or become entitled thereto.

John Hutchins, by his will, dated the 25th of April 1850, after directing payment of his debts, &c., and giving several specific and pecuniary legacies, bequeathed as follows:—"And as to all my ready money, money in the stocks or funds, debts, securities for money, household

furniture, plate, linen, china, my leasehold messuage or tenement and premises No. 7, Carter Street aforesaid, and all other my estate, property and effects whatsoever and wheresoever which I shall or may be possessed of, interested in or entitled unto at my decease, subject to the payment of the before-mentioned legacies, and also subject, as to such parts thereof respectively as is or are comprised in an indenture of settlement and assignment, dated the 15th of July 1836, made on or previous to my marriage with my said wife, to the said indenture and the trusts thereby declared, and which indenture I hereby ratify and confirm in all respects, I give and bequeath the same and every part thereof to my said wife, her executors, administrators and assigns, absolutely." And he appointed his wife and R. Evans and H. Mecham his executrix and executors.

The testator died on the 4th of August 1850, leaving Maria Hutchins his widow and Silas Hutchins his only child. Silas Hutchins died intestate, on the 2nd of September 1853, leaving the plaintiff his widow and three children, and the widow took out administration. Maria Hutchins died on the 14th of December 1856, having, by her will, appointed the defendant Osborne and others her executors.

The questions submitted by this special case for the opinion of the Court were, first, whether the general residuary bequest to the said Maria Hutchins, contained in the will of the said testator John Hutchins, operated as an execution of the power of appointment by will given or reserved to him by the said indenture of settlement of the 15th of July 1836; the second question became immaterial; thirdly, out of what estate or by whom the costs of the plaintiff and of the defendants of and incident to this case ought to be paid.

Mr. W. A. Clark, for the plaintiff, contended that the will did not operate as an execution of the power. Under the old law, a general bequest did not amount to an execution of the power unless a contrary intention appeared. By the 1 Vict. c. 26. s. 27. the rule was reversed, but the principle remained the same. It was still a question of construction, only the onus

of proof was shifted. The words "subject to the said indenture" sufficiently indicated an intention not to interfere with the settlement in any way. *Lake v. Currie* (1) was distinguishable.

Mr. J. S. Smith, Mr. Sheffield and Mr. Joseph appeared for the several defendants.

Mr. Clark replied.

March 26.—Wood, V.C.—It is perfectly clear what must be the construction of the testator's will. The presumption of law under the recent statute is, that everything will pass over which the testator has a power of appointment, unless a contrary intention appears. But even before that statute, such expressions as are used here would be held to imply that he intended to operate upon the estate over which he had this power, because, in speaking of "all other his estate, property and effects whatsoever," he refers to this as being part thereof, and he says "subject, as to such parts thereof as are comprised in an indenture of settlement, &c. to the said indenture and the trusts thereby declared." Now, the trusts of that indenture are just as much for such persons as he shall appoint as for the persons taking in default of appointment. I understand very well why he should throw in this form of expression, ratifying and confirming the settlement. He means to say:—I do not intend to disturb my wife's estate, but to enlarge it,—giving effect to every word of the settlement, the first trust of which is for his wife for life, and the next for such person, &c. as he shall direct. The argument on the part of the plaintiff was very ingenious, but I cannot suppose that when the testator says, "subject to the trusts of the settlement," he means exclusive of the power of appointment therein contained. Upon the face of the will the argument is equally balanced as to intention, and I must adopt the construction given by the act. Some argument might have arisen if any reasonable doubt could be suggested arising from his not having given anything to his only child by the first marriage, but I find, on reference to the will, though it is not stated in the case,

that he has made considerable provision for that child by giving him several houses in Walworth, and another circumstance is his giving to his wife No. 7. in Carter Street, which was not comprised in the settlement, and omitting all mention of the others. I must declare, therefore, that, under the general bequest, this property passed absolutely to the widow. The costs of all parties to come out of the residuary estate.

LOrds JUSTICES. }
 March 26, 27. } *In re PINCKARD'S TRUST.*

Will—Testamentary undated Paper—Precatory Trust—Ambiguity.

G. P. gave the residue of his personal estate to trustees for his wife for life, and after her decease to his nephew R. P. for his own use and benefit absolutely. After the death of G. P. an undated letter was found in his handwriting, addressed to R. P., entreating him, as a last request, to accept that letter in explanation, lest there should be anything not fully explanatory of his intention in the terms of his will. The paper then went on to make certain requests in very vague and ambiguous language. It was admitted to probate. One of the Vice Chancellors decided that the absolute gift of the residue contained in the will was cut down to a life estate by the terms of the letter; but on appeal, it was held, that though the letter was a testamentary instrument, it was uncertain in its meaning, and did not revoke or cut down the absolute gift to R. P. in the will; and, moreover, that the words of the letter were not sufficient to create a trust which this Court could enforce.

This was an appeal from a decision of Vice Chancellor Wood, made on a petition in the matter of the Trustees' Relief Act. The petition stated that George Pinckard, late of Bloomsbury Square, Esq., by his will, dated the 24th of August 1831, after bequeathing pecuniary legacies to various persons, gave to Frederick Thomas Sargent and Robert Pedder, and the survivor of them, his executors and administrators, his leasehold house in Blooms-

(1) 2 De Gex, M. & G. 536.

bury Square, and all his stock in the public funds, and general residuary personal estate, upon trust to let the house, and to convert his furniture and other effects into money, and to pay the income, dividends and interest to his dear and beloved wife Louisa Pinckard, for her life, and after her decease upon trust to assign the said house, and pay and transfer the said stocks, funds and premises to his nephew, Richard Pinckard, M.D., for his own use and benefit absolutely; and he appointed the trustees executors; that he also made a codicil to his will; that the testator died in May 1855; and that shortly after his death there was found amongst his papers a letter, enclosed in an envelope, and in his own handwriting, as follows:—

“Dear Richard,—I entreat you, as a last request, to accept this letter in explanation, lest there should be anything not fully explanatory of my intention in the terms of my will. I wish all the remainder of my property, after paying the legacies, funeral expenses, &c., to be placed in the hands of the executors, and the interest thereof to be paid to your dear aunt during her life, provided there be enough to maintain her respectably, and to allow her to continue to reside in the house, No. 18. I wish her always to remain there. If there be not sufficient for continuing the payments on the several policies of assurance, in order to keep them up until they become claims, it is my wish that such of them be sold as my executors may think fit, and the monies placed out at interest instead of continuing the payment of premiums. At your dear aunt's decease it is my wish that the property should be yours, there not being sufficient to divide amongst my numerous relations so as to effect any considerable benefit to each of them; at the same time I hope you will be kindly considerate and liberal towards them, as far as may be in your power, keeping the principal together and using the income arising therefrom. It is my wish that you should have some one nephew (son of Henry or George, should either of them marry and have male offspring) educated as a physician, and that you bequeath to such nephew being so educated all or the greater part of the property the interest of which I now bequeath to your

dear aunt, and after her to yourself. It having been the toil of my days to accumulate this property, I wish it first to benefit your dearest beloved aunt, next yourself, and, finally, such nephew as you may select as your successor. Knowing your honourable character and your high integrity, I feel that I need not add another syllable to induce you to act according to my last wish as herein expressed. Farewell.

George Pinckard.

“To Dr. Richard Pinckard.”

It was proved that this letter was undated, and was found in the drawer of the testator's dressing-table; that it was in his handwriting, and enclosed in an envelope, on which the name of his nephew was written also in his handwriting, and that the will and a codicil on the same sheet of paper were found in the testator's writing-desk, enclosed in an envelope, addressed to the executors. The will and codicil, and the letter (as a codicil) were proved in July 1835. It was also proved that the parties respectively named in the letter, Henry and George, were brothers of Dr. Richard Pinckard, and were unmarried at the death of the testator; that the former had since married, but had had no child, and the latter was still unmarried. The widow outlived Dr. Richard Pinckard, who died in March 1846, and she lived until 1856. Dr. Richard Pinckard, by his will, dated in 1845, gave all his estate and effects (subject to the life estate of Mrs. Louisa Pinckard) to such of his brothers and sisters who should be living at the decease of the survivor of himself and that lady.

Mr. Sargent, the executor and trustee of the will of Dr. George Pinckard, was the survivor of the trustees of that will, and he paid the interest of the residue to Mrs. Louisa Pinckard until her death, and then he paid such residue, consisting of 13,992*l.* new 3*l.* per cents., and 496*l.* 7*s.* 10*d.* consols. into court, under the Trustees' Relief Act.

The petitioners were Henry Pinckard, George Pinckard and others, the surviving brothers and sister of Dr. Richard Pinckard, and they prayed that the residue might be divided between them according to the trusts of the will of their brother.

The petition was heard before Vice

Chancellor Wood, who held that the effect of the letter was to cut down the absolute gift to Richard to a life estate, and that there was an intestacy as to the residuary personal estate of the original testator George Pinckard, whose next-of-kin were entitled to the same. The petitioners appealed.

Mr. Rolt, Mr. Baily and Mr. Martelli, for the appellants, insisted that no trust was created by the letter, because the words used admitted of doubt and the property disposed of and amount given were alike uncertain: while on the one hand the will itself was plain and precise, the words of the letter were not only vague, but were self-contradictory, and could not be held to create any trust whatsoever. They cited—

Doe v. Hicks, 8 Bing. 475; s. c. 1 Cl. & F. 20.

Briggs v. Penny, 3 De Gex & Sm. 525; s. c. 3 Mac. & G. 546; 21 Law J. Rep. (N.S.) Chanc. 265.

Palmer v. Simmonds, 2 Drew. 221.

Bardswell v. Bardswell, 9 Sim. 319; s. c. 7 Law J. Rep. (N.S.) Chanc. 268.

Macnab v. Whitbread, 17 Beav. 299.

Green v. Marsden, 1 Drew. 646; s. c. 22 Law J. Rep. (N.S.) Chanc. 1092.

Mr. Daniel and Mr. Southgate, for the respondents.

Mr. W. M. James and Mr. Busk, for other parties.

Mr. Willcock and Mr. Nalder, for the executors of Dr. Richard Pinckard.

Mr. Rolt, in reply, cited *Gompertz v. Gompertz* (1).

LORD JUSTICE KNIGHT BRUCE.—The codicil in the shape of a letter, on which the dispute in this case has arisen, is in every sense, both in form and substance, a distinct instrument from the will and the first codicil, which was written on the same sheet of paper with the will itself. That letter was written on a separate sheet of paper, and was found after the testator's death in a repository different from that

where the will and first codicil had been placed. The meaning of the will itself is beyond all dispute: it gives the residue of the personal estate to the nephew Richard Pinckard, "for his own use and benefit absolutely," subject only to the life estate given to the testator's wife. Both the nephew and the wife survived the testator, and the contention on the part of the respondents is that this clear gift to the nephew is revoked or cut down by the letter, which formed, as I have previously said, a distinct testamentary instrument. The fact that it has been admitted to probate is sufficient to shew that it ought to have some effect given to it; but if it were necessary to come to a conclusion upon it for the purpose of giving a correct decision upon the present case, I should decide that it was recommendatory only, and not obligatory upon the nephew. But there is reasonable doubt on the face of it as to its meaning: a reasonable doubt whether the testator intended to oblige his nephew to treat the property not as his own, or whether he intended merely to recommend him to do so. In whichever light that letter is regarded, the clear gift made by the will is wholly untouched, and it must be held to prevail. The order of Vice Chancellor Wood, must, therefore, be reversed, and an order in the terms of the prayer of the original petition substituted for it.

LORD JUSTICE TURNER.—The testator has left his residuary personal estate to his wife for her life, and after her death to his nephew absolutely. After he made his will he wrote the letter set out in the petition; and the question is, whether that letter has destroyed the effect of the absolute gift contained in the will. The testator begins by saying that his object is to explain by that letter what he intended his nephew to do with the property given to him. The whole context confirms that view. The question for us is, whether he has, or has not, declared his purpose in terms which the Court can enforce? Is that letter certain either as to the subject given, or the objects to whom it is given? To me it clearly is not. The expression in the letter, "that you bequeath to such nephew, being so educated, all or the greater part of the property," left the testator's nephew (Richard Pinckard) in a position which enabled him

(1) 2 Phill. 107; s. c. 16 Law J. Rep. (N.S.) Chanc. 23.

to dispose of the remainder as he might think fit. It is in this as in all similar cases essential to be able to determine that the trust fixed on the whole, or at all events on a definite portion, of the fund bequeathed. This testator has not, by the letter, created a trust which this Court can enforce: he has perhaps intended to do so; but if he has, he has failed. Even if the absolute gift in the will were removed, and the disposition contained in the codicil substituted for it, it appears to me very doubtful whether even then the nephew would not take the residuary estate for his own absolute use. The costs of all parties must be paid out of the estate.

M.R.	} WILLIAMS v. PAGE.
1857.	
Dec. 15, 16, 17.	
1858.	
Jan. 20.	

Company — Accounts — Parties — Misjoinder — Barratry.

A railway company was projected in 1845. As but comparatively few shares were taken, it was found impossible to carry the project into effect. A proposal was then made to make a part of the line only, and a report of a committee of investigation was circulated among the shareholders, stating that eleven of the provisional committee and three other shareholders would take additional shares, which would make the capital sufficient to enable them to pay the deposit and comply with the Standing Orders of the House of Lords. A sum of 9,975l., the amount of the deposit on these shares, was borrowed from the bankers of the company. The Standing Orders of the House were in form complied with, but in 1846 the bill was lost, and the project altogether abandoned. The provisional committee then repaid the 9,975l. to the bankers in full, and they also repaid in full the deposit on shares made by three other shareholders; they then paid 10s. per share to such of the shareholders as would receive it. This was accepted by one of the plaintiffs. No accounts of any receipts and payments were ever rendered to the shareholders. A previous suit was instituted by a shareholder for an account; the solicitors in the present suit acted for the plaintiff in that

suit; it was, however, compromised, and in 1853 the present suit was instituted by two shareholders to obtain an account of the receipts and payments made on behalf of the company and for a distribution of the surplus: — Held, that the provisional committee were trustees, and that the relief sought by the plaintiffs was not barred by lapse of time:

That the dismissal of the bill against two of the committee had not rendered the suit defective, as it appeared in evidence that they had not sanctioned the repayment of the 9,975l.:

That there was no misjoinder of the plaintiffs in consequence of one having received the dividend of 10s.:

That the suit was defective, as three shareholders, who had received back their deposits in full, were not parties; but leave to amend and make them defendants was given:

That the bill must be dismissed, with costs, against such of the defendants who had ceased to be of the committee when the resolution was passed to repay the 9,975l., notwithstanding they were made defendants upon the suggestion and requisition in the answer of the original defendants: and

That the plaintiffs were entitled to relief, though their individual interest was small, and though the proceedings were instigated by their solicitor.

The bill in this cause was filed by Jonh Williams and George Barrett Lennard, on behalf of themselves and all other holders of scrip and shares in the Midland and Eastern Counties Railway Company (except the defendants), against the directors and managing committee of the company, praying for an account of their receipts and disbursements; and that any surplus might be secured and applied for the benefit of the plaintiffs and the other parties interested.

The company was formed in July 1845 for making a railway to connect Cambridge with Northampton and Worcester or Evesham; it was provisionally registered, and a prospectus was issued, stating that the capital was to be 1,500,000l., to be divided into 60,000 shares, of 25l. each, and that a deposit of 2l. 12s. 6d. was to be paid on each share. Directors were appointed and a managing committee was formed. Only 18,160 shares were taken. The deposits

paid amounted to 47,670*l.* 1*s.* J. Williams, the plaintiff, took twenty shares and paid the deposit. He afterwards bought the scrip for thirty additional shares, upon which also the deposit had been paid. The plaintiff G. B. Lennard took fifty original shares and paid the deposit. They both executed the subscribers' agreement, by which Thomas Bernard Hewlett, Charles Basil Lindsay and William Gee, all since deceased, were appointed trustees of the funds and property of the company. The small number of shares taken induced the directors to abandon a portion of the contemplated undertaking, and to confine the act of parliament to the construction of a line from Cambridge to Weedon only. The bill passed the House of Commons without opposition. Various meetings of the scripholders were held to consider whether the undertaking should be abandoned; but at none of them were the shareholders represented in sufficient numbers. A fourth meeting, however, was held in June 1846, at which a sufficient number of shareholders was present. A report of a committee appointed to investigate the affairs of the company had been circulated among the shareholders; this was laid before the meeting, and contained the only information they had. It stated, amongst other things, that in order to provide the means of complying with the Standing Orders of the House of Lords an additional sum of money was required beyond the money subscribed; that the necessary sum would be obtained by the subscription of fourteen persons, eleven of whom were members of the committee of management, who had for this purpose taken among them 3,800*l.* additional shares, and paid the deposit, amounting to 9,975*l.* The funds of the company were also stated in the report as follows:—In the name of the Accountant General, 30,000*l.*; balance at Glyn & Co.'s, the bankers of the company, 4,197*l.* 16*s.* 9*d.*; subscriptions by members of the committee of management 9,975*l.*; making a total of 44,172*l.* 16*s.* 9*d.* Against this was to be put the expenses already incurred, which amounted to 18,325*l.* 17*s.* 5*d.* This left a balance of 25,846*l.* 19*s.* 4*d.* Upon these representations, the shareholders resolved not to abandon the un-

dertaking, but to endeavour to carry the proposed bill through the House of Lords. The bill, however, was opposed; it was thrown out, and the project was abandoned; and nothing remained but to give an account of the manner in which the funds had been employed, and to distribute the balance. The managing committee, however, never stated any formal account of the receipts and payments to the shareholders; but they paid 10*s.* per share to such of the shareholders as were willing to accept it, and as appeared by their answer and the entries in their books, they disposed of the sums they received in payment of the expenses incurred by them for the purposes of the undertaking, and in the repayment of 9,975*l.* lent by the bankers, to enable them to comply with the Standing Orders of the House of Lords, this sum having never been paid as a deposit on shares taken by the fourteen persons, of whom eleven were members of the managing committee. This sum was never treated as assets of the company; it was simply repaid to the bankers who advanced it. In June 1853, seven years afterwards, this suit was instituted; and it was now asked that this sum might be considered as a part of the assets of the company, and that it might be made good by the members of the managing committee.

A suit of *Apperly v. Page* (1) had been instituted by a shareholder against the provisional directors for an account; but this was compromised in February 1851. The same solicitors acted in that suit as in the present. The individual interest of each of the plaintiffs was very small, though in the aggregate the sum retained was large. John Williams, the plaintiff, and others of the shareholders, had received 10*s.* per share on the deposit paid by them; but G. B. Lennard and others had refused to accept it.

The bill was filed against the parties comprising the provisional committee, and also against those who had sanctioned the repayment of the 9,975*l.* It was afterwards amended; and other members of the committee, who had not acted through-out, and who had not been parties to or

(1) 1 Phill. 779; a.c. 16 Law J. Rep. (n.s.) Chanc. 100, 302.

sanctioned such repayment, had been made parties, in consequence of the requisition made in the answers of the defendants. The bill, however, had been dismissed against William Dabbs and John Thomas Raworth. There were also three additional shareholders, not members of the committee, who had taken additional shares, but had received back their deposits in full. These had not been made parties to the suit.

Mr. R. Palmer, Mr. J. H. Palmer and Mr. H. Smith, for the plaintiffs, referred to—

Clements v. Bowes, 1 Drew. 684; s. c. 22 Law J. Rep. (n.s.) Chanc. 1022; 21 Law J. Rep. (n.s.) Chanc. 306.

Preston v. the Grand Collier Dock Company, 11 Sim. 327; s. c. nom.

Preston v. Guyon, 10 Law J. Rep. (n.s.) Chanc. 73.

Holt's case, 1 Sim. N.S. 389; s. c. 20 Law J. Rep. (n.s.) Chanc. 413.

Apperly v. Page, 1 Phill. 779; s. c. 16 Law J. Rep. (n.s.) Chanc. 100, 302.

Parsons v. Spooner, 5 Hare, 102; s. c. 15 Law J. Rep. (n.s.) Chanc. 155.

The Charitable Corporation v. Sir R. Sutton, 2 Atk. 400.

Mr. Lloyd and Mr. Speed, for Robert Page, John Chevalier Cobbold and John Cobbold, Marion Welstead, James Allen Ransome, and William Porter, cited—

Davidson's case, 3 De Gex & Sm. 21; s. c. 18 Law J. Rep. (n.s.) Chanc. 254.

Carrick's case, 1 Sim. N.S. 505; s. c. 20 Law J. Rep. (n.s.) Chanc. 670.

Perry v. Knott, 4 Beav. 179; s. c. 5 Ibid. 293.

Shipton v. Rawlins, 4 Hare, 623.

Fussell v. Elwin, 7 Ibid. 29; s. c. 18 Law J. Rep. (n.s.) Chanc. 349.

The London Gaslight Company v. Spottiswoode, 14 Beav. 264.

The Grand Trunk Railway v. Brodie, 9 Hare, 823; s. c. 22 Law J. Rep. (n.s.) Chanc. 514; 3 De Gex, M. & G. 146.

Goode v. West, 9 Hare, 378; s. c. 21 Law J. Rep. (n.s.) Chanc. 127.

Williams v. Salmond, 2 Kay & J. 463.

Sibson v. Edgworth, 2 De Gex & Sm. 73.

Mr. Selwyn, Mr. Freeling and Mr. Osborne, for the executors of Mr. Lindsay, cited—

Evans v. Stokes, 1 Keen, 24; s. c. 5 Law J. Rep. (n.s.) Chanc. 129.

Mr. Follett, for John Wood Sharman.

Mr. Roxburgh, for Philadelphus Jeyes.

Mr. Elderton, for the personal representatives of T. B. Hewlett.

Mr. Bagshawe and Mr. J. H. Humphreys, for Mr. Bradley.

Mr. Jessel, for Thomas Elgood.

Mr. Osler, for Harriet Gee, executrix of W. Gee.

Mr. Villiers, for J. M. Cottle.

Mr. R. Palmer, in reply, referred to—

Harrison v. Brown, 5 De Gex & Sm. 728.

Besley's case, 3 Ibid. 224; s. c. 19 Law J. Rep. (n.s.) Chanc. 362; 2 Mac. & G. 176.

Maitland's case, 4 De Gex, M. & G. 769; s. c. 23 Law J. Rep. (n.s.) Chanc. 140.

Bright v. Hutton, 3 H.L. Cas. 341.

Lautour v. Holcombe, 10 Beav. 256.

Dixon v. Gayfere, 17 Ibid. 421; s. c. 23 Law J. Rep. (n.s.) Chanc. 60.

Macbride v. Lindsay, 9 Hare, 574; s. c. 22 Law J. Rep. (n.s.) Chanc. 165.

Jan. 20.—THE MASTER OF THE ROLLS.
—The defendants dispute the plaintiffs' right to an account under any circumstances. If they fail in that, then they contend that the time which has elapsed is a bar to any relief to be afforded in this suit. If they fail in that also, then they allege that the constitution of the suit and the absence of material parties are insuperable obstacles in the way of the plaintiffs' demand. I will first consider the question which arises as against the defendants, who were avowedly members of the managing committee, and who have already sanctioned and now defend the transaction in question. If no case can be made against them it will be unnecessary to consider the case of the other defendants; but if the plaintiffs are entitled to

relief against any of these defendants, it will be necessary to consider the cases of the other defendants individually, as points of difference occur between them. With respect to the first class of defendants, regarding the case solely on the merits, and apart from any objections which may arise from the form of the suit or from lapse of time, I have not from the commencement entertained the slightest doubt. The managing committee of a projected railway company are, as well as the directors of the company after its formation, not mere agents of the shareholders, but trustees, and liable to account as such. The trust, no doubt, is peculiar; but such as it is they have undertaken to discharge the duties, and they must be responsible, as such, for the performance of them. All principle and all authority point one way. I should waste public time in enunciating and enforcing elementary principles if I were to enlarge on this subject. Still the nature of the trust is such, that time, though not a bar by statute, is a very material ingredient in such a transaction. Having regard to the discretion exercised in these cases, a Court of equity would refuse relief to shareholders, and decline to decree such general account against persons who had three or four years before rendered their accounts and divided the money in their hands without meeting with either comment or remonstrance on the part of the shareholders. They might suppose that they had got rid of the whole matter, and might have lost or failed to preserve vouchers and evidence on the subject of their accounts. In such cases all that is favourable ought to be presumed in their favour; but if in the account rendered by them there be any concealment of a material item, or if they suppress an important circumstance affecting that account, it would be difficult to say that three or four, or even more, years of acquiescence in the accounts so rendered would bind the shareholders. Here, if there was no concealment, there was no publicity, since no statement of accounts, to justify the repayment of only 10s. per share, was ever made to any of the shareholders; and the books, if open to their inspection (which I think was the fact), were not so in all cases without difficulty,

and in the case of the plaintiff, G. B. Lenard, application made by him for that purpose was refused. Time alone, therefore, cannot constitute any bar to the plaintiffs' right to an account, whatever might have been the case if the accounts had been rendered, inspected, and not objected to, and no error or defect had been subsequently assigned in respect of them; but such certainly is not the case here. Not only have no accounts been rendered before the institution of this suit, but on the examination of them the sum of 9,975*l.* had not been treated like the other assets of the company, but had been repaid in full to the fourteen shareholders who had subscribed for the additional shares, or to the persons who had supplied them with the money. It does not require the authority of *Clements v. Bowes* to establish that this proceeding can never be sanctioned in any court of equity. To decide that the holders of these additional shares were entitled to be repaid in full the deposits made in respect of them, would be to sanction a direct breach of trust, and an act of gross partiality, unless all the other shareholders are also to be paid in full the deposits advanced by them. To hold it to be a mere colourable subscription, or a nominal taking of shares, and that the money was advanced as a mere loan, in order to comply with the exigencies of the Standing Orders of the House of Lords, would be to lay down that a direct and positive fraud on the House of Lords would be countenanced and upheld as valid in this court; besides which, and in addition to the frauds on the legislature, a direct fraud would be thereby perpetrated on the other shareholders, who were ignorant that this was intended to be a mere loan, and who were assured by the report, that, if they proceeded, this sum would be treated as part of the assets of the company. This remark as to the deception practised on the other shareholders applies not merely to those who attended the meeting of June 1846, but also to those who abstained from attending it, and who may fairly be presumed to have stayed away in consequence of their acquiescence in the resolution which it was probable that the shareholders would adopt, after reading the report which had been circu-

lated among them. I am, therefore, unable to regard this transaction in any other light than that the managing committee have thought fit, with respect to certain shares belonging to certain shareholders, to treat them in a different way to the shares of other shareholders similarly situated, and that they have repaid one class the full amount of their deposits, while to the other they only return one-fifth part of their deposits; and what makes the transaction worse is, that the shareholders so favoured are eleven-fourteenths of the committee. It is, on the whole, a transaction which does not bear stating, and which a Court of equity will strive to repress and to redress. So far, therefore, as the merits are concerned, the plaintiffs are entitled to relief, and time offers no bar to their title. I come now to consider the objections to the suit, which do not consist in the merits of the case. The first is not put so much as an objection, as it is brought forward as a reason why the Court should be astute and vigilant to discover any technical reason to defeat the suit, inasmuch as it is not substantially brought by the plaintiffs for relief, but is instituted for costs by persons other than the plaintiffs, who have already shewn their disposition in the suit of *Apperly v. Page*, and the conduct of the solicitors in that suit, who are the solicitors of the plaintiffs in this suit, is referred to in corroboration of this statement. It is then strongly urged that this Court is bound to protect persons from the injury arising from the stirring up of quarrels and law-suits, and that it ought to repress every tendency to the offence called "barratry," which has been discountenanced by this country from all time, some of the earliest statutes inflicting penalties on the persons found guilty of it (2). On hearing the evidence of what occurred in *Apperly v. Page* and the cross-examination of both the plaintiffs in this case, I think it highly probable that this suit has been encouraged, and probably instigated, by the plaintiffs' attorneys; but I have not, in consequence, considered myself entitled to view this case in any different manner than that in which I should have regarded it had I come to an

opposite conclusion. It is difficult to draw the proper boundary between advice, encouragement and instigation to a client to institute a suit; all these may proceed from an earnest desire to redress the wrongs suffered by a poor and uninfluential person. If the suit be substantially that of the attorney, and the client can neither gain nor lose by it, a very different state of considerations arises; but, on the evidence, this is not such a case, neither can the Court weigh the evidence with regard to any knowledge it may possess of the character of the actors derived from other suits. It is the province of a Court of justice to hold its hand evenly between all persons. It may be difficult when the case arises not to feel influenced by the reflection that the Court is giving property to one who has already a superabundance, and taking it away from one who can ill afford to spare a penny—that it is making a decree in favour of a man of bad character, and against one of the most unimpeachable reputation. But it is the duty of the Court to shut its eyes to all circumstances other than those which belong to and are established in the cause before it; it was a wise provision of our ancestors which, among other advantages, by varying circuits and Judges, prevented as much as possible the cause of an innocent suitor from suffering from the prejudice which might attach to his having unwittingly employed as his attorney a man who had usually been found to conduct discreditable cases. When the Court is unavoidably possessed of the knowledge which results from such experience, it becomes doubly its duty to watch the feelings which arise, and to prevent itself from being led away by what appears to be the impulse of an honest zeal into what, in truth, may really be only the bias of prejudice, and tend to a denial of justice. The case which the Court has to determine is the cause of the plaintiffs and the defendants. Their rights must depend on the facts alleged and proved, and ought not to depend on any extraneous circumstances, which in the opinion of the Court, justly or unjustly, may attach to their legal advisers. On the evidence I am satisfied that this is a suit in which the plaintiffs will be liable for the consequences if they

(2) 3 Edw. 1. c. 28, Westr. 1; 1 Edw. 3. c. 14; 20 Edw. 3. c. 4; 34 Edw. 3. c. 1; 1 Ric. 2. c. 4. and 9.

fail to pay what may be decreed against them, and that they will receive what, if anything, they shall be found entitled to. The amount in question, so far as regards the plaintiffs, is extremely small; so much so, that it will not exceed the sum of 22*l.* 10*s.* in favour of either; but if on such a ground I were to allow the defendants to keep upwards of 9,000*l.* which they had improperly paid or retained to themselves, I should be labouring to establish the doctrine, that provided the amount taken was small, although the number of victims was great, the perpetrators of the fraud would remain secure from any decree. But such a decree would never be followed, even if it were allowed to remain unquestioned. I now come to consider the circumstances arising from the constitution of the suit on which the defendants rely. The objections taken by the defendants may be thus stated:—First, that the bill is defective by reason of the absence of Messrs. Dabbs and Raworth, two of the original defendants on the record, against whom the bill has been dismissed. Secondly, that there has been a misjoinder of the plaintiffs, for that the plaintiff J. Williams has received 10*s.* per share, and therefore cannot complain of that transaction, or dispute the propriety of that payment as in full of all claim on the provisional directors. Thirdly, that this is a suit instituted practically to contest the propriety of the repayment of the 9,975*l.* in full to the fourteen shareholders who took the 3,800 additional shares; that it is a bill by some of the shareholders on behalf of themselves and all the shareholders other than the defendants; that of the fourteen shareholders who subscribed for the 3,800 additional shares, eleven only are represented on this record, and that the remaining three must be treated as plaintiffs; and that this is a bill by three amongst other plaintiffs, who ask that the transaction by which they got paid in full may be annulled, and consequently they ought to be made defendants, having an interest adverse to that of the other plaintiffs. In support of the first it is urged, that although the plaintiffs might possibly have sustained their suit without making Messrs. Dabbs and Raworth parties, yet that having elected to do so, they must

keep them or their representatives on the record, upon the principle of *The London Gas-light Company v. Spottiswoode*, namely, that if a plaintiff elects to proceed against all the trustees, he cannot afterwards waive his relief as regards one or more, and proceed solely against the remainder. This principle has no application to the present case. If Mr. Dabbs and Mr. Raworth had acted throughout as members of the provisional committee, and had made or sanctioned the retention and payment of the 9,975*l.*, the argument would be well founded and the objection valid; but if, as appears on the evidence, these defendants did not so act, their interest was rather with the plaintiffs than with the defendants, and no liability to account existed as against them, then the bill was properly dismissed as against them by the plaintiffs, and the other defendants cannot complain. Upon this view an endeavour was made to establish the impropriety of their dismissal, on the ground that their liability to account as provisional directors could not now be disputed, inasmuch as the bill had alleged that liability to account, that the bill was verified by affidavit, and that the fact so alleged and verified had been admitted to be true by the defendants other than the two in question, and that therefore it was not competent for the plaintiffs now to allege the contrary. But in a matter not expressly put in issue between Mr. Lloyd's clients and the plaintiffs, those defendants are not entitled to say that the plaintiffs are estopped from relying on the facts as they appear in evidence, as to a matter which is in issue between the plaintiffs and the other defendants, the more especially as the argument is used, not for the purpose of giving them any rights against those other defendants, but for the purpose of supporting a technical objection to the relief to which the plaintiffs would be otherwise entitled. The second objection, as to the misjoinder of the plaintiffs, is answered by the case of *Clements v. Bowes*, which is neither affected nor weakened by *Williams v. Salmond*. It was a suit instituted by one of the share or scripholders of the Hull and Lincoln Railway Company, on behalf of himself and all other shareholders other than the defendants, against the finance committee of the company, pray-

ing an account of their receipts and payments on behalf of the company. The bill stated the promotion of the scheme and its registration, with 25,000 shares of 20*l.* each, and a deposit of 2*l.* 2*s.* per share. The plaintiffs took and paid deposits on 500 shares. On the 4th of February 1846, 26,250*l.* was deposited with the Accountant General, in conformity with the Standing Orders of the House. The bill was thrown out, and the project abandoned. The finance committee managed all the affairs of the company, sent an account to each shareholder, and offered a return of 17*s.* 6*d.* per share. The defendants, by their answer, accounted for the whole of the deposits, with the exception of thirteen sums of 210*l.* each, which they stated were a loan by thirteen shareholders, made for the purpose of complying with the Standing Orders of the Houses of Parliament; and which were subsequently repaid in full. Kindersley, V.C. held, that these sums must be treated as assets of the company, to be distributed *pro rata* with the other funds, and that the thirteen shareholders were not entitled to receive these payments back in full. He held, first, that the circumstance that the plaintiffs might have applied under the Winding-up Acts was no objection to that suit; secondly, that the 15 & 16 Vict. c. 86. s. 49, removed any defect which might previously have existed with respect to the misjoinder; thirdly, that the persons comprising the committee of management were not necessary parties to that suit; and, fourthly, that the fact that 17*s.* 6*d.* had been paid and received on behalf of their shares by many of the shareholders did not give them an adverse interest to the plaintiffs or the rest of the shareholders; and he made a decree for an account accordingly, declaring that the defendants were entitled to credit for 17*s.* 6*d.* a share paid by them. That case bears a striking affinity to this suit, with this exception, that the third objection for want of parties was not taken, and did not arise. This decision is in strict accordance with the principles of equity, and it is not disputed by Wood, V.C. in *Williams v. Salmond*, which was a bill filed by the plaintiff on behalf of himself and all other the holders of scrip or shares in the Boston, Newark and Sheffield Railway

Company, which failed. The subscribers' agreement provided that a deposit of 2*l.* 12*s.* 6*d.* should be paid on each share taken, and that, whether the act should be obtained or not, each of the subscribers should, out of the deposit monies, indemnify the trustees against all losses and expenses then and thereafter to be incurred. The company failed; the trustees returned three instalments to the shareholders, amounting altogether to 1*l.* 14*s.* per share. The plaintiff and other shareholders accepted the two first instalments, amounting to 1*l.* 12*s.* 6*d.*, but refused to accept the final instalment of 1*s.* 6*d.* The plaintiff filed his bill for a common account, not alleging any misconduct or error in the accounts. Wood, V.C. held, that—since the directors were entitled to indemnity out of the deposits, and as the result of opening the account might be that the plaintiff and persons similarly circumstanced had received more than they were entitled to, and that they might, therefore, have to refund,—therefore, in that event, the persons in the situation of the plaintiff, on whose behalf he was suing, and who represented 7,000 shares, must be made parties personally; he also held, that the plaintiff had no merits, and dismissed the bill, with costs. On appeal, the defendants having offered to repay the plaintiff his instalments in full, without prejudice to the question of costs, which was to be left to the Court, the Lords Justices expressed no opinion on the right to the account, and awarded to the defendants 300*l.* in respect of costs of the suit from the plaintiff. The distinctions between that case and the present are obvious. In the first place, there is an absence of allegation of any gross case of misconduct or partiality against the defendants; in the second place, no accounts at all have been rendered; and, thirdly, no such indemnity clause exists in the subscription contract. In the present case it is merely a covenant, on the part of the persons subscribing the contract, that in case the application to parliament shall fail, they will discharge all the expenses incurred or to be incurred, rateably, in proportion to the sums subscribed by them respectively. *The Grand Trunk Railway Company v. Brodie* was a bill by one shareholder on behalf of him-

self and the others, except the defendants, who were the provisional directors, and the secretary, not only for a general account, but to recover certain specific monies alleged to have been abstracted from the funds of the company by the fraud or negligence of the defendants. The company failed in 1846. The bill was filed on the 23rd of December in that year; a first instalment of 1*l.* 1*s.* per share, and a second instalment of 2*s.* 6*d.* per share, were paid. The shareholders who received the last instalment signed a memorandum, undertaking to sign a release to the directors when called upon to do so. Turner, V.C. held, that this was a new contract, and that if a case of fraud were established, the persons who signed that memorandum were entitled to elect whether they would abide by that transaction or set it aside; and if set aside, it must be set aside wholly, and not partially, merely to the extent of the money not received. He also held, that the plaintiff could not exercise his option on behalf of absent persons, and that he, therefore, could not sue on their behalf, and that the objection was not covered by the 11 & 12 Vict. c. 45. s. 35. The Court also held, that the suit wholly failed on the merits, and that the fraud and negligence alleged were disproved, and accordingly the bill was dismissed with costs. The bill in that case was originally filed by the former solicitor of the company, who had indemnified the plaintiff against costs; it does not affect this question. In that case the company was in a course of liquidation under the Winding-up Acts, and the official manager had adopted and continued the suit. It was held, that he stood in the same situation as the original plaintiff, and he was ordered to pay the costs of the suit. In that case the fraud and negligence alleged, and on which the prayer for relief was founded, were disproved at the hearing. In the present case the undue retention and payment is admitted, and attempted to be justified. In that case also the shareholders who had received the instalments had accepted them in full, and had entered into an undertaking to release the directors from all further claims and liability, which circumstance is also wanting in this case. These cases are consistent and uniform; and although I should be

disposed to hold that the shareholders could not institute such a suit as the present after an account rendered, all matters disclosed, no fraud proved, and no objection taken for any considerable time, and that in such a case the Court would not allow the plaintiff to remedy any defect of parties, the case is very different where a substantial case of improper retention of monies is established against the defendants. The third objection, that the three other shareholders who have been favoured by having their deposits returned in full are not before the Court, and are not represented by the plaintiffs nor by the defendants, is a more serious objection in the plaintiffs' way than the other two. If this had been a mere bill for an account, not alleging or proving any instance of improper conduct on the part of the provisional committee in the management of the funds of the projected company, the plaintiffs would certainly have represented all the shareholders except those against whom the account was sought; but in that case I doubt much whether, having regard to the peculiar nature of the business, the time which has elapsed, and the authorities, I should have granted any relief at all; but this is a case where, besides seeking the general account against the managing body, the plaintiffs have established a case of express and intentional partiality in favour of three other persons, not being members of the managing body. The managing body cannot represent those three, because they are not liable to account as trustees or otherwise, in respect of which principally the defendants to this suit are made defendants; and on this part of the case the interests of the three are identical with those of the plaintiffs. But the plaintiffs cannot represent them, for their interests are adverse in other respects, inasmuch as the principal ground of complaint, and that which mainly influences the Court in giving any relief, is a matter in respect of which an undue payment has been made to these very three persons, and in respect of which also they will probably have to refund. This objection did not arise in *Clements v. Bowes*. The objection is insuperable; it is impossible to treat this as a bill by the three as co-plaintiffs, complaining of an

act by which they are gainers at the expense of their co-plaintiffs, and between whom and their co-plaintiffs there is in this respect a direct conflict of interest. I must therefore allow the objection as to the absence of these three persons; but I shall allow the cause to stand over, with liberty to the plaintiffs to amend, by making these three persons or their representatives parties. If on receiving notice of these proceedings they will take copies of the evidence, and appear and argue the case as if they had originally been made parties, it may save some expense; but they may have a defence which does not appear on the proceedings, and therefore may be advised not to adopt this course. It is this consideration that induces me not to direct them to be merely served with a copy of the decree, and to give liberty to attend the taking of the accounts. This further expense may be avoided if the plaintiffs will confine the relief they ask to the repayment of the 9,975*l.*, and the distribution of that sum amongst the shareholders; but this very suggestion shews the impossibility of dealing with the case in the absence of the three, who will in that case have to refund. Hitherto I have made no distinction between any of the classes of defendants, but a material distinction exists between them. My observations have hitherto been directed towards those defendants who acted as members of the provisional committee throughout, and made or sanctioned the retention or payment in question. With respect to the others, it is unnecessary to go through the detail of their greater or lesser participation in the affairs and management of the company. Some of them were never provisional directors, and others acted for a very short time, and withdrew before the project was matured or its extent finally settled; none of them were directors or members of the committee at the time of the transaction in question, or sanctioned the proceeding complained of, or the retention of the money advanced to comply with the Standing Orders of the House of Lords. Against all these defendants the bill must be dismissed, and the plaintiffs must pay their costs. The plaintiffs ought, before making these persons

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parties to the suit, to have carefully ascertained how, and to what extent, each of them acted; nor was this a matter of any difficulty, as all the evidence on which either side relies, and indeed all the evidence on the subject is consistent with and confirmatory of the entries in the minute-books of the company, to which the plaintiffs might have obtained access certainly immediately after the institution of the suit, and at any time they thought fit. The plaintiff J. Williams inspected the books and accounts as he pleased; and although the other plaintiff was refused to be allowed to examine the accounts on his personal application, it does not appear that he ever applied in writing, or in any formal manner, for leave to inspect the books of the company; nor does it appear probable, from the evidence, that if he had done so he would have been refused. The bill will therefore be dismissed, with costs, as against these defendants; and as regards the other three defendants, the cause will stand over, with liberty to the plaintiffs to amend by adding them or their representatives as parties. Liberty to apply will be reserved to all parties, in case, on further considering the small amount in question and the probable expense, the plaintiffs should determine not to prosecute the present proceedings any further.

Mr. R. Palmer.—Many of the parties who had been added by way of amendment, and against whom the bill was dismissed, had been added upon the answer of the original defendants coming in; by the answer they insisted that all persons living who had acted as members of the provisional committee, and the representatives of such as were dead, were necessary parties to the suit, and they required such persons to be made parties accordingly.

THE MASTER OF THE ROLLS.—I do not consider a plaintiff is justified in making a person a party to a suit because the defendant insists upon it. I shall make a decree in the terms I have mentioned.

FULL COURT
OF
APPEAL.
March 10 ;
April 21, 28 ;
May 8. }

VINEY v. CHAPLIN.

Vendor and Purchaser — Execution of Conveyance — Payment of Purchase-Money.

Where a purchaser requires the deed of conveyance to him to be executed by the vendor in the presence of, and to be attested by, his (the purchaser's) solicitor, that requisition ought not to be refused unless there are special circumstances justifying the refusal.

The possession by the vendor's solicitor of the executed conveyance, with the signed receipt for the consideration money indorsed, is not in itself an authority to the solicitor to receive the purchase-money.

Although a purchaser has not a right in every case to insist upon the vendor being present when the purchase-money is paid, the vendor is not entitled to refuse compliance with a request of this description when circumstances arise which are sufficient to justify it.

This was a suit instituted for the purpose of enforcing specific performance of a contract for sale of certain freehold property at Gravesend, and to restrain the vendor from proceeding in an action commenced against the plaintiffs, the purchasers, for the purchase-money. The contract was dated the 15th of October 1857, and was signed by the defendant, John Chaplin, and was indorsed upon certain printed particulars and conditions of sale, subject to which the contract was made. The third of these conditions provided for the payment of the purchase-money to the vendor at the office of his solicitor. The plaintiff James Viney entered into the contract on behalf of himself and William Giles, they being jointly interested in the purchase. Mr. Steele, who acted as the vendor's solicitor, delivered to the plaintiff Viney an abstract of the title, from which it appeared that Chaplin was mortgagee in fee with power of sale, the mortgage being made to him as sole acting executor and trustee of James Harmer, deceased. Before accepting

the title, the plaintiffs discovered a registered judgment affecting the property, and which had been entered up by George Carew for 521*l.* 2*s.* and costs, and their solicitors, on the 22nd of October 1857, required that the judgment should be satisfied. It was subsequently arranged that this judgment should be purchased for 100*l.*, of which 50*l.* was to be contributed by Mr. Steele and the remaining 50*l.* by the plaintiffs, and that the property should be released from the judgment. On the 19th of December 1857, Mr. Steele sent to the plaintiffs' solicitors, for their approval, a draft of the assignment of the judgment to Mr. Steele, and this was approved of. Shortly afterwards, the plaintiffs accepted the title on the terms of these arrangements, and on the 24th of December they submitted the draft conveyance, to which Steele was a party in respect of the judgment, for the approval of Steele, on behalf of himself and Chaplin. These drafts were returned approved by Steele. In consequence of the delay which had occurred with reference to the judgment, Giles had invested his money in consols, and he was unable, in consequence of the transfer books being closed, to sell out the stock when the parties were ready to complete. The plaintiffs' solicitors therefore applied for a delay until the 7th of January 1858; and they sent, on the 31st of December 1857, the engrossments and drafts to Steele for examination. On the 28th of December the plaintiffs' solicitors had in a letter to Steele intimated that they would be obliged by his procuring Chaplin's attendance at the completion of the purchase. On the 1st of January Steele, who had previously declined to allow Chaplin to execute the conveyance in the presence of the plaintiffs and had threatened an action for the purchase-money, wrote to the plaintiffs' solicitors, stating that he had obtained Chaplin's execution of the deeds and would delay taking any steps until after the 7th of January. On the 2nd of January the plaintiffs' solicitors, Messrs. Temple & Windsor, wrote to Steele as follows :—" In five letters to you we have expressed what might have been considered more than a wish to see Mr. Chaplin execute these conveyances. We are unable

then to appreciate the motive for your obtaining Mr. Chaplin's execution without our being present. To prevent misunderstanding at last, we beg to say we require to see Mr. Chaplin re-execute and to pay the purchase-money to him."

Mr. Steele's reply was as follows :—

" Chaplin to Viney.

" Jan. 5th, 1858.

" Dear Sirs,—You are not entitled to see Mr. Chaplin execute the conveyance, and I have in my letters informed you that such will not be permitted. As to your new requisition, that the purchase-money shall be received by him personally, I have also to inform you that it will not be complied with. I must beg you to favour me with a letter by bearer, stating whether or not the appointment for three o'clock on Thursday is to stand, that I may apprise Mr. Carew. In the event of your declining to complete then, and to accept my clerk's attestation to the execution of the conveyances by Mr. Chaplin, and to pay the purchase-moneys to me or my clerk should I be absent, I regret that no course will be left me but to resort to legal proceedings, and beg to be informed in your letter by bearer whether or not you will accept service of process against Mr. Viney."

On the same day the plaintiffs' solicitors offered, by letter, to submit the points in difference to counsel for arbitration. On the 6th of January Mr. Steele, by letter, informed the plaintiffs' solicitors that he had commenced an action in the Court of Exchequer in the name of Chaplin, and that he had sent the writ to Gravesend for personal service on Viney. The conclusion of the letter was as follows :—

" If you will complete to-morrow at the appointed time, I will accept the costs out of pocket of the writ. Previously to issuing the writ I completed with Mr. Carew and executed the conveyances to your clients."

On the 7th of January the plaintiffs and their solicitor attended at Mr. Steele's office to complete the purchases, according to the appointment, and a statement of the sum payable by the plaintiffs was delivered to Mr. Windsor by Mr. Steele's clerk. They were then informed in answer to their inquiry, that Mr. Chaplin was not there. The required amount of

purchase-money, interest and costs (965*l*. 5*s*.) the plaintiffs were ready to pay, and accordingly they went to Chaplin's residence, and remained there for an hour in the expectation of his returning. Upon their leaving they left a message in writing for Chaplin, stating that they had come to tender him the 965*l*. 5*s*. On the following day the plaintiffs called three times at the residence of Chaplin, who refused to see them. Viney then left the following letter for him :—

" London, Jan. 8th, 1858.

" Dear Sir,—I bought four houses from you, and I am willing and desirous of paying the purchase-money to you. I have already had to pay 50*l*. over my purchase-money to make the title good by buying up a judgment. Pray assist me, either by meeting me at Mr. Steele's to-day at any time you may name, or ask Mr. Steele to send the deeds and papers to your house. You will excuse me for saying I prefer paying my purchase-money to you personally. Mr. Steele has issued a writ against me on the 5th or 6th of this month, although he had written, giving me till the 7th to pay. Yours truly,

" J. Viney."

" Mr. Chaplin."

This letter was returned unopened. Other letters passed between the respective solicitors on the 8th and 9th of January, insisting upon their respective views of the vendor's and purchaser's rights on this question. The plaintiffs pleaded to the action, and then filed the bill in this suit against Chaplin and Steele, praying a specific performance of the contract, the plaintiffs being ready and willing, and thereby offering to pay to the defendants the said purchase-money, together with interest thereon; and also praying that the defendants might be restrained from proceeding in the action. On the 11th of February the plaintiffs moved for an injunction before Kindersley, V.C., and his Honour granted it (1).

(1) The following is the Vice Chancellor's judgment :—I am not satisfied that this question could be tried at law. A Court of equity and not of law is the proper forum. The purchaser had a right to say, " I will have the conveyance attested by my own solicitor," though the practice is the other way. He also has a right to pay his money to the vendor

March 10.—*Sir R. Bethell, Mr. Baily, and Mr. G. L. Russell*, on behalf of the defendant, moved to discharge the order of Kindersley, V.C., granting the injunction.

Mr. Glasse and Mr. Druce appeared for the plaintiffs.

At the suggestion of the Court, an order was made by consent, discharging the order for an injunction, and directing the purchase-money and interest to be paid to Mr. Steele for the use of Chaplin, and Mr. Steele to hand over the deeds to the plaintiffs; the order to be without prejudice to any question, and the cause to be brought on for hearing, together with the appeal motion, in Easter term on the question of costs.

April 21.—This cause now came on for hearing, and upon the appeal motion.

Mr. Glasse and Mr. Druce, for the plaintiffs, said that there were three questions involved in the case: first, whether a purchaser was justified in requiring to see the vendor execute the conveyance; secondly, whether a purchaser was, under any circumstances, justified, or could be compelled to pay money to the solicitor without the written authority of the vendor; and, thirdly, whether such could be the case where a purchaser knew that the vendor was in effect a trustee, and, therefore knew that the vendor was not justified in authorizing his solicitor to receive the money, and that the purchaser must bear the consequences of any default on the

personally; it is the simple and natural right, and requires no case or authority to support it; but authority is required the other way. Even in a payment under a power of attorney or written authority, and more especially a verbal one, there is a risk. If the vendor were to die, and the executors to find no account of the money, they might bring an action for it, and the purchaser would then have to prove his authority to pay to the attorney. If a power of attorney compelled a debtor to pay to the attorney, then the attorney would have a right of action himself in his own name. A debtor has a right to say, "I will pay to my creditor and to no one else;" and I should require authority to shew me that that which is the common rule of nature is not the rule of law. The law is plain, subject to what may exist in special cases. A creditor has no right to insist that the money shall be paid to his attorney or to any one else. Under these circumstances, the action must be restrained, and the injunction granted.

part of the solicitor. Upon the first question they contended that in feoffments the purchaser was entitled to the presence of the vendor on the land to deliver seisin; that if the conveyance were not executed in the presence of the purchaser's solicitor or his clerk, the purchaser might hereafter have considerable difficulties in proving the execution; and that the purchaser could not be protected against forgery—*Harman v. Johnson* (2), *Ghest v. Waller* (3), *Ryle v. Haggie* (4), *Lord St. Leonards' Handy Book*, 86. Upon the second point they contended that the object of the purchaser was to have some evidence of the authority having been really given, and in the present case the series of verbal messages sent by Mr. Chaplin could not be required to be made a link in the purchaser's title. Upon this, and also on the third point, they cited—

Dart's Vendors and Purchasers, 3rd ed. 428, 429.

Lord St. Leonards' Vend. and Pur. 549.

Hope v. Liddell, 21 Beav. 183.

Rowntree v. Jacob, 2 Taunt. 141.

Waugh v. Wyche, 2 Drew. 318; s. c.

23 Law J. Rep. (N.S.) Chanc. 833.

Rowland v. Witherden, 3 Mac. & G.

568; s. c. 21 Law J. Rep. (N.S.)

Chanc. 480.

Hughes v. Norris, 9 Hare, 636; s. c.

21 Law J. Rep. (N.S.) Chanc. 761.

Stratton v. Rastall, 2 Term Rep. 366.

Wilkinson v. Candlish, 5 Exch. Rep.

91; s. c. 19 Law J. Rep. (N.S.)

Exch. 166.

Re Fryer, 3 Kay & J. 317; s. c. 26

Law J. Rep. (N.S.) Chanc. 398.

Webb v. Ledsam, 1 Kay & J. 385.

Sir R. Bethell, Mr. Baily and Mr. G. L. Russell, for the defendants, said, that in this case there were two points of great professional importance, and that the costs were to be arrived at by the decision of these two abstract propositions. It had been contended, first, that a purchaser may require that the vendor should execute the conveyance in the presence of a person deputed by the purchaser to attend

(2) 21 Law Times, 89; s. c. 22 Law J. Rep. (N.S.) Q.B. 297.

(3) 9 Beav. 497.

(4) 1 Jac. & W. 234.

the execution; and, secondly, that the vendor in this case being a trustee, the money must be paid into his own personal hand, and cannot safely be paid by the purchaser to any other person. As to the first proposition, if carried into effect, the inconvenience would be monstrous. The conveying parties might be fourteen or fifteen in number, and if the theory of the purchaser being allowed to see the execution were recognised, the purchaser might require all the persons to come to the particular place at which it was provided the purchase should be completed. If it were laid down that purchasers' solicitors might require any particular things to be done, the responsibility would rest upon them in case of their omission in any one of them, from which loss might arise. This was illustrated by the special conditions of sale which were now adopted, and which shewed that there was a constant warfare between these principles and the conveyancers. This rendered it undesirable to lay down any such abstract proposition as that contended for by the plaintiffs—*Borradaile v. Smart* (5). As to the second proposition, it was inapplicable to this case, there being nothing to justify the requisition. Mr. Chaplin did not stand in the position of a trustee; the mortgage was to himself, and the money was part of the ordinary assets of Harmer. The loose manner in which the words "trust" and "trustee" were used, proved a fertile source of inconvenience. But if it were conceded that Chaplin was a trustee, the plaintiffs over and over again received intimation that the matter was in Steele's hands, and they never requested that Chaplin should sign a request to pay the money to Mr. Steele.

Mr. Glasse, in reply.—Mr. Chaplin was a trustee, as the debts, &c. of the testator were all paid—*Phillipo v. Munnings* (6).

May 8.—The LORD CHANCELLOR.—I cannot proceed to deliver my opinion upon the question we are called upon to determine without expressing my deep regret at the amount of litigation which has taken place, and the consequent expense which has been unnecessarily and, I am com-

pelled to add, vexatiously occasioned to the parties. The purchase-money having been paid on an understanding that it was not to prejudice the right to have the judgment of the Court, the parties are entitled to our decision, upon which, so far as they are concerned, nothing but the question of costs now remains. With respect to the defendant Chaplin, he has ceased to be interested even to this extent, for we have received his solicitor's assurance that no demand for costs is intended to be made upon him. The questions we are called upon to decide are, whether a purchaser has a right to insist upon having a conveyance attested by a solicitor or by a witness of his own selection; and whether he has also a right to require that the money shall be paid to the vendor personally. Upon these questions, as to which the Court was strongly pressed, at one period of the argument, to give an opinion in the abstract, there is very little in the way of authority to be found. The reason of this is obvious; sales and purchases are generally conducted with mutual confidence. Each party is anxious for the completion of the transaction, and therefore unwilling to introduce any unnecessary obstacle and, in general, no necessity exists for any unusual precautions. Under ordinary circumstances, therefore, the purchaser's solicitor has no hesitation in accepting the conveyance, though he has not witnessed its execution, or in permitting his client to pay the purchase-money to the solicitor of the vendor. But supposing circumstances should arise in which the purchaser may feel that he ought to be armed with the most complete proof of the transaction, is he entitled to make himself perfectly secure both as to the execution of the conveyance and as to the receipt of the purchase-money? It is quite clear that if a purchaser pays his purchase-money to a person not authorized to receive it, he is liable to pay it over again; and it may, I think, be considered as established, that the possession of the executed conveyance, with the signed receipt for the consideration money indorsed, is not, in itself, an authority to the solicitor of the vendor to receive the purchase-money. The difficulty is to see how the purchaser can be safe at all times from the danger of paying

(5) 5 Weekly Rep. 270.

(6) 2 Myl. & Cr. 309.

his money to an unauthorized person without the vendor being present, or having expressly given to the purchaser, or his solicitor, authority to pay it in a particular manner. The text-books speak of a written authority, but how can the purchaser be sure that it is genuine? At all events, it may impose upon him a difficulty in the way of proof, which he may have a right to object to. It becomes, as it was said in the argument, a link in his chain of title which may hereafter embarrass him, and which, it may be said, the vendor ought not to be permitted to force upon him. On the other hand, many occasions may be suggested in which it would be most unreasonable for the purchaser to require the presence of a vendor or of several vendors dispersed in various parts of the country, and when he may have been taken to have waived the right to the vendor's attendance by the conditions of sale, and especially so in a negotiation on behalf of a person who is not resident in this country. If the Court were to lay down a rule that the purchaser, under all circumstances, has this right, it might, in many cases, afford a purchaser a means of escaping from his contract on account of non-compliance with the requisition on which his title is to rest, or might be a ground for a bill for specific performance. These are some of the difficulties with which the subject is embarrassed on the one side and on the other, and which make me very unwilling to decide any abstract question with relation to it. It will be sufficient in this case to say, that if a purchaser has not a right in every case to insist upon the vendor being present when the purchase-money is paid, neither is the vendor entitled to refuse compliance with a request of this description, when circumstances arise which are sufficient to justify it. It is not likely, in ordinary transactions between a vendor and purchaser, that the attendance of the vendor will be vexatiously required, and I think that the purchaser ought to have the right reserved, to be used whenever the proper occasion for its exercise arises. Was it, then, reasonable or proper, in this case, that the purchaser's solicitor should insist upon Mr. Chaplin executing the conveyance in his presence, and upon the condition of

his receiving the purchase-money? I lay no stress upon the condition in the contract, that the purchase-money was to be paid to the vendor at the office of Mr. Steele, his solicitor; nor is it necessary to consider whether Mr. Chaplin was or was not a trustee, although the cases shew that, where there is a trustee, a purchaser may incur considerable risk in paying to the solicitor of the trustee; but this is a question of degree. What I rely upon is, the conduct of the vendor and his solicitor throughout the transaction, which, in my opinion, was sufficient to raise in the mind of the purchaser's solicitor an impression that more than the ordinary precaution was necessary to be taken, and to justify him in seeing the vendor and insisting upon his taking a personal part in the completion of the purchase. The protest and refusal of the vendor's solicitor to allow him to execute the conveyance in the presence of the purchaser's solicitor, with an intimation of his intention to bring an action for the purchase-money, was unnecessary and unreasonable. The requisition that the purchase-money should be paid to Mr. Steele or his clerk, was one which he certainly was not warranted in making; and the action, brought hastily and vexatiously, placed the parties in a position of hostility, which was not justified on the part of the vendor's solicitor; and all this, followed up, as it was, by the determination of the vendor to refuse all access, and to oppose every endeavour to tender the purchase-money, justified the purchaser's solicitor in refusing to act upon the messages received through various persons that he was to pay the money to Mr. Steele, and in determining that he had no sufficient authority which, under all the circumstances, it would be safe and proper for him to rely upon. I think, therefore, that the action in the Court of Exchequer was commenced without any necessity and without any justification, and that it ought to be restrained; that the injunction as prayed must be granted; and that the defendant Mr. Chaplin must pay all the costs, both at law and in equity.

LORD JUSTICE KNIGHT BRUCE.—It is not necessary, for any purposes of this cause, to recognize or to deny the existence of any general rule applicable to the

completion of purchases of real estate such as that, or either of those asserted by the plaintiffs, and contended against by their opponents. The particular facts in the present case rendered the action brought in Mr. Chaplin's name plainly unjustifiable, in my opinion,—unjustifiable, I mean, in equity, — whether maintainable or not maintainable at law; and there were in my judgment good grounds for filing the bill. The line of conduct which, previously to it and previously to the action, Mr. Steele thought fit to pursue gave Mr. Viney and Mr. Giles, as I conceive, very clearly a right,—even if otherwise, if independently of special circumstances, they would not have had the right—to require more proof of Mr. Chaplin's execution of the conveyance than, before the filing of the bill, had been offered, and to see that at that time neither Mr. Viney nor Mr. Giles was in default as to the whole or any part of the purchase-money. Perhaps the greater part of Mr. Steele's letter of the 5th of January, the day of commencing, or the day before commencing the action, was not in any sense justifiable. But however this may have been, the expression "or my clerk, should I be absent," was plainly not so. It is, in my opinion, much to be regretted that he wrote that letter, and that a subsequent letter to Mr. Chaplin was returned by Mr. Chaplin unopened. But these gentlemen were not alone arbitrary towards the purchasers and their solicitors; they were that and something more. I think that the costs of litigation here, and a portion at least, if not all, of those at law, should be paid by Mr. Chaplin, and that Mr. Steele should neither pay nor receive costs.

LORD JUSTICE TURNER.—I also think that the vendor must pay the costs of the suit and of the action. Before this bill was filed an offer was made, on the part of the plaintiffs to complete, paying the purchase-money, the costs of action, and interest to the day, if the vendor should attend and receive the purchase-money, and hand over the deeds in exchange. The offer was not accepted; and it must rest with the vendor to shew why it was not accepted. The explanation given is this: that the vendor's solicitor was entitled to receive the purchase-money, either by

virtue of his character of solicitor, or by authority given to him for that purpose. The first of these propositions rests upon a question of law; the second upon a question of fact. As to the first, I take it to be settled that a solicitor is not, by virtue of his office, entitled to receive purchase-moneys, even though he may have possession of the deed of conveyance; and it would be strange if he were, for it is no part of the ordinary duty of a solicitor to receive money belonging to his client, and the deed of conveyance comes into his hands for a wholly different purpose. As to the second proposition, no written authority is produced, or, as it would appear, has ever been given by the vendor. It is said that no such authority was asked for, but I think it was incumbent on the vendor, asserting the authority of his solicitor to receive, to produce that authority. The soundness of the proposition as to the right of the solicitor to receive the purchase-money may be tested thus:—Suppose, after the completion of the purchase and after the purchase-money was paid to the solicitor, the vendor should deny that it had been received by him, and should file a bill in this court claiming a lien on the estate for the unpaid purchase-money, what defence could the purchaser make? The receipt upon the conveyance would be no defence for him; he could not shew that the law authorized the solicitor to receive, and his whole case would depend upon his proving that the solicitor was authorized to receive; a fact which he might have no means of proving. I think, therefore, that the purchaser had the right of insisting either that the vendor should attend and himself receive the purchase-money, or of requiring that there should be a written authority to pay the solicitor; and the vendor not having attended, and no written authority having been produced, I think that he must pay the costs of the suit. Then as to the action, it was brought before the expiration of the time for which the vendor, by his solicitor, had agreed to wait for payment of the purchase-money, and it was evidently brought in consequence of the purchaser having insisted that the vendor should re-execute the deed, and should himself receive the purchase-money. It was brought, therefore, in

breach of an express agreement, and on grounds which, in part at least, were, in my judgment, untenable: I think, therefore, that whether the purchaser was or was not entitled to insist upon the re-execution of the deed, the vendor must pay the costs of it. Under these circumstances it is not necessary for us to decide whether the purchaser was or was not entitled to insist upon the re-execution of the deed. But I do not hesitate to say that, in my opinion, where the purchaser requires the deed to be executed by the vendor and attested by his own solicitor, that requisition ought not to be refused, unless there are special circumstances justifying the refusal. Whether there are special circumstances sufficient to justify refusal, must depend in each case upon the particular facts. In this case I have no doubt. I think that what I have here stated is well supported by the authority of Lord St. Leonards, in what he has said on the subject of mortgages. It was attempted, on the part of the vendor, to distinguish between the case of mortgages and that of purchases, but I think that the distinction is in this respect unfounded.

KINDERSLEY, V.C. } BLAGROVE v. BRAD-
Feb. 1. } SHAW.

Will—Name and Arms Clause—Forfeiture.

A testator devised his estates to trustees in trust for A. B. upon attaining the age of twenty-five, for life, with remainder to the heirs male of his body, and with ultimate remainders over; and he directed that the persons who should severally come into possession, if they should be of the age of twenty-one years, or if under that age then within twelve months after attaining that age, should assume the surname and arms of the testator, they respectively not being of that name; and in case any of such persons should refuse or discontinue to take, assume and use such surname and arms respectively for the space of twelve months after they should severally become entitled, then the estate of any person so offending should, from and after the expiration of the said twelve months, cease and determine, and

should go over to the next person entitled. A. B. upon attaining twenty-one assumed the name and arms of the testator, and came into possession of the estates at twenty-five years of age. Some years afterwards A. B. discontinued to use the required name and arms for above twelve months:—Held, that a forfeiture had taken place, and that the estate determined and went over.

This was a special case brought before the Court for the purpose of raising a question as to the construction of a clause in the will of John Blagrove, dated the 3rd of February 1824, by which he devised certain real estates including property in Jamaica, to trustees, upon trust to raise and pay various annuities therein specified, and subject thereto to pay the rents, issues and profits to his daughter, Eliza Bradshaw, for life, and after her decease to pay the sum of 3,000*l.* per annum to Henry Bradshaw until he should attain the age of twenty-five, with a direction to accumulate the residue: and that when and as soon as the said H. Bradshaw should attain the age of twenty-five years, and not sooner, he should be let into possession of the whole rents and profits of the estates; and the trustees were to stand seised thereof for the benefit of the said H. Bradshaw and his assigns for the term of his natural life; and after his decease, in trust for his first and every other son severally and successively according to their seniorities, in tail male; and in default of issue of the said H. Bradshaw there was a devise over in favour of the sons of the testator's daughters, Isabella Coore and Charlotte Parkyns, and the issue male of such sons. The will then contained the following proviso:—"Provided always, and it is my will and desire, and I do hereby direct that all and every the sons of my said respective daughters, Eliza Bradshaw, Isabella Coore and Charlotte Parkyns, and the issue male of such sons, shall, within the space of twelve calendar months next after they shall severally become entitled in possession unto any of my said plantations, estates, messuages, lands, tenements and hereditaments, under and by virtue of this my will, if they shall severally be of the age of twenty-one years when they shall so re-

spectively become entitled as aforesaid, but if they shall be then under that age, then within twelve calendar months after they shall attain that age, assume and take upon themselves respectively the surname of Blagrove, they respectively not being of that name, and by such name only, and no other, thenceforth shall style and subscribe themselves respectively in all deeds, instruments and writings, and on all other occasions, and also shall and do bear the arms of my family alone, and do and shall apply for and endeavour to obtain an act of parliament or proper licence from the Crown, or take such other means as may be requisite to enable and authorize them respectively to take, use and bear the surname and arms of Blagrove; and in case any of the persons aforesaid shall refuse, decline, neglect or discontinue to take, assume and use such surname and arms respectively, or shall refuse or neglect to endeavour to obtain such act of parliament or licence as aforesaid for that purpose, for the space of twelve calendar months after they shall severally so become entitled as aforesaid, or shall respectively attain the age of twenty-one as aforesaid, then, and so often as the case shall happen, the estate and interest of every such person so offending in the premises, of or in the said plantations, estates, messuages, lands, tenements and hereditaments, shall from and immediately after the expiration of the said space of twelve calendar months cease, determine and be void to all intents and purposes whatsoever, and every the said plantations and estates, messuages, lands, tenements and hereditaments so devised as aforesaid, shall immediately thereupon go to the person or persons who shall then be next in remainder, under or by virtue of the devises and limitations hereinbefore contained, in the same manner as if he or they so offending, being tenant for life or in tail were then actually dead without issue heritable."

The testator died on the 9th of April 1824, leaving the said H. Bradshaw, an infant of five years old, him surviving. Eliza Bradshaw died in May 1839. H. Bradshaw, within twelve months after he had attained the age of twenty-one, obtained the royal licence that he

and his issue might thenceforth take, use and bear the surname of Blagrove in lieu of that of Bradshaw, and that he and they might bear the surname of Blagrove only. He attained the age of twenty-five in November 1844, when he was let into possession of the rents and profits of the estates devised by the will. He continued to use the name and arms of Blagrove until November 1856, when by virtue of royal licence he resumed the surname of Bradshaw, and had ever since continued to use that name and to bear the arms of Bradshaw alone, instead of the name and arms of Blagrove. He had no male issue; and the estates devised by the will were now claimed by the plaintiff, Henry John Blagrove, who was the infant son of another of the testator's grandsons, who had during his life assumed and borne the surname and arms of Blagrove, and who died in March 1854.

The question was now argued, whether a forfeiture had been committed by Henry Bradshaw (formerly Blagrove) under the name and arms clause in the above will.

Mr. Glasse and *Mr. Nalder* appeared for the plaintiff, and contended that a forfeiture of the estates had been committed by H. Bradshaw.

Mr. Baily and *Mr. Berkeley*, for the defendant, H. Bradshaw, submitted that the rule was, that a clause purporting to divest an estate must be clear and specific, and must be construed strictly. The terms of this clause were by no means certain, and to bring the case within it, the discontinuance to use the name and arms of Blagrove must take place within twelve months after the tenant should come into possession—*Doe d. Luscombe v. Yates* (1).

KINDERSLEY, V.C.—I feel no doubt about the meaning of this clause, although at first it might appear doubtful, and I confess that, in framing such a clause, I should not express it in the same terms. The rule is, that where there is a clear and specific devise, whether for life or not, any clause purporting to divest the estate so given must be construed with great strictness; and unless the Court is

(1) 5 B. & Ald. 544; s. c. 1 Dowl. & Ry. 187.

satisfied that the precise terms of the contingency are fulfilled, the clause cannot have the effect of divesting the estate. It does not appear to me that there is any reasonable doubt in this case as to the effect of the words used. The estate was given, after certain limitations, to the son of Eliza Bradshaw for his life, with limitations over to the heirs male of his body, and with ultimate limitations to the sons of the two daughters of the testator and their issue in strict settlement. The person who was first entitled to a life estate was H. Bradshaw; and the question is, whether the estate, which was clearly vested in him, has become divested under the terms of the name and arms clause in the will.—[His Honour then read the clause.]—The first question is, whether H. Bradshaw comes within the description of the person mentioned in the directing part of the clause? Now, in describing the persons to whom it is to apply, the testator describes them as the sons of his daughters Eliza Bradshaw, Isabella Coore and Charlotte Parkyns, and their issue male, and they are required, supposing they are of age, to assume and take upon themselves respectively the surname of Blagrove only, within twelve months next after they shall severally become entitled in possession. Then, when he comes to the gift over, the direction is, "that in case any of the persons aforesaid"—that is, all the sons of his daughters and their issue, whether they bear the name of Blagrove or not,—“shall refuse, decline, neglect or discontinue to take, assume and use such surname and arms.” The fair construction, therefore, appears to me to be, that the persons to whom the directing part of the clause applies are those to whom the divesting portion of the clause is intended to apply; that is, to all the sons of the daughters and their issue. It appears that H. Bradshaw had, upon attaining the age of twenty-one, and before he came into possession of the estates, assumed the name and arms of Blagrove; so that when he came into possession he was then bearing the name and arms, and of course did nothing further for the purpose of assuming them. The next question is, whether, according to the terms of the gift over, in the event of discontinuance, such gift over

can take effect unless the discontinuance should take place within twelve months next after the party came into possession. It appears to me that there can be no reasonable doubt as to the language, although by ingenuity it certainly might be rendered doubtful. Now, suppose the testator had not used the word “next” when he spoke of assuming *de novo* the name and arms, still, it could only mean next after; but when he comes to the discontinuance, he uses the words “for the space of twelve calendar months after” such discontinuance, meaning the words to apply indiscriminately to the refusal and discontinuance for any twelve months. In the first instance, the testator directs the person coming into possession to take and assume the name and arms within twelve months next after he shall come into possession; but when he speaks of the case of his not being of age, then he does not use the word “next,” as it would have been unnecessary. And when he comes to the clause of discontinuance he again omits the word “next,” shewing that it was to apply, as it might be necessary, to any twelve months, and any other construction would make the restriction not correlative with the direction. I think, therefore, that it is consistent with the legitimate use of language, to hold that the estate ceased and determined upon the expiration of the twelve months after H. Bradshaw had ceased to use the name and arms of Blagrove.

M.R. }
Feb. 20. } MACLAREN v. STANTON.

Devise—Use and Enjoyment of House—Child—Ceasing to occupy—Gift over.

A testator devised a house and premises to trustees upon trust to offer the use and enjoyment of them to the eldest of his children, for the time being, rent free, so long as he or she should please; but on refusal, death, or ceasing to occupy, the offer was to be made to the eldest of his other children in succession, and on the refusal, death, or ceasing to occupy of all the children, then upon other trusts:—Held, that a personal occupation was intended; that occasional residence would be sufficient if

the house was kept furnished, and in the occupation of a servant, but that the premises could not be let.

Henry Stainton, by his will, dated the 12th of December 1846, devised all his heritable or real estates in England, Wales and Scotland, or elsewhere, unto and to the use of his son Henry Tibbatts Stainton, James Maclaren and Henry Dawson, and their heirs, upon trust that they or other the trustees for the time being should, within three calendar months after his decease, offer the use and enjoyment of the house, garden and field purchased by him of Mr. Holmes, and called Meadow Croft, to the eldest of his children for the time being (other than his son H. T. Stainton), rent free, for so long as he or they should please; and in case of the refusal of such eldest child as aforesaid to accept the same within one calendar month next after the same should be offered to him or her, or in case of his or her death, or ceasing to occupy the same, then and in like manner to offer the same to the next eldest, for the time being, of his said children other than as aforesaid, and so on in succession, according to seniority of age, and subject thereto the trustees were to hold the premises upon other trusts.

The testator died on the 5th of December 1851, leaving seven children. The trustees offered the house and premises to the children according to seniority, and after two refusals the same was accepted by Caroline Mary Stainton.

On the 10th of July 1856 she married the Rev. Charles Sumner Burder, and they went to reside in the Isle of Wight; a servant and a part of the furniture were left in the house, and it was alleged that they occupied the house occasionally when they came into the neighbourhood.

James Joseph Stainton, the next in seniority, was advised that his sister's right to the premises had terminated by her ceasing to occupy the same, and that he was entitled to have the same offered to him.

It was accordingly arranged that he should present a petition to ascertain the opinion of the Court whether this was an occupation within the meaning of the will, whether Mr. and Mrs. Burder were

entitled to retain possession of the premises, and whether by accepting the use and enjoyment of the premises Mrs. Burder could let the premises.

Mr. Lewin, for the petitioner.—The intention of the testator was to provide a residence for the child willing to occupy the premises as a residence. The words "use and enjoyment" could not apply to a mere nominal occupation. Actual residence was made an imperative condition. No gift of the rents and profits could be implied. In *Rabbeth v. Squire* (1) no condition express or implied was held to attach to the words "use and occupation;" but then it was a farm subject to a rent, and also to forfeiture in the event of improper tillage, though there was no direct gift over.

THE MASTER OF THE ROLLS.—Personal occupation had no reference to any given number of days in the year. If Mr. and Mrs. Burder kept the house furnished and occupied by their own servant, it was such an occupation as came within the terms of the will, though they resided there only for a day. The will evidently contemplated an actual personal occupation. If, however, any claim to let the house was raised, he must hear upon what grounds it could be supported.

Mr. Selwyn and *Mr. Kenyon*, for Mrs. Burder.—The words "use and enjoyment" contemplated the most beneficial use of the premises possible, and it was only by Mrs. Burder leaving the premises unoccupied by herself or her tenant that any resulting trust arose.

Mr. Bentinck and *Mr. Appack* appeared for other parties.

THE MASTER OF THE ROLLS.—If the house could be let, a child could not cease to occupy it except by leaving it altogether unoccupied. No child would refuse so beneficial an offer of a house. It was open for Mr. and Mrs. Burder to occupy the house either personally or by their servants, but they could not let the pre-

(1) 19 Beav. 77; s.c. 24 Law J. Rep. (n.s.) Chanc. 203.

mises or any part of them, neither could they make any profit from the occupation.

Shippy, Grey, 1925, 2525.

[IN THE HOUSE OF LORDS.]

1858. } SHAW v. NEALE AND
March 12, 15, 16. } REMNANT.

Mortgage—Registration—Costs.

An attorney has no lien for his costs upon real estate recovered for a client.

An order to tax costs, and a Master's allocatur thereon, cannot be registered as judgments under the 1 & 2 Vict. c. 110; but the rule absolute for payment of what has been found due on the Master's allocatur may be so registered.

Where such a rule has been registered, it takes priority over all mortgages and purchases of a date subsequent to the registration, and within five years from the date of registration, and will retain such priority over them, though not re-registered within five years, under the 2 & 3 Vict. c. 11. But any mortgage or purchase occurring between the end of the five years and the re-registration, will have priority over it.

A mortgage to secure future advances will not operate as a security for costs subsequently incurred.

This was an appeal against a decree of the Master of the Rolls. The real respondent was Remnant. Neale's interest was exhausted by the charges on the estate. The facts are fully stated in the report of the case in the Court below (24 *Law J. Rep.* (N.S.) Chanc. 563). They may be summed up thus:—Neale was a labourer. In 1836 he employed Shaw, an attorney and solicitor, to recover for him an estate, which he claimed as heir, against a will executed by a relative. Shaw obtained a verdict in ejectment, and then took proceedings in Chancery, under which, in August 1837, the title-deeds were brought into court. In February 1838 Neale discharged Shaw, and appointed Remnant in his place. The costs claimed by Shaw were taxed, and in April 1839 he obtained and registered the order to tax, and the Master's allocatur. He could not find Neale to serve this

order on him, and Remnant would not give him any information to assist him in this object. In November 1840 Shaw became able to serve Neale with the allocatur, and in January 1841 obtained against him a rule absolute for payment of the money found due. This rule was registered under the 1 & 2 Vict. c. 110, but was not re-registered according to the 2 & 3 Vict. c. 11. until more than five years had elapsed from the date of its first registration. Remnant obtained mortgage securities from Neale both before and after the date of the registration. One of these securities was not only for money then due, but also for "future advances." Remnant made no advances except a very small weekly allowance to Neale, but he presented some heavy bills of costs. Shaw filed a bill claiming to be declared to have a lien on the estate for what was due to him, and to have priority over the incumbrances granted to Remnant. The cause was heard before the Master of the Rolls, who held that there was no lien for the costs of recovering the estate; that nothing but the rule absolute to pay the costs found due on the allocatur constituted a judgment to be registered under the 1 & 2 Vict. c. 110, and that such registration became void as to all purchases and mortgages on the expiration of five years from its date. The appeal was against the whole of this decree.

Mr. Roll and Mr. Selwyn, for the appellant, cited—

Turwin v. Gibson, 3 Atk. 720.
Barnesley v. Powell, Amb. 102.
Worrall v. Johnson, 2 J. & W. 214.
Lambert v. Buckmaster, 2 B. & C. 616;
s. c. 2 Law J. Rep. K.B. 93.
Wilnot v. Pike, 5 Hare, 14; s. c. 14 Law J. Rep. (N.S.) Chanc. 469.
Gordon v. Graham, 7 Vin. Abr. 52, pl. 16; s. c. 2 Eq. Cas. Abr. 598.
Hickson v. Collis, 1 Jo. & Lat. 94.
Beavan v. Lord Oxford, 6 De Gex, M. & G. 492; s. c. 25 Law J. Rep. (N.S.) Chanc. 299.
Lord St. Leonards' Vend. and Purch. 13th edit. 425.
Freer v. Hesse, 4 De Gex, M. & G. 495; s. c. 22 Law J. Rep. (N.S.) Chanc. 597.

Mr. R. Palmer and Mr. E. K. Karlake,
for the respondents, referred to—

Neale v. Postlethwayte, 1 Q.B. Rep.
243; s. c. 10 Law J. Rep. (n.s.)
Q.B. 134.

Gibbs v. Flight, 22 Law J. Rep. (n.s.)
C.P. 256.

Freer v. Hesse, 17 Jur. 177.

Beere v. Head, 3 Jo. & Lat. 340.

Knox v. Kelly, 1 Dru. & Wal. 542.

Mr. Rolé replied.

March 16. — The LORD CHANCELLOR (Lord Chelmsford) stated the facts of the case, and said that it was impossible to avoid feeling the deepest regret that the recovery of this property had been almost barren of benefit to Neale, and that the case had now become a mere struggle for costs between the two solicitors, between whom it was difficult to apportion the blame. An argument much relied on by the appellant was, that the rule for taxation of costs, and the allocatur made thereon, which were registered in April 1839, constituted a charge upon the estate within the terms of the 18th section of the 1 & 2 Vict. c. 110. That argument could not be supported. The rule for taxation was nothing but an order to the officer of the court to ascertain what was due, and the allocatur was nothing but his report of what was due; but neither of these constituted an order for payment within the terms of the statute, nor was there any such order until the rule for the payment of the costs thus ascertained had been made absolute. That rule was made absolute on the 28th of January 1841, and was registered on the 30th of January, and it was on that registration that the question of the appellant's priority depended.

Mr. Remnant's securities commenced by a warrant of attorney to confess judgment for 500*l.* That was obtained in March 1839; judgment was entered up thereon; an *elegit* issued, and possession of the estate was delivered by the sheriff, either to Remnant or Neale, but at all events Remnant soon afterwards obtained possession and had been in receipt of the rents and profits ever since. In June 1839 a mortgage was given by Neale to Remnant

to secure a sum of 647*l.*, which consisted of the previous 500*l.* and a sum of 147*l.* subsequently incurred, and the mortgage was also intended to secure future advances. On the 16th of April 1840 Remnant obtained another security, as to which it had been contended, on the part of Shaw, that it must be treated as void, because he alleged that it was obtained at a time when Remnant knew that he, Shaw, had an allocatur for costs which he sought to serve on Neale, but was prevented from so doing by Remnant keeping Neale out of the way. There was no doubt that Remnant knew where Neale was to be found, but he was not bound to produce his client for the purpose of being served with a proceeding, which would render him liable to the payment of a sum of money, and his not producing his client under such circumstances would not invalidate any securities which he himself obtained. The last of the securities obtained by Remnant included everything that was due to him, and was dated on the 8th of January 1844, being a mortgage for a sum of 1,796*l.* The other securities of Remnant were of a date prior to January 1841, assuming that to be the date from which Shaw's security was to take effect. But an attempt had been made, on the part of Shaw, to carry his title up to an earlier period. The estate had been recovered for Neale at that earlier period, and it was contended that the costs incurred in its recovery gave Shaw, who recovered it for him, a lien upon the estate, and for that proposition *Barnesley v. Powell* had been cited. That case was hardly to be deemed an authority for such a proposition, which, indeed, seemed contrary to principle, for a lien could only exist upon property in the possession of the party who claimed the lien. Now, a solicitor who recovered an estate for a client, whether it was conveyed to the solicitor or not, was not in possession of the estate. He might be in possession of the papers and might have a lien upon them, but not upon the estate, and might make them available for the purpose of recovering his costs. Then it was said that the Master's allocatur, by the special terms contained in it, directing that on

payment of the sum allowed, or on proper security for such sum being given to Shaw, he, Shaw, should execute an assignment of certain terms, virtually gave Shaw a charge upon the estate at that period, and therefore gave him priority over the securities given to Remnant. But that argument was not well founded, for, in the first place, the Master had no authority to direct that the term which had been assigned to attend the inheritance should stand as a security for the costs found to be due to Shaw, and even if he had possessed such an authority, he had not exercised it. The commencement of Shaw's securities must therefore be dated from the 30th of January 1841, when he registered the rule absolute for the payment of costs. But then arose the question whether Shaw's security was to be dated as a charge on the estate even from that day, for though then registered, it was not re-registered until more than five years had elapsed from that time, and it was contended that for want of re-registration within the five years, it had become void as to other securities on the same estate, and the Master of the Rolls had decided that this security obtained by Shaw was only to have priority from the date of its last re-registration, which was on the 30th of November 1852. This question depended on the 2 & 3 Vict. c. 11. s. 4. His Honour, referring to that statute, and to the 3 & 4 Vict. c. 82, had said, "I think it clear on the construction of these clauses that the previous registrations of this order are to be treated as nothing. It is true that it was under the first statute a valid and subsisting charge when the defendant Remnant advanced his money and obtained his security, but it ceased to be any charge at all when the five years had elapsed, and it became, so far as regards his interests, exactly as if it had been paid off, and the registration again operates only as if a new judgment had been created and a new charge had been put upon the land." With that opinion he (the Lord Chancellor) could not agree. In his opinion the legislature intended to give a registered incumbrancer the benefit of that registration during the five years in which it endured, and to render it a protection to him against any purchasers,

mortgagees or creditors who might become so during the currency of the period of re-registration. And so, with respect to re-registration and *loties quoties* at the end of every five years, when re-registration was required. So that if, after the expiration of the first five years the incumbrancer omitted to re-register, and in the intervening period before his re-registration, a person became a mortgagee or purchaser of the estate, that subsequent re-registration would not prevail against this mortgage or purchase; but this mortgage or purchase would have priority over the incumbrance which the party had failed to re-register within the term, and so advantage would be given to other parties to intervene and obtain the benefit of prior security. There might, no doubt, be difficulties in the way of adopting this construction, and some of them had been pressed on the House in the argument; but the difficulties thus relied on referred to possible cases which had not happened, and when they did would be the proper time to consider how to dispose of them. On the other hand, there were at least equal difficulties on the other side, and it appeared to him impossible for a registered incumbrancer to re-register so as to preserve his priority if the construction contended for by the respondents should be adopted. The construction they were proposing was that which had been adopted, and as he thought properly adopted, in *Beavan v. the Earl of Oxford*, where Lord Cranworth took the same view that he now did of the impossibility of exactly complying with the provisions of the statute. Lord Cranworth certainly there referred to *Hickson v. Collis*, but only as an illustration, and Lord Justice Turner took the same view of the matter that Lord Cranworth had taken; but even without the assistance of these authorities, the construction of this provision seemed to be plain. He was of opinion, therefore, that the security of Mr. Shaw must have priority from the 30th of January 1841, when the rule absolute was first registered, but not from any antecedent time.

The next question was, whether, in redeeming the securities of Remnant, Shaw

must pay off the advances made by Remnant subsequently to that date, but made in respect of a mortgage dated on a prior day. This mortgage was the one dated on the 12th of June 1839, and was given to secure the payment of 647*l.* and "future advances." *Gordon v. Graham* was relied on by Remnant; but, in the first place, that was a questionable authority, and, in the next, the sums claimed were not *bonâ fide* advances, but mere bills of costs, incurred subsequently to the date of the mortgage. They could not be brought into the account by Remnant as against Shaw. The result was, that the decree of the Court below must be reversed and the cause remitted with a declaration as to what the same ought to have been; and as these parties had been both prior and subsequent incumbrancers, there would be redemption and re-redemption between them, but the rules on which they were to proceed he had already stated.

LORD BROUGHAM expressed his entire concurrence with the judgment of his noble and learned friend on the woolsack. There was a case to which he had been referred by Mr. Clark, the learned reporter to the House, decided by their Lordships three years ago, which threw some light on that part of the present case which related to the effect of the Master's *allocatur* as a charge upon land. It was the case of *Lane v. Horlock* (1). There a question was, whether a warrant of attorney to confess judgment brought the case within the provisions of the Usury Act, 2 & 3 Vict. c. 37. Although no direct opinion was given on the point of a warrant of attorney operating as a charge upon land, there could be no doubt that the opinion of his noble and learned friend and himself was that it bore no such character.

LORD CRANWORTH concurred with his noble and learned friends, and was inclined to content himself with that expression of opinion, as the subject had been in reality exhausted by the Lord Chancellor. The main question here was one of general importance, and it was of consequence that it should be generally known to the pro-

fession and the public that it was the distinct opinion of noble and learned Lords in this House, that the Court of Chancery had, in the case of *Beavan v. Lord Oxford*, adopted a right construction of the statute 2 & 3 Vict. c. 11. As to the order to tax, and the *allocatur* thereon, it was preposterous to argue that they were more than proceedings in order to arrive at that which was the ultimate judgment of the Court, namely, that payment should be made. Then, by the 1 & 2 Vict. c. 110, when the rule was made absolute, it acquired the character of a judgment; and when it was registered, as it was in January 1841, it became a charge upon the land. Remnant became a subsequent incumbrancer; and the question was, whether he had or had not priority over Shaw, by reason of Shaw not having re-registered his judgment. That was the question which was decided in *Beavan v. Lord Oxford*, and to the decision which the Full Court of Appeal had pronounced in that case he most completely adhered. Suppose, instead of reading the words as they stood, they were to be read thus:—"That all judgments which are to be registered shall be null and void against lands, tenements, &c. as to purchasers, mortgagees, or creditors after the expiration of five years from the date thereof." It was clear that though that was not the order in which the different members of the sentence occurred, that was what was really meant. The object of the statute was to take care that all persons advancing money should have the means of knowing whether there were prior charges or not; but it never could have meant that, although a person knew there was a prior charge, the mere omission to re-register it within five years should put him in the situation as if he had never known anything about the matter.

LORD WENSLEYDALE was of the same opinion. He entirely concurred with the decision in *Beavan v. the Earl of Oxford*, and he agreed, as to the other points of the case, with what his noble and learned friends had stated.

Decree reversed, and cause remitted, with a declaration.

(1) 5 H.L. Cas. 580; s.c. 25 Law J. Rep. (n.s.) Chanc. 253.

KINDERSLEY, V.C. }
March 5. } HOWARD v. KAY.

Will—Construction—“Monies in the Public Funds”—Long Annuities.

A testator directed his trustees to sell and convert into money all his property, except such portion as consisted of monies in the public funds, and the proceeds thereof to be invested in the public funds:—Held, that the exception included long annuities.

William Kay, the testator in this suit, devised and bequeathed all his real and personal estate and effects whatsoever to trustees upon trust to convert into money all his personal estate (not being monies in the public funds), and to sell all his real and landed estates, and to invest the monies arising from the sale and conversion of his said real and personal estate in their names in some or one of the public funds or in Government or real securities, and to hold the same upon the trusts therein specified.

The testator, at the time of his decease, was possessed of a sum of long annuities, and the question now raised was, whether such long annuities were to be sold and invested in the public funds, or whether they were to remain in their present state of investment. The question was raised upon the petition of a defendant who had become entitled to the income of the estate for life.

Mr. Goldsmid and *Mr. Dickinson* appeared for the tenant for life, and contended that the words “public funds” must include long annuities. The expression “public funds” was only a concise way of including all the Government stocks, funds and securities. A testator would never express each individual stock; and in common conversation every person would consider that the term “public funds” applied to long annuities as well as all other Government stock.

Mr. Walford and *Mr. Villiers*, contra, submitted that the testator had shewn clearly that he did not include long annuities in the exception contained in the will. He had directed that the proceeds of the

sale of his estate should be invested in the public funds; and in this case he could not have intended that the investment should include long annuities or any terminable investment; it was clear, therefore, that in construing the words “public funds” in the exception he could not have meant to include long annuities. The long annuities ought, therefore, to be sold.

Mr. Bovill and *Mr. Rawlinson* appeared for other parties.

The following cases were cited:—

Lord v. Godfrey, 4 Madd. 455.

Bethune v. Kennedy, 1 Myl. & Cr. 114.

KINDERSLEY, V.C.—It has been argued, that the testator when he directed the investment in the public funds of such portions of his estate as were to be sold, could not be presumed to have meant that the investment should be in long annuities, and, consequently, that when he directed the conversion of his estate except such portion as consisted of public funds, he could not have intended to include long annuities in the exception; but I cannot yield to that argument. The testator has directed that all his estate should be converted, with the exception of monies in the public funds. That is not a very accurate description of any particular species of public security, but it is sufficient to describe some portion of some one or other of the public stocks or securities. It is admitted that, in the natural meaning of the words, the term public stocks or securities would include long annuities; consequently, the direction here must be considered to mean a sale of his property, except such part thereof as consists of consols, reduced annuities, long annuities, or any other public funds, and the monies to arise therefrom to be invested in public stocks or funds. I cannot, under the terms of this will, take upon myself to say that the testator certainly intended that the long annuities should be converted. He might possibly have intended it, but an intention cannot be presumed which is not expressed.

M.R. }
Feb. 15; } DAVIES v. HODGSON.
March 1. }

*Feme Covert — Separate Property —
Breach of Trust — Acquiescence — Goodwill.*

A testator gave funds to trustees, to pay the income to his wife, or otherwise, for the maintenance of his seven children till the youngest should attain twenty-five, if a son, and if a daughter, till that age or marriage, and when the youngest should attain twenty-five, to divide the same equally amongst the children, the share of the daughters to be for their separate use. The trustees four years after the testator's death sold out the trust funds and invested the proceeds in railway shares (which resulted in great loss). The youngest child attained twenty-five. Upon a bill by a married daughter of the testator claiming her original share of the trust funds,—Held, that she, though aware of the sale of the trust funds, either immediately before or shortly after the purchase of the railway shares, had not sanctioned the breach of trust; that she was bound to assume that the discretion vested in the trustees was properly exercised, and though she did not complain for some years afterwards, that she was entitled to have her share of the stock replaced, allowing for the sums paid for maintenance beyond those which would have arisen from the dividends of the trust stock.

The bill in this case was filed by Amelia Davies, by her next friend, against John Hodgson, Frederick Boulton, George William Frederick Grant and her husband, Charles Davies, for the administration of the estate of her father, Alexander Grant, and praying that the defendants, as trustees of his will might be charged with a sum of 38,143*l.*, 3*l.* 10*s.* per cent. stock, which had been invested in Great Western Railway shares. The bill also prayed that the five surviving children of Alexander Grant might be entitled to participate in the profits made by carrying on the testator's business after his decease, and that the defendants might, at the plaintiff's election, either account for the profits or otherwise for the full value of the trade, with the good-

will thereof, at the testator's death. It also prayed for the requisite accounts.

Alexander Grant, a tobacco-broker, by his will, dated the 6th of July 1836, after reciting, among other things, that it was shortly his intention to enter into a partnership deed with his brother William Grant, with certain stipulations and conditions to be therein contained, relative to a future and joint partnership of his brother, George Grant, and of his, the testator's, sons Alexander and G. W. F. Grant, upon their attaining twenty-five, gave all the residue of his real and personal estate to his brother William Grant, deceased, Charles Davies (the husband of the plaintiff), John Hodgson, and the defendant Frederick Boulton, their heirs and assigns, "upon trust to receive and take the rents, interest and dividends so, from time to time, arising therefrom, and pay the same into the hands of Fanny Julia, his wife, or otherwise in their discretion, to appropriate so much thereof as would amply provide for the suitable support, maintenance, education, clothing and bringing up of all his seven children until the youngest child should attain the full age of twenty-five years, if a son, or if a daughter, until she attained that age or day of marriage; and when and so soon as the youngest of his said children should have attained that age or day of marriage as aforesaid, then he directed his trustees, or the survivor or survivors of them, or the executors, administrators or assigns of the survivor, to sell and dispose of all and every his freehold estates and premises, as also all and singular his other estate and effects of every description that did not consist of ready money, either by public auction or private contract, as might appear to them most advantageous; and when and as soon as the same was converted into ready money, then the testator gave and bequeathed the same unto his children thereinbefore mentioned, share and share alike, in equal proportions: the shares of his daughters to be for their own exclusive use and benefit, and not in any way to be subject or liable to the debts, controul, engagements or intermeddling of any husband with whom they might intermarry; and the shares of his sons to

be paid to them at the discretion of his trustees in the like and the same manner as directed with respect to the former legacies so bequeathed to them; and in case of the death of any of his daughters before that period leaving a husband or husbands her or them surviving, then the testator gave and bequeathed the share of such one or more so dying unto her or their husband or husbands for his and their own use and benefit; and in case of the death of either of his sons before he attained his age of twenty-five years, leaving lawful issue him surviving, then the testator bequeathed the share of him so dying unto and equally amongst such issue, share and share alike, and if but one such issue, then to such only child absolutely, but in the event of either of his daughters dying before the period of distribution, being a widow and leaving issue of her or them surviving, then the testator gave the share of her or them so dying unto and amongst the issue of such deceased daughter, share and share alike, and if but one such issue, to such one only for his or her own use and benefit absolutely. But in case either of his children should die under the age of twenty-five years without leaving lawful issue or a husband them surviving, then he gave and bequeathed the share of him, her or them so dying, unto and among all his surviving children, share and share alike; and if but one such child, then to such one child absolutely for ever." And he nominated his four trustees the executors of his will. The testator died on the 22nd of August 1839. All the executors proved the will and invested a part of the residue in the purchase of 38,143*l.*, New 3*l.* 10*s.* per cents. Two of the testator's children died without having obtained a vested interest in the testator's estate. In the year 1843 the trustees sold out this stock and invested it in railway shares, the result of which was that a loss had arisen.

The plaintiff now insisted that W. Grant, though apparently a partner with the testator, was, in fact, only a clerk in the office, and that the goodwill of the trade formed a part of the assets of the testator; she also claimed her original share of the sum of 38,143*l.* New 3*l.* 10*s.*

per cent. annuities, which became payable on the 24th of September 1854, when the youngest child attained the age of twenty-five years.

The defendants said that the plaintiff knew of and sanctioned the sale of the stock, and its investment in railway shares, and that as she had acquiesced for a long series of years, she could not now institute this suit, as she was altogether a *feme sole* with respect to the property.

Mr. R. Palmer and Mr. W. A. Collins, for the plaintiff.—The goodwill of the testator's business formed a part of his assets. The trustees must be held responsible for the loss which had been sustained by the investments; the discretion exercised had never been acquiesced in by the plaintiff.

Nail v. Punter, 5 Sim. 555.

Raby v. Ridehalgh, 7 De Gex, M. & G. 105; s. c. 24 Law J. Rep. (N.S.) Chanc. 528.

Mr. Follett, for C. Davies.

Mr. Selwyn and Mr. G. L. Russell, for G. F. Grant, one of the executors of W. Grant, deceased.—The plaintiff was aware of the sale of the stock; she sanctioned it, and also the purchase of the railway shares. Her mind had been fully instructed with respect to the transaction. She had received the increased advantages arising from it at the time. Surely, therefore, she had acquiesced; and, as she was entitled to the property free from the controul of her husband, she was bound as much as if she were a *feme sole*. If she had not acquiesced, it was little short of a fraud to allow the trustees to continue the investment for a series of years.

Hughes v. Wells, 9 Hare, 749, 773.

Lewin on Trusts, 775, 2nd edit.

Hulme v. Tennant, 1 Bro. C.C. 16; s. c. Dick. 560.

Fettiplace v. Gorges, 1 Ves. jun. 46.

Murray v. Barlee, 4 Sim. 82.

Mara v. Manning, 2 Jo. & Lat. 311.

Smith v. French, 2 Atk. 243.

Browne v. Cross, 14 Beav. 105.

THE MASTER OF THE ROLLS.—I think the goodwill was worth nothing; it is

immaterial to consider whether William Grant was a partner or not. I find from the decree in *Cook v. Collingridge*, in *Collyer on Partnership*, that Lord Eldon expressly states that the partners were to be at liberty to carry on the same business; and those who bought the goodwill did so with the express knowledge that it was liable to the circumstance of the purchaser being likely to carry off any, or many, or some of the customers in the business. It was said here that no event could prevent the late co-partner from engaging in the same business; therefore, the sale thereof could not proceed on the same principle as if a Court could prevent their so engaging; and it was declared that the valuation or estimation was, or would only be, that which every bidder according to his own speculation would fancy it to be worth from his chance of retaining the old customers, and their not following the old partners into a new establishment. It is here stated in evidence that the goodwill would be worth nothing; it is also in evidence that to make it worth anything W. Grant must covenant not to carry on business, and to do everything he could to assist those who purchased the goodwill to get the business made as beneficial to themselves as they could. If W. Grant claims to be a partner, *Cook v. Collingridge* applies, as it holds that a partner is not liable to be prevented from carrying on the same business. If he is not a partner, it is impossible to prevent him carrying on the business, and his having been held out to the public as a partner, and thereby being liable to the debts of the concern, it would have been difficult to hold, if the goodwill had been sold, that he would not have been entitled to a share. The testator may not have considered that W. Grant was a partner. He had stated his intention to take him into partnership, but he did not hold it out to the public. It is therefore impossible now to fix the executors with any species of goodwill, or to require that it should be put up for sale.

Mr. Bagshawe, sen. and Mr. Bagshawe, jun., for John Hodgson and Frederick Bolton.

Mr. Collins, in reply.—The plaintiff was never consulted respecting the disposition

of the trust estate; she would not know whence the dividends came, and it was impossible for her to ratify that of which she knew nothing.

March 1.—The MASTER OF THE ROLLS.—I desired to consider whether the plaintiff was entitled to have her share of her father's estate made good by the purchase of stock to the amount sold out. Apparently, a question of importance was raised, namely, whether a *feme covert*, being in respect of this property a *feme sole*, could consent to a breach of trust, and whether she might have authorized payment of this money either to herself or to any other person. This would include the power of authorizing the trustees either to lend the money to any one she sanctioned or to invest it upon imperfect and inadequate securities. When there is a proviso against anticipation her authority and sanction to the trustees to invest it in unauthorized securities would not be a sufficient authority to them. It is difficult to understand upon what principle her sanction can be a sufficient authority when there is no such proviso, if it be insufficient when there is such a proviso. I can understand that if the authority to invest upon improper and imperfect securities is intended as a means of forestalling the income, the proviso against anticipation would create a difference, but when this is not the case, and it simply arises from a desire to obtain a larger amount of interest, with a *bond fide* belief that the capital is equally secured, why should the proviso against anticipation make any difference? It has nothing to do with the powers or duties of the trustees as to the investment of the fund. All that it does is to fetter the power of a married woman in disposing of the fund itself; but her authority, if it exists, to enable the trustees to invest it upon securities not authorized by the original settlement, would seem to be exactly the same. She has nothing to do with the investment. That is a part of the duties of the trustees. Her power is over the interest if there is a proviso against anticipation, and over the capital as well as the interest if there be none, and she may dispose of the fund itself. But the question is, whether she can or cannot direct any alteration in the

investment. Lord Hardwicke, in *Smith v. French*, seems to have so decided. He uses this expression with reference to a married woman who had a separate use, not, as it would seem, coupled with any restraint against anticipation. He says, that a promise by her to release during her coverture it was certain could not bind her. And this was cited in *Mara v. Manning*; and the same doctrine seems to have been followed in the original suit of *Nail v. Punter*, which is cited in the report of that case. This case must be regarded wholly apart from any commission of fraud. As a married woman as well as an infant may undoubtedly commit and will be responsible for the commission of a fraud, the disabilities of a married woman or an infant will not protect them from the consequences of so doing. But this case is wholly free from any consideration of that description. I have not, however, gone more fully into this question, which, so far as I am aware, has not been directly decided, because, after examining and considering the evidence, the point does not require a decision, and the plaintiff has not done anything here which can be treated as an authority or a sanction for the breach of trust which was committed. Now, the facts upon the evidence appear to be that she did not know of the intended sale of stock or investment in railway shares before the stock was sold out, and she gave no preliminary sanction for that purpose; she knew it immediately before or very shortly after the railway stock was purchased, but she never complained of it until 1850, when the railway shares became depreciated in value in the market. Up to that time she had received an additional sum annually in the way of maintenance, in consequence of the higher rate of interest derived from the railway securities. This is quite as high as the case can fairly be put against her upon the evidence; but against this, it must be observed, that she had no right to any share in the capital of the fund until the youngest child attained the age of twenty-five years, which was not until the 24th of September 1854, and until that time she was only entitled to such a sum as the trustees might probably think fit to apply for her benefit in the shape of maintenance; and besides this, no formal or

express approbation of any such investment was ever made by her, or anything done by her more than this, that she knew of the investment, but did not complain of it. This is distinct from *Browne v. Cross*. There Walter Browne was entitled to a reversion vested in him upon the death of the tenant for life, the widow. He allowed the investment to continue unaltered from the year 1812 to 1826, a period of fourteen years. The plaintiffs in that suit were his legatees, and were bound by all his acts. They attained the ages of twenty-one years in 1834 and 1835, and did not file their bill till 1847, making in one case fifteen and in the other fourteen years. They sold their reversionary interest in 1839, specifying and describing the investments as they then actually stood, and received the purchase-money as for such investments. It was held, that they and their testator were bound by the investments so made; that they were prevented by laches and acquiescence from any further complaint at that period. Here the plaintiff had no vested right in the money until the 24th of September 1854, and assuming she might have required the fund to be properly invested by reason of the contingent interest she had, yet she might well abstain from taking any such course, regard being had to the fact that the amount of maintenance was to be regulated at the mere discretion of the trustees; and she had no business to inquire whether that discretion had been properly or improperly exercised. It is suggested, however, that to allow motives to operate which might probably have prejudiced her interest or induced her not to complain, would be either to commit or sanction a fraud; and that, in addition to this, she had heard, and entertained the belief that her uncle, William Grant, one of the executors and trustees, intended to leave her or her children money, and that she abstained from complaining in order not to offend him, and that this must be treated in the same light, as she did actually obtain the benefit she anticipated in the shape of a legacy, which, if she had complained of this improper investment during his lifetime, she might probably have forfeited. When I say "complain," I mean take any necessary steps. She

certainly did complain in the year 1850. No case, however, is made out in evidence to justify any accusation of fraud upon her part. There was a reluctance to take any active steps until the money became actually payable; but this was excusable under the circumstances. She did complain upon the subject as early as 1850, which was in the lifetime of William Grant; and certainly there is no evidence of any waiver or abandonment, either express or implied, of her claim and her rights, provided, or on the condition, that she should obtain a legacy from William Grant, either for herself or for her children. In this state of circumstances she is entitled to have her share of the stock replaced, but she must account for, or allow in account, such sums as she received in respect of maintenance, in excess of what the dividends would have produced in case the stock had not been sold out.

I will also direct an inquiry, the same as in *Crawshay v. Collins* (1), as to what profit has been made since the death of the testator, from the use or application of the stock in trade and capital of the business, with liberty to state specially any circumstances respecting it.

WOOD, V.C. }
April 27. }

JOHNSTON v. MOORE.

*Will—Construction—Tenant for Life—
“Produce.”*

A testator by will directed his trustees to collect and convert into money such part of his personal estate as should not consist of money, and to invest the same, and permit his wife to receive the annual income of the trust fund during her life, and he authorized his trustees to postpone from time to time the sale, calling in, collection or conversion of any part of his personal estate, to such period or periods as they should in their judgment think fit, and to pay the rents, dividends and produce of the same, or any part thereof not sold, called in, collected or converted, to the same person or persons, and in the same manner as the income of the money to arise by such sale, &c., would be payable under

the trusts thereinbefore declared. The testator, at the time of his death, was a partner in a mercantile firm under articles of partnership, which provided, amongst other things, that interest at 5l. per cent. should be allowed on the balances standing to the credit of the respective partners at the end of each year before any division of the profits; and that in the event of the decease of one or more of the partners during the term, the partnership should not cease, but the representatives of the deceased partner should be entitled to his share of the capital and profits up to the expiration of the term, and the survivors should pay to the representatives of the deceased partner the balance appearing to his credit at the expiration of the term, by three equal yearly instalments, with interest at 5l. per cent. in the meantime, on the balance remaining unpaid. The trustees allowed the whole of the testator's capital to remain in the business until the expiration of the partnership by effluxion of time, and large profits were made after the testator's death:—Held, that the widow was entitled to all the interest and profits arising from the testator's capital, as it stood at the first making up of the accounts after his death, together with a proportionate part of the interest on the balance standing to the testator's credit at the last previous making up of the accounts, for so much time as elapsed between his death and the next making up of the accounts.

Samuel Johnston, by his will, dated the 31st of March 1851, after bequeathing to his wife, the plaintiff, certain specific legacies and a sum of 1,500*l.*, devised and bequeathed his real and personal estate to trustees, upon trust, as soon as conveniently might be, to sell his said real estate, and such part of his personal estate as should be in its nature saleable; and he directed them to collect and convert into money such part of his personal estate as should not consist of money, or of the stocks, funds and securities therein mentioned; and he declared that the said trustees should, out of the money to arise from such sale and conversion, after paying his funeral and testamentary expenses, debts and legacies, invest the residue of the said monies in their names, and pay over to, or permit his said wife to receive,

the annual income of the said trust funds during her life, and after her death to hold the same in trust for his children ; and he authorized his trustees to postpone from time to time the sale, calling in, collection or conversion of any part of his real or personal estate, to such period or periods as they should in their judgment think fit, and without being answerable for any loss thereby occasioned, and to pay the rents, dividends and produce of the same, or any part thereof not sold, called in, collected or converted, to the same person or persons, and in the same manner as the income of the money to arise by such sale, calling in, collection or conversion, would be payable under the trusts thereinbefore declared.

The testator, at the time of making his will, traded at Liverpool and Manchester, in England, and at Bahia and Pernambuco, in the Brazils, in copartnership with certain persons as general merchants, and large profits were made. The copartnership, commenced on the 1st of January 1853 ; but no articles of partnership were executed until the 14th of August 1856, when articles of partnership of that date were executed, by which it was declared that the copartnership should continue for five years from the 1st of January 1853, upon the following, among other terms:—1. That interest, after the rate of 5*l.* per cent. per annum, should be allowed on the balances standing to the credit of the respective partners at the end of each year before any division of the profits. 9. That in the event of the decease of one or more of the said partners during the said term, the said copartnership thereby agreed upon should not cease, but the representatives of the deceased partner should be entitled to his share of and in the capital and profits up to the expiration of the term, and the survivors and survivor should pay to the representatives of such deceased partner the balance appearing to his credit at the expiration of the term, by three equal yearly instalments from the expiration of the said term, together with interest at the rate of 5*l.* per cent. in the mean time on the balance remaining unpaid.

The testator died on the 13th of November 1856. Upon the accounts made up

to the 31st of December 1855, and the 31st of December 1856, large balances appeared to the testator's credit in the books of the partnership, and the business was carried on by the surviving partners, under the 9th of the articles of partnership, until the 31st of December 1857, the whole of the testator's capital being retained in the business until that day, after which it was to be paid off by three yearly instalments.

Questions having arisen between the plaintiff and the defendants as to what the plaintiff, under the testator's will, was beneficially entitled to receive in respect of the balances standing to the testator's credit in the partnership accounts on the 31st of December 1855, the 31st of December 1856, and the 31st of December 1857, the parties concurred in stating a special case embodying the above facts, and asking the opinion of the Court upon the following questions:—

First. Whether the plaintiff was or was not entitled to receive and be paid beneficially, for her own absolute use, interest at the rate of 5*l.* per cent., or after any other and what rate, upon the balances which were standing to the testator's credit on the 31st of December 1855 and 1856, or either of them, or any and what proportion of such interest?

The second question was in similar terms, as to the interest to accrue due upon the testator's share of the capital at the expiration of the partnership, the case having been filed before the 31st of December 1857.

Third. Whether the plaintiff was entitled to receive, and be paid beneficially for her own absolute use, any and what annual income in respect of the testator's balances, and his share in the capital and profits of the partnership.

Mr. R. Pryor, for the plaintiff, contended that she was entitled to all the profits upon the testator's share of the capital in the business since his death. It was part of the "produce" given to her by the will. The case was different from *Dimes v. Scott* (1), *Taylor v. Clarke* (2),

(1) 4 Russ. 195.

(2) 1 Hare, 161; s. c. 11 Law J. Rep. (n.s.) Chanc. 189.

and *Douglas v. Congreve* (3), there being here a clause authorizing the postponement of the conversion. The trustees might have declined to continue the partnership—*Downs v. Collins* (4); but having allowed the capital to remain in the business, the widow was entitled to the whole profits.

Wrey v. Smith, 14 Sim. 202.

Sparling v. Parker, 9 Beav. 524.

Mackie v. Mackie, 5 Hare, 70.

Fearn v. Young, 9 Ves. 549.

Caldicott v. Caldicott, 1 You. & C.

C.C. 312; s. c. 11 Law J. Rep.

(N.S.) Chanc. 158.

Meyer v. Simonsen, 5 De Gex & Sm.

723; s. c. 21 Law J. Rep. (N.S.)

Chanc. 678.

Macpherson v. Macpherson, 16 Jur.

847.

Mr. Daniel and Mr. Hislop Clarke, for the defendants, referred to *Morgan v. Morgan* (5).

WOOD, V.C. (without hearing a reply).—I really think this clause in the will does make the whole difference; and for this reason. The first trust is "to sell all my real estate, and such part of my personal estate as shall be in its nature saleable." There is an entire trust to get in and convert into money part of the personal estate; that is the effect of it; "and to resell without being responsible for any loss occasioned thereby, and to do all such acts and assurances for effectuating such sale as they or he shall think fit. And I direct my said trustees or trustee to collect and convert into money such part of my personal estate as shall not consist of money or of some or one of the stocks, funds and securities hereinafter mentioned." This property must fall under one or other of those categories. You must either take it as a property to be called in, as in the case before Wigram, V.C., though it appears to me there is considerable objection to an executor taking that course, unless there are no means of avoiding it, or else there must be a saleable interest. I think, in this case, it is distinctly saleable, because

it is capital to be ascertained at the testator's death; it is an interest in the business of the co-partnership, under which his executors are entitled to be paid the profits of the business, and the interest and balances, and so on, arising from the concern, and to be paid out the capital at the end of a certain period of years. It is not that the executors are to become co-partners; and, therefore, there is no personal question between the surviving partners and the deceased partner. The executors are simply *cestuis que trust* of this beneficial interest in the partnership. One cannot say that is a thing which is not saleable; and, therefore, if you take the first part of the will, there would be apparently an express direction that they should either sell this or convert it into money, whichever is the best thing of the two to be done. They would be compellable, in fact, at the instance of those interested in the matter so to do.

Then there comes a proviso, which says this: "And I authorize my trustees or trustee to postpone, from time to time, the sale, calling in, the collection or conversion of any part of my real or personal estate, to such period or periods as they or he shall in their or his judgment think fit, and without being answerable for any loss occasioned thereby." If it had been a simple power, the only doubt that could have arisen at all in the case would be from the contract of the testator, by which it appears that the executors would be bound to leave the capital in till the expiration of the given period; but if there had been a simple power to the executors to do this in the articles, then there could not have been a question in the case. That would have been a clear and distinct trust, from which they could not have escaped in the first instance, followed by a proviso: You need not do it, unless you think fit in the exercise of your discretion; and if, in the exercise of your discretion, you do not think fit, you shall not be liable to any loss; and in that state of circumstances the property would remain subject to the trust to pay the rents and dividends and produce of the same, or any part thereof, to any person entitled to the income of the money produced by the conversion. The produce of the capital

(3) 1 Keen, 410; s. c. 6 Law J. Rep. (N.S.) Chanc. 51.

(4) 6 Hare, 418.

(5) 14 Beav. 72.

employed in trade is all that the capital produces; that is to say, whether it is in the shape of interest or profits allowed. Everything that is allowed is part of the produce of the trade, and, looking therefore to this clause, it seems to me, what has happened is, that the trustees have been authorized to postpone the calling in, and they have *de facto* postponed it. Whether they have exercised this power by any distinct act of judgment, expressed in writing or otherwise, I do not think is material; but they have not *de facto* called it in. The Court cannot find any impropriety in their not doing so. They have availed themselves properly of this proviso; they have not either sold the interest (which would be an injudicious mode of disposing of it) nor called it in, according to the case before Vice Chancellor Wigram; but they have left the property to produce profit in the trade; and if that proviso does apply, then I will not apply it in any other shape or way than by giving to this lady all the produce made by the capital being so left. No doubt it will be a large benefit to her, and the children will not get so much as they would get under the other rules, which have been referred to in other cases. All those cases have proceeded on the ground of its being a duty of the trustees to do that, which not having done, you cannot say that either a breach of duty on the part of the trustees, or the want of judgment or discretion on the part of the trustees, is to alter the rights of the parties who are there affected.

The only case bearing a contrary aspect is that case of *Fearns v. Young*, where it was an impossibility for the trustees to do that which was required to be done. Therefore there was no breach of duty in that case. Nevertheless the Court said, in adjusting the case between the remainderman and the tenant for life, we will treat as capital all that produces more than what this Court considers to be the due share of the tenant for life. That one understands perfectly as a rule laid down by the Court, namely, that the tenant for life's share being so much interest, all *ultra* that is capital. But when you find a clause like this, which says, I do not intend the tenant for life to have merely the interest and dividends, but I have a

proviso by which I say, that if the capital is not invested as I direct there shall be something different, for she shall have the rents, dividends and produce; then, according to that long class of cases which have been decided, such as *Howe v. Lord Dartmouth* (6), the widow simply takes in specie as she would anything else; she does, in truth, take part of the capital by the force of the direction in the testator's will. It seems to me that upon that proviso the will must be construed; and what really ought to be done is to ascertain what the testator's capital was under the articles. The true construction is, in fact, to treat it as an investment, governed by the articles, of whatever was capital at the stock-taking immediately following the death. I deal with that as capital which the articles say shall be treated as capital in the hands of the executor of the deceased partner. In other words, he has directed that they shall take as capital that which shall be capital at the period of taking the account after the death. That is his own capital, and that I fix as his capital. I apprehend, then, the plaintiff would be entitled to this: the account would be taken on the 31st of December 1856, that is, the first balancing day after the testator's death. Then, I apprehend, she cannot get interest, except from that day, unless you apportion it on the day of the testator's death. In fact, no such apportionment, I apprehend, would arise. It is like those cases of stocks—*Broune v. Amyot* (7).

[*Mr. Pryor.*—There was a balance struck on the 30th of June; therefore, there would be current interest running from the 30th of June to the 31st of December.]

If you want it, there will be an apportionment. It would be the share of interest at 5*l.* per cent. from the 13th of November 1856, the day of the testator's death, to the 31st of December 1856. Then I propose to answer the first question thus: "The widow is entitled to a proportionate part of the interest at 5*l.* per cent. on the balance standing to the testator's credit on the 30th of June 1856,

(6) 7 Ves. 137.

(7) 3 Hare, 173; s.c. 13 Law J. Rep. (n.s.) Chanc. 232.

for so much time as elapsed between the 13th of November 1856 and the 31st of December 1856." Then I would not answer the second question at all; and the third question, which is a general question, may be answered in this way: "She is entitled to all the interest and profits arising from the testator's capital, as it stood on the 31st of December 1856 up to the expiration of the partnership on the 31st of December 1857. And she is entitled to interest at 5l. per cent. on the payment of each instalment of the testator's capital, by the surviving partners, so far as such instalment represents one-third of the capital of the testator on the 31st of December 1856, and is entitled to any surplus of such instalment over such one-third share of capital, and such interest as aforesaid, as being composed of her share of profits and interest on such her share." That will leave the third of the testator's capital payable on each instalment to the capital account of the estate.

L.C.
May 1, 4, 6, 7, 24, 29. { *Re* THE LONDON AND
EASTERN BANKING
CORPORATION.

*Banking Company—Winding-up Acts—
Bankruptcy.*

A banking company, registered under the 7 & 8 Vict. c. 113, was ordered to be wound up, and official managers and a creditors' representative were appointed, the latter appointment being on the 13th of January. Some creditors of the company brought an action against the company on the same 13th of January, and on a summons by the official managers to stay proceedings, it was ordered that the plaintiffs should be at liberty to proceed, but the judgment was not to be available for any other purpose than to make the company bankrupt. Judgment was accordingly entered up, and a notice requiring payment was served. One of the Vice Chancellors having refused an injunction to stay the proceedings, the company was, on the 22nd of April, adjudged bankrupt. On an appeal from the Vice Chancellor's judgment, and an application to annul the adjudication, — Held, that the bankruptcy was valid, the 20 & 21

Vict. c. 78. not preventing a company being made bankrupt under the 7 & 8 Vict. c. 111, but that the bankruptcy was of no further avail than to clothe the assignees with authority to concur with the official manager in the proceedings in the winding up.

The London and Eastern Banking Corporation, which was a banking company, incorporated under the 7 & 8 Vict. c. 113, ceased to carry on business on the 11th of March 1857, except for the purpose of liquidation. On the 25th of November 1857 an order for the dissolution and winding up of the company was made; and on the 21st of December Messrs. Stuart and Ball were appointed official managers. On the 13th of January 1858 Mr. Thompson was appointed creditors' representative in conformity with the provisions of the 20 & 21 Vict. c. 78. On the same 13th of January, Sir Charles Forbes and others, who were creditors upon a bill of exchange, accepted on behalf of the company by the manager, brought an action against the company in the Court of Exchequer, under the 18 & 19 Vict. c. 67. A summons was taken out at Judge's chambers, on behalf of the official managers, for a stay of the proceedings, and on the 6th of February an order was made, by Martin, B., that the plaintiffs were to be at liberty to proceed, but that the judgment was not to be available for any other purpose than to make the company bankrupt. Judgment having been entered up on the 10th of February, a notice requiring payment of the judgment debt was, on the 20th of March, served upon one of the directors of the company, upon the official managers, and was left at the company's late place of business. On the 29th of March, Wood, V.C. refused to grant, on the motion of the official managers, an injunction to restrain the proceedings in the action or on the judgment (1); and on the 22nd of

(1) The following judgment was delivered by WOOD, V.C.—Unquestionably it is a task of considerable difficulty to construe an act of parliament, which does not seem very clearly to enunciate the several propositions, which evidently must have been before the legislature, and to which its attention must have been called at the time, as one would conceive, when they were intending to legislate; and I cannot say that I have, at this moment, any very precise or definite idea of the exact extent

April 1858, the amount claimed not having been paid, secured or compounded for within fifteen days after service of the notice, the company was adjudged bankrupt.

to which the legislature intended these enactments to operate. On looking to the whole state of this case, however, I have no doubt, that on this application for an injunction to restrain the legal right, I ought not to interfere with that legal right, if there is any question at all whether such a right can be exercised. I feel it is far better that I should abstain from interfering with the exercise of that right, if such there be (I am now confining myself more particularly to the arguments which have been adduced with reference to the power of issuing a fiat, under the circumstances of this company); I say it is far better that I should abstain from interfering with the legal right, if it be a matter of doubt, than, by stopping the trial of the question, work that injustice which must eventually take place, if it should be ultimately determined, that the legislature had the intention that has been contended for by Mr. Amplett, on the part of Sir Charles Forbes and the other parties, whose interests he represents. More especially in this case I ought to do so, because, from the present construction of our Courts, the superior Court which could controul my jurisdiction has also a power, which I have not, of expressing its opinion with reference to the law in bankruptcy; and, therefore, it has more complete jurisdiction over the whole matter than I can have here. In attempting to shut out that jurisdiction in bankruptcy, even for a time, as I am asked to do, I should, as it seems to me, be doing an injustice to those who wish to assert their right before the Bankrupt Commissioners, and who may be controuled, both as to the exercise of that right and the exercise of any right, in consequence of my interference, before a tribunal which is competent to determine the whole question. Now, as regards the position of our present legislation as to the winding up of joint-stock companies, it is anything but satisfactory. There being an act, which was passed in the 7th and 8th years of the Queen, which enabled those who were desirous of bringing the bankrupt laws into operation against joint-stock companies to take that course of proceeding (that being an act entirely for the benefit of the creditors of the companies), it was found that that act would not have the effect of settling the various equities existing between the several shareholders *inter se*, and that the greatest injustice was perpetrated continually with reference to individual shareholders who were made victims of judgments, or of some proceedings in bankruptcy, or whatever other course of proceeding might be taken by creditors, without having any power of compelling contribution from the several other shareholders in the company; the machinery of this Court was not found adequate to meet cases of that description, and therefore it was that the Winding-up Act, the 11 & 12 Vict. c. 46, was passed. Unquestionably that act was intended entirely for the benefit of shareholders, and for the arrangement of their affairs, *inter se*. The payment of the creditors was merely an incident to

Mr. Rolt, Mr. Hetherington, and Mr. Roxburgh, on behalf of the official managers, now moved, by way of appeal from the decision of Wood, V.C., and to annul the adjudication.

the administration of the equities amongst the shareholders. By the act of 1848, the contributories could not initiate proceedings in any other way than in a certain imperfect manner, that right being conceded to them by the 38th and some other sections, namely, that they could bring in proposals at their own expense, and appoint a solicitor to watch the proceedings at their own expense, and there was a certain species of controul given to them, but of a very imperfect and inadequate character. Then came the 58th section, which expressly enacted that which was the leading feature and guide (the clue, as it appears to me) to the construction at all times of that act, namely, that nothing in the act contained should interfere with, or abridge the legal rights of creditors in any other way than they were expressly interfered with, or abridged by the act; it being, in fact, an act for the benefit of the directors, or rather the shareholders *inter se*, for the arrangement of their common affairs, and not for the benefit of creditors in any way, and there being certain limitations put upon the creditors' right, namely, the limitation in the 73rd section being placed upon their right to this extent, and this extent only:—it being for the benefit and advantage of all the contributories, and justice requiring, as regards the company, that all the liabilities of the company shall be ascertained, we find—say the legislature—that the most expedient mode of ascertaining the full extent of the liabilities will be this, to force every creditor to come in and make known what his claim is; then ascertain what is the state of the assets, on the one hand, and what is the amount of the debts on the other; and having that fully before you, you will be able to do complete justice to the contributories. The creditor's hand was, therefore, arrested for that limited period, namely, the period of coming in, and either proving, or selecting to prove, or to establish (although there was no necessity for his establishing actually) the debt, or being admitted a creditor, — the moment he comes in and says, this is my demand or claim, the contributories *inter se* would know the liability overhanging them, and for which they ought to make such provision as they might be advised. The moment he has done that, he has performed his duty, and he is immediately allowed to bring any such action as he may think fit. To no other extent were his rights interfered with. That was the state of the law when the question came to be considered, as between the British Bank and their creditors. Now, of course, the obvious defect of these two modes of operation is this: that inasmuch as the creditors had their ordinary jurisdiction in bankruptcy for their assistance, and for administering their equities *inter se*, which does not assist the contributories, and inasmuch as the contributories, in administering their equities *inter se*, having an act of parliament for that purpose, which only gave an interim provision—only provided incidentally—for the payment of debts, through the

Mr. Amphlett, Mr. Bagley, and Mr. E. Macnaghten, for the plaintiffs in the action.

Mr. Daniel and Mr. E. Rodwell, for the creditors' representative.

medium of the Winding-up Act, something was wanting, and a something which I trust that the Legislature, ere long, will supply, namely, to bring the two distinct operations into one uniform course of jurisdiction. A jurisdiction was wanting, which I should have hoped would have been supplied before this; but which it does not appear to me that the 20 & 21 Vict. c. 78. has supplied. What was wanted was, to bring these two operations into one common jurisdiction, so as to satisfy, on the one hand, all the claims of justice between contributories *inter se*, and to satisfy, on the other hand, all the debts that would be due from the joint-stock company to the various creditors of the concern. However, in the case of the British Bank, the inconvenience was this, that before the official manager was appointed there occurred an act of bankruptcy, upon which there was an adjudication, which adjudication having reference back to the period when the notice—the trader-debtor summons—had been served, overrode the appointment of the official manager, and overrode also probably the order for winding up, but certainly the appointment of the official manager; and the consequence was, that there was an immediate conflict between the two jurisdictions. The Court there came to the conclusion, upon a very clear and lucid exposition of the act by the Lords Justices, that the act for winding up being only, in effect, for the benefit of the debtors and not for the benefit of the creditors, it was right that these proceedings should take place in bankruptcy, and go on whatever might be the consequence of so doing, and that, inasmuch as in that case the estate was not vested in the official manager, the assignees' right prevailed against his, and the assets were immediately transferred to the official assignee in bankruptcy. There, as was observed, no very great mischief was the effect, except the mischief that always must arise from such a system of litigation of having two Courts operating on the same fund. But you had this achieved—you had the fund distributed to the creditors in a bankruptcy proceeding, and thus you had a fund to administer,—if there were anything left of it,—the residue of the fund to administer, amongst the contributories *inter se*, doing full justice to them, with reference to contribution and the like. In this case the proceeding goes a step further, because here, assuming the act of the 20 & 21 Vict. c. 78. not to have passed, the fund would be in the hands of the official manager. I think it would be a subject of very grave doubt (although I can foresee the possibility of an argument being used, on the other hand, if a bankruptcy took place)—whether any of these assets could ever be divested from the official manager in the event of a bankruptcy taking place; and then you would not have the advantage which did exist in the case of the British Bank, of administering the fund in bankruptcy amongst the creditors in “their own forum” (as it was called by

Mr. Roll, in reply.

The arguments are stated in the Lord Chancellor's judgment.

The following cases were cited:—

Ex parte Marcus, in re the Royal British Bank, 26 Law J. Rep. (N.S.) Bankr. 1.

Fletcher v. Crosbie, 9 Mee. & W. 252; s. c. 11 Law J. Rep. (N.S.) Exch. 16.

Steward v. Greaves, 10 Mee. & W. 711; s. c. 12 Law J. Rep. (N.S.) Exch. 109.

Davidson v. Cooper, 11 Mee. & W. 778; s. c. 12 Law J. Rep. (N.S.) Exch. 487.

Ex parte Griffiths, in re Mostyn, 3 De Gex, M. & G. 174; s. c. 22 Law J. Rep. (N.S.) Bankr. 50.

Lord Justice Turner) to which they had a right to look for a division or administration of the whole of the property amongst the whole of the creditors, and then only dealing with the debtors after that operation was performed. But here you will have this singular sort of anomaly: if the bankruptcy is to take place here, there will be no fund upon which it can operate, inasmuch as every portion of the property is vested in the official manager, and the distribution must be through the medium of the winding-up order, and the winding-up order alone. The only benefit that can accrue under the bankruptcy is, such a benefit as Mr. Amphlett has suggested, namely, the possibility of a question of fraudulent preference or the like. Others might be suggested, in which, possibly, the creditors would have the right to insist on the operation of bankruptcy, and the power of summoning the directors, which is subject to this peculiar qualification, that inasmuch as they may have to make out a balance-sheet, they must produce all their books and vouchers; but not a step of that kind can they take without the permission of this Court, as the whole is in the possession of the official manager. Therefore, I must say that it does seem very singular that the legislature should have wished, after the appointment of the official manager, and after the property had been vested in him, that this right of proceeding in bankruptcy should be still exercised when, apparently, there is so little to be operated upon to produce any benefit to the creditors, and when, in effect, the machinery—even for such a purpose as has been pointed out, namely, a supposed better mode of searching the consciences of the directors—would become completely inefficient, unless this Court assisted, as it would be bound to do, if necessary for the purpose of justice, by ordering the production of the papers and documents upon application to this Court for that purpose. However, it is not necessary for me to say more than this: it does not appear to me, looking to the grounds of the decision in the British Bank case, even after the property had been vested in the official manager, and looking to the grounds upon

May 24.—The LORD CHANCELLOR.—This case was originally brought before Vice Chancellor Wood, on a motion, made on behalf of the official managers appointed to wind up the affairs of the company, to

restrain Sir Charles Forbes and others, creditors of the company, from proceeding in an action which they had commenced, or upon a judgment which they had signed, for the purpose of making the company

which that decision was come to,—(namely, that the rights of creditors were not further interfered with than by the "express provision" of the act, and there being no express provision which did that)—that they could not avail themselves of the act of the 7 & 8 Vict. c. 111, for allowing a fiat in bankruptcy to issue against joint-stock companies unable to meet their engagements. I do not think that the Court can come to any other conclusion than that proceedings might take place, whatever might be the result of it. But I have now to consider what has been done by the act of last session, the 20 & 21 Vict. c. 78. Now this act remedied a very great defect. One would have thought that the legislature then would have proceeded to take the step for doing complete justice between all parties, either by the one Court or the other, namely, either in bankruptcy or before the Court of Chancery, operating through the medium of the Winding-up Acts, or would have left to each concurrent jurisdiction. One might have thought that two plain courses would have been open, either to hand the whole jurisdiction over to the one tribunal, or to say that the two tribunals should have full and complete jurisdiction; but that when one had assumed jurisdiction, the other should not interfere. Something intermediate has been done; and beyond all question no clear enactment to that effect is to be found in that act of parliament. On the contrary, if you only read the act of parliament, in the only way in which it can be construed, it appears to me that the legislature has purposely left that matter still open, because it proceeds to do this. In the 1st section it says, "In all cases in which an order heretofore has been, or hereafter shall be made for the dissolution and winding-up, or for the winding-up of any company, it shall be lawful for the Judge or Master charged with the winding-up of any company, at the instance of any creditor of such company, or otherwise, in all cases in which it shall appear expedient, and for the benefit of the parties interested, in and by the advertisement for proof of debts required by the 72nd section of the 'Joint-Stock Companies Winding-up Act, 1848,' or by subsequent advertisements, or by notice transmitted to each of the creditors by post, as directed by the said two before-mentioned acts, from time to time to call upon the creditors of the company to meet before such Judge or Master at such time and place as shall be fixed by him, for the purpose of appointing one or more person or persons other than the official manager to represent all the creditors."

Now, a good deal has been said in the argument upon this act by those who ask me to stay the proceedings of the creditors in bankruptcy upon this: that the view of the legislature must have been to apply this to cases where the property had not been vested in the official manager. The first thing which strikes one on the opening clause is, that it applies to all cases where orders shall have

been made, as well as orders which shall be made and which necessarily include a vast number of orders where official managers have been appointed and are in existence. It says here,—to elect the representative of creditors, and he shall not be the person who is an official manager. Therefore, it seems to be more immediately in the contemplation of the legislature when that state of things did exist—when there did exist this power in the official manager—to make this provision which is contained in this clause as they are going to make it for all cases; and they say, when there shall be an official manager, we will provide that the official manager shall not be the representative of the creditors; and then they provide for the appointment of the representative. Then the legislature proceeds to say, "Provided always, that in case such company heretofore has been, or hereafter shall be, adjudged bankrupt, the assignees of the estate and effects of such bankrupt company shall be deemed and taken to be, and they are hereby constituted (without such advertisement or meeting as hereinafter mentioned) the representatives of the creditors for the purposes of this act." Now, that is a case of a bankruptcy with assignees before the Judge issues the advertisement calling the creditors together. Then comes this clause, "That if any such representative or representatives of the creditors shall have been chosen or appointed in the matter of the winding-up of any company, before the appointment of assignees under the adjudication of bankruptcy against the same company, then upon such appointment of assignees, the rights, powers and authorities of such representative or representatives shall cease and determine, and the same rights, powers and authorities shall thereupon become vested in, and may lawfully be had and exercised by such assignees as aforesaid; and such representative or representatives shall be entitled to his or their reasonable costs in the matter of the winding-up of such company." Now this clause, as Mr. Amphlett pointed to my attention, substituting assignees under an adjudication in bankruptcy for the representatives actually appointed, must mean a state of things in which the adjudication in bankruptcy must be subsequent to the winding-up, for this reason, that by the 6th section of the Winding-up Act, after there has been a bankruptcy there could be no winding-up whatever, except on the application of the assignees; and therefore the bankruptcy here pointed out must be a bankruptcy which has taken place after the winding-up order has been pronounced, and after the appointment of the representatives of creditors. Then it has been suggested by Mr. Hetherington, in reply, that it may apply to two cases: the one of a mere adjudication in bankruptcy, which by relation to the previous act—antecedent to the winding-up order—in effect supersedes the winding-up order, and which would dissolve the title of any official manager if he existed; and, secondly, it may apply to the case where no

bankrupt. The Vice Chancellor, not having jurisdiction in bankruptcy, was not competent to pronounce any opinion upon the validity of the fiat, and, therefore, he confined himself strictly to the motion

official manager has been appointed, although there has been an order for winding up, or although there has been a representative of creditors appointed. It might apply to two such cases; but am I at liberty to say here that it is confined to these two cases? when I find the legislature in all the previous parts of this section contemplating the very case where the official manager has been appointed, in that very large class of winding-up orders, so many of which must exist, and are known to have existed. It is impossible that I can say so, looking to the whole clauses throughout, where the existence of the official manager has been so repeatedly contemplated.

Then we have the 3rd section, which is this:—"It shall be lawful for such representatives or representative as hereinbefore mentioned to join and concur or take part in all the proceedings in and about the winding up of the said company, or such of the same proceedings as the Judge or Master shall deem expedient for the interest of the creditors, and also subject as hereinafter is mentioned, and so far as the creditors of the said company are concerned, to make or enter into, take part in, consent to, or approve of any compromise, composition, or arbitration, or other arrangement, whether for the discharge and satisfaction of the liability of all and every the shareholders and members, or any or either of them, to the debts and liabilities of such company, or otherwise, as such representatives or representative, for the time being, shall think fit; and the certificate of the Judge or Master shall be deemed and taken as full and sufficient evidence and proof of every such compromise, composition, arbitration, or other arrangement, and of any discharge or release which may have been thereby effected; and it shall also be lawful for such representatives or representative as hereinbefore mentioned (subject as aforesaid) to take part in, consent to, or approve of any compromise, composition, arbitration, or other arrangement which the official manager may propose to make or enter into with the debtors or creditors of the said company, or otherwise, in respect of its estate or affairs; and all the creditors of the said company, whether their debts shall have been then proved or not, shall, subject to the provisions hereinafter contained, be fully and effectually bound by the acts of such representatives or representative as to all such matters as are authorized by this act."

Now I will make a comment upon that presently, for it may remove some of the other inconveniences which otherwise would seem to be extreme on the construction of this act of parliament. The 7th section proceeds to say:—"When any such company heretofore has been or hereafter shall be adjudicated bankrupt, then if or so soon as creditors' assignees shall have been appointed, or when any such company shall not have been or be adjudicated bankrupt, then after the Judge or Master shall by advertisement have called on the creditors to ap-

point a representative or representatives as hereinbefore mentioned, no such action as is mentioned in the 78th section of the said 'Joint-Stock Companies Winding-up Act, 1848,' shall be commenced or proceeded with otherwise than for the purpose of making the company bankrupt."

point a representative or representatives as hereinbefore mentioned, no such action as is mentioned in the 78th section of the said 'Joint-Stock Companies Winding-up Act, 1848,' shall be commenced or proceeded with otherwise than for the purpose of making the company bankrupt."

It is prodigiously difficult to override the effect of these words, because I ought to notice the 14th section, which says, this act is to be deemed as inserted in the 'Joint-Stock Companies Winding-up Acts, 1848 and 1849.' Taking the two acts together, what do I find? I find the 58th section of the 11 & 12 Vict. c. 45, enacting that no creditor's rights of any kind whatever are to be interfered with by anything in the act contained, except by an express enactment. Having found that, I am to look for an express enactment taking away the right of a creditor to proceed in bankruptcy. So far from finding any express clause to take it away, all I find is a clause saying, that after they have appointed a representative of these persons, then he shall not be able to proceed with anything else, except for that purpose—a proceeding in bankruptcy. The whole argument has been not upon an "express enactment," but upon necessary implication. No doubt, it would be a sound principle of construction to say necessary implication (that is, an implication which admits of no other construction when you put the two or three clauses together,) might be in some cases equivalent to an express enactment. As if, for instance, it might be suggested that the whole administration should be in this Court, and in this Court alone, and that this Court should exercise all and every the powers and provisions of the Court of Bankruptcy, and I had given it full and complete jurisdiction in every possible way. I say it is just possible in such a case to contend that the necessary implication of the whole act was equivalent to an express direction. When you find that not only is there no express negative direction at all that he shall not proceed in bankruptcy, but, that there is an express direction that in an excepted case he shall be allowed to proceed, it would be more strange to say I am to get rid of that in the state of circumstances now before me, of the whole property being now vested in the official manager. There is a possible state of circumstances in which there being no official manager, and the representative having been appointed, they may be at liberty to proceed in bankruptcy to vest in the assignees that property which ought otherwise to be vested in the official manager. It was contemplated in the 1st section that nobody would be appointed representative who was an official manager; and therefore it contemplates the great probability of there existing official managers at the time of the appointment of the representative. When, therefore, I find that, after the advertisement calling on the creditors to appoint their representative, the proceedings are allowed to go on to the extent of bankruptcy, is there

an injunction. The whole case now comes before me both upon the validity of the fiat in bankruptcy, and also upon the equity alleged on behalf of the contributories, through the official managers, to

stay the proceedings, even if the validity of the fiat should be established. The London and Eastern Banking Company, which was incorporated under the provisions of the 7 & 8 Vict. c. 113, ceased to

anything which can justify or authorise me in saying that there is an express prohibition against their proceeding in bankruptcy under the operation of this act of parliament? If I am right in coming to the conclusion that, under the old act of parliament, the existence of the property in the official manager would not have altered the construction arrived at in the British Bank case, it appears to me plain that I cannot do that. Then as to the inconveniences, I see them, and feel them to be considerable; I feel that there is very little good to be done by applying in bankruptcy when there is no estate to administer; there is very little good in summoning the directors to be examined when they can just as well be examined here, and they cannot produce any books or papers, or any balance-sheet, without coming to this Court to have it done, and when no proceedings or judgment can be taken (for that is provided for by the 7th section) without the leave of this Court. I foresee all these inconveniences, but then those inconveniences, it appears to me, are met in a great degree by that 3rd section, which made me very anxious to know the part Mr. Daniel would take in this controversy, because that 3rd section would, beyond all doubt, as it seems to me, enable the representative of the creditors to come to a determination with the company for a compromise of all claims of a certain amount, and to stop all proceedings in bankruptcy, or other proceedings whatever. He might compromise all claims and release (the expression is to "release") them from all their liabilities; and if they are released from all liabilities this Court would not allow any proceeding in bankruptcy to go on; there would be a clear and substantial equity by the agreement of him who represents the whole body of creditors. However, Mr. Daniel's client does not take that part; he does not say he wishes to interfere in any way in this proceeding; he prefers, for some reason or other which he has, proceeding in bankruptcy.

Now there is another question which has been urged very strongly, which is this:—the equity has been put in this way, and it appeared the strongest way of arguing it. The act says, when the representative is appointed the creditors shall be parties to the winding up. Then, being parties to the winding up, it is said, you have something equivalent to a state of things going on to which the creditors are parties and in which the representative binds them all. And you have one of that body so represented taking steps of his own in order to proceed in bankruptcy; and what is more, the step is of this character: he says "pay me my debt or become bankrupt," and therefore the Court is put in this position, the Court has got the fund, and the Court has it in its power to say whether the company shall become bankrupt or not, by ordering payment of the debt which is sued for, and is not in a situation in which it should have its jurisdiction displaced. The creditor says, unless we exercise this

jurisdiction, which is to the prejudice of the general creditors, by paying a particular creditor, bankruptcy is to ensue. That seems to be a very strong argument again, if Mr. Daniel's client had not taken the part he had. His client represents the whole body of creditors, and therefore we have the whole body of creditors merely saying we make no objection to the proceeding. If you look at the reasoning of the Vice Chancellor Kindersley upon the course of proceeding in administering assets in this court in the case of the British Bank (which appears to me, if I may be allowed to say so, to be a very correct and sound way of viewing the question), he puts it thus: he says—"this Court considers when the decree has been made for the administration of the assets, that is for the benefit of all the creditors, and this Court considers it for the benefit of all to be paid rateably, of course according to their priorities, and the Court will not allow one single creditor to get an advantage." If I had in this case the representative of the body of creditors here saying—this creditor is bound as much as all are; we are all bound together; do not let this creditor adopt a mode of getting an advantage and forcing payment to him by means of his proceeding in bankruptcy, and driving the company to bankruptcy in the event of payment not being made, whilst the representative of the creditors says that this is not a course which we think ought to be pursued, we think that the proper mode of dividing the fund rateably amongst us is by a proceeding under the Winding-up Act to which we are all parties:—it struck me, in that point of view, that it would be something very nearly analogous to the case of administration of assets upon the death of a testator amongst his several classes of creditors. The Court would not, in that case, I am very much inclined to think, allow one creditor to take that course of proceeding which is merely to force a full payment of his own debt, all the other creditors being opposed to that course of proceeding. The course which all the other creditors wish to take, and which they say they think is the best, is to put aside all equities as amongst themselves. Then I ask, what is the equity of the contributories? I confess I cannot find in the course of legislation upon this subject any equity on the part of the contributories which entitles them to say that the course of proceeding now devised shall not take place. I do not like to dispose of this case without saying one word on what is supposed to be the course of proceeding in chambers in these matters. I think it would be a most unfortunate thing if it were supposed that a creditors' representative has not a full right to the utmost possible extent which he may consider legitimate, for the purpose of asserting the right to the payment of the debts of the creditors, of attending, watching over, and in every way of supervising the proceedings. That order, which has been made, may or may not have been under-

carry on business on the 11th of March 1857. On the 25th of November 1857, an order for the dissolution and winding up of the company was made. On the 21st of December 1857 official managers were appointed, and on the 13th of January 1858 a creditors' representative was chosen, in conformity with the provisions of the Joint-Stock Companies Amendment Act, 1857. On the same 13th of January

stood, but as I understand it, it is this, that this gentleman should have notice of all proceedings, and attend upon application being made. But that he must, at some time or other, make application under the 3rd section, I apprehend, is clear. He is only to attend such proceedings as the Judge may deem expedient and for the interest of the creditors. I apprehend that it would be open to him, and it would be his duty to apply to the Judge *in limine*, and state the class of proceedings which he wishes to attend, but not to make his application to be present at every summons. When the order is taken, I should have thought the simple course would have been for the representatives of the creditors to say, here is a class of proceedings which we wish to attend, and there is another class of proceedings which we do not wish to attend; we wish to have a definite understanding whether the business or proceedings are of such a nature or class as that we might ask to be present at it. This, as it appears to me, under this section of the act, would have been an ample protection to the creditors, as much as any bankruptcy. And I am bound to say that I cannot discover, save and except from the suggestion of Mr. Amphlett as to the case of a fraudulent preference, any possible benefit or advantage to any party by any proceedings in bankruptcy. At the same time, I own I do not feel that I am in a position to say—at least that is what is asked of me—that they shall not have an opportunity of asserting their rights before the Commissioner in bankruptcy, considering the position in which the whole mass of the creditors have placed the matter, all of them considering that it is for their benefit that this should take place. One advantage of not stopping the proceedings is this—and I really have not entered at length into the legal question, as to the fiat in bankruptcy, which I think would probably be decided by that tribunal—the additional advantage of allowing this course to be taken, of allowing the question to be tried, is this, that whenever the question is tried and disposed of, if it is adverse to the present applicants, who seek to stay the proceedings, they will have the full opportunity of bringing before one Court the two questions: namely, the equitable question whether there should be an injunction in the first instance to restrain proceedings, and also the legal question, whether or not the fiat could be sustained. That Court would have competent jurisdiction to try both questions, which I have not. I must, therefore, refuse this order, and I am bound to refuse it with costs, — to come out of the estate, of course.

Sir Charles Forbes and others, who were creditors upon a bill of exchange, accepted on behalf of the company by the manager, brought an action against the company in the Court of Exchequer, under the "Summary Procedure on Bills of Exchange Act, 1855." A summons was taken out before a Judge, by the official managers for a stay of proceedings, and on the 6th of February an order was made, by Martin, B., that the plaintiffs were to be at liberty to proceed, but that the judgment was not to be available for any other purpose than to make the company bankrupt. Judgment having been entered up, on the 10th of February, a notice requiring payment of the judgment debt was, on the 20th of March 1858, served upon Colonel Chadwick, who had been one of the directors of the company, and upon the official managers, and was also left at the office in Threadneedle Street, where the company had carried on the business. The amount not having been paid, secured or compounded for within fifteen days after service of the notice, the judgment creditors proceeded upon the act of bankruptcy alleged to have been thus committed, and on the 22nd of April 1858 the company was adjudged bankrupt. On the part of the official managers the proceedings in bankruptcy are impeached, and the validity of the fiat questioned on four distinct grounds:—First, that the act of parliament by which companies are made liable to bankruptcy does not apply to companies dissolved by act of law; secondly, that the judgment on which the petitioning creditor's debt was founded in this case was the result of an action which did not lie against the company; thirdly, that execution upon the judgment was restrained, and therefore it could not be used to occasion an act of bankruptcy; and, fourthly, that all the assets of the company were vested in the official managers, and the company were prohibited by the act of parliament from paying any debt, and therefore the non-payment of this judgment debt could not constitute an act of bankruptcy. The determination of these points, and of the whole case, will involve the necessity of a careful as well as an extensive examination of various provisions of acts of parliament, which, providing for different classes of persons interested

in the transactions of joint-stock companies, and each regarding its own object principally, and perhaps exclusively, have made it occasionally difficult to reconcile them together. The 7 & 8 Vict. c. 111, was the first act which was passed for the purpose of winding up the affairs of joint-stock companies unable to meet their pecuniary engagements. This act had principally, if not solely, in view, the rights of creditors, and it furnished them with the machinery of a fiat in bankruptcy to compel the payment and satisfaction of the debts and liabilities of the company. But though the legislature contemplated the final settlement of the affairs of a company through proceedings in bankruptcy, and this act contains clauses for compelling a just contribution from the members of the company towards payment and satisfaction of their debts and liabilities; yet it makes no provision for the adjustment of the rights and claims of the shareholders and contributories *inter se*. This was left to be regulated by the 11 & 12 Vict. c. 45, which was passed, as its preamble states, for the purpose of giving further facilities for the dissolution and winding up of joint-stock companies. As the former act had principally in view the rights of creditors, this appears to have been mainly directed to the shareholders and contributories, the winding up of the affairs of the company under its provisions proceeding in general upon the petition of the contributories, and the official managers being entrusted with the duty of adjusting the rights and liabilities of the contributories among themselves. Whether these two modes of proceeding for winding up companies may be co-existent and in action together, though independent of each other, or whether the one which is first forestalls and prevents the other, is a question which must necessarily be considered in the present case. But, assuming that under the acts already mentioned it was intended to leave these two systems to run each its own independent course, a further question will arise, whether, by the act of the 20 & 21 Vict. c. 78, they were not brought to the same point and forced into mutual co-operation. It is with these three acts of parliament that I have to deal in this case. In the first place, then, does the act which makes

companies liable to the bankrupt law apply to companies dissolved by law? It is argued, on the part of the official managers, that the 7 & 8 Vict. c. 111, in all its provisions, clearly points to and only regards existing companies, and the 3rd, 4th, 5th, 6th and 7th sections were referred to, and also the 48th section of the 7 & 8 Vict. c. 113, to shew by their language that it was only with companies in existence and carrying on their business, with directors capable of doing acts which would constitute acts of bankruptcy, and officers upon whom notices of different proceedings might be served, that the legislature intended to deal. But it appears to me that a satisfactory answer was found to this critical application of these sections in the 28th and 29th sections of the 7 & 8 Vict. c. 111, which expressly provide that notwithstanding the determination of any company incorporated within the meaning of the act by any other means than its determination by Her Majesty, such company and the persons who were officers thereof at the time of such determination shall respectively be considered as subsisting and as continuing for all the purposes of this act so long and so far as any matters relating to such company shall remain unsettled. Now, the purposes of the act are to wind up affairs of joint-stock companies through the medium of a fiat in bankruptcy, and therefore the company and its officers have continuance for the purpose of all those acts and all those proceedings which may be necessary in order to lead up to this object. But, secondly, it is contended that the judgment could not be used to work an act of bankruptcy as it was entered up in an action brought against the company which the petitioning creditors had no right to bring. There can be no doubt that an official manager having been appointed before the action was commenced by Sir Charles Forbes and others, by the 50th section of the 11 & 12 Vict. c. 45, it ought properly to have been brought against him, the words "shall and lawfully may," being in my opinion obligatory. But this objection, which is merely a formal one, the action, though nominally against the official managers, being actually against the company, should have been taken at an earlier period, and it is

much too late to urge it after judgment has been signed. In *Steward v. Greaves* the objection was raised by a plea in bar to the action. Had the defendant pleaded only non assumpsit, or had the judgment gone by default, he could never afterwards have been heard to object that a different party ought to have been sued. It is thirdly argued, on the part of the official managers, that the judgment was one upon which no execution could issue, and therefore that it was incapable of creating a debt which could serve as the foundation for an act of bankruptcy. This argument proceeds upon the words of the 5th section of the 7 & 8 Vict. c. 111, which is confined to judgments upon which the plaintiff "shall be in a situation to sue out execution," and it is alleged that the petitioning creditors could not have sued out execution upon their judgment, as by Baron Martin's order it was not to be available for any purpose but to make the company bankrupt. But I draw a totally different conclusion from the terms of this order. It is observable that not one word is said in it about restraining execution. The object is to leave the judgment available for the purpose of making the company bankrupt. If a power to issue execution was essential for this object, the power must have been left, or the judgment could not have been available for the only purpose for which it was allowed to have any effect. It would completely defeat the intention of the order if it were not to be capable of being used as a good foundation for an act of bankruptcy. The fourth point, however, is the most important one, and it raised the general question, whether proceedings in bankruptcy and for dissolving and winding up companies, under the two acts of the 7 & 8 Vict. c. 111, and the 11 & 12 Vict. c. 45, can be carried on at the same time by two separate and independent modes of action. This question has never before been distinctly raised. The Lords Justices, in the *British Bank case*, had no occasion to express any judgment upon it, as the act of bankruptcy in that case was by relation prior to the appointment of the official manager, and therefore the adjudication, which was the only point they had to answer, was valid and could not be annulled; and whatever

may be gathered to have been the inclination of Vice Chancellor Wood's opinion, when this case was before him, as the question of the validity of the fiat was not within his competency to decide, it would not be right to allow it to have the weight of an authority. In considering the question, then, independently of any previous decision, it will be important to observe that when the bankruptcy has taken place before any proceedings have been commenced under the 11 & 12 Vict. c. 45, the winding up of the affairs of the company is completely under the controul of the assignees. By the 6th section of the act, in case a fiat shall have been issued against any company no petition shall be presented for the dissolution or winding up, or for the winding up of such company under the act by any other person than by the creditors' assignees of the estate and effects of such company. Where, therefore, the bankruptcy has preceded any petition for the winding up of the affairs of the company no conflict of authority can possibly arise, because such petition can only be presented by the creditors' assignees, and if they think proper to pursue this course, and an official manager is appointed, all the estate and effects of the company which were before vested in the assignees become, by the 30th section of the act, absolutely vested in the official manager, and all the proceedings must then take place under the winding-up petition, and not under the bankruptcy. The real difficulty arises when, as in this case, the winding up has gone on to the extent of an official manager being appointed before a step towards bankruptcy has been taken. Under these circumstances, by the 29th section of the 11 & 12 Vict. c. 45, on the appointment of the official manager, all the estate, effects and credits, and rights of action of the company, become absolutely vested in him. All actions and proceedings are to be in his name. He is, by the 70th section, to pay all monies received by him into the bank, to his own account, and he is entrusted with ample powers to get in the estate, and to distribute it amongst the creditors, so as to make a final settlement of the affairs of the company. With these powers and duties, which leave no room for the intervention of any other hand to

deal with the estate, I should have thought that the legislature, having made provision for transferring the winding up to the official manager when the company had been made bankrupt, intended that, if the petition and the proceedings under the act had preceded the bankruptcy, the affairs of the company should be wound up in this manner, and that no subsequent proceeding to make the company bankrupt should take place, there being nothing on which the bankruptcy could operate, or over which the assignees could exercise any power. But I should have felt very much pressed by the 58th section, which provides "that, except as by the act expressly provided, nothing in the act contained, nor any petition or order under the same for the dissolution and winding-up, or for the winding-up of any company, shall extend or enlarge, diminish, prejudice, or in anywise alter or affect the rights or remedies of creditors, whether against the company or against any contributories of the same." Now, it is nowhere expressly provided by the act, that after a petition or order for winding up, no proceeding in bankruptcy should be commenced against the company, and the power to make companies bankrupt is one of the rights and remedies which creditors have against them. I should therefore have felt great perplexity and embarrassment how to reconcile the apparent intention to remove the estate of the company from the operation of bankruptcy on the one hand, with the reservation of the right to proceed in this mode, though of no conceivable benefit to the creditors, on the other, if the matter had rested on the two acts of the 7 & 8 Vict. c. 111, and the 11 & 12 Vict. c. 45. But the recent act, the 20 & 21 Vict. c. 78, relieves the question from some of its uncertainty, though not altogether from its difficulties. It seems to me to be quite clear, that by this act the legislature contemplated that proceedings in bankruptcy may be taken against a company after the other course of petition for winding up has been adopted. This can be made quite plain by reference to a few of its provisions. By the 1st section, which provides for the appointment of a creditors' representative, the whole proceeding is referred to a period after an order has been made for the dissolution and winding-up

of the company. And by the 7th section, when any company shall not have been adjudicated bankrupt, then, after the Judge or Master shall by advertisement have called on the creditors to appoint a representative, no such action as is mentioned in the Joint-Stock Companies Winding-up Act 1848, shall be commenced or proceeded with, otherwise than for the purpose of making the company bankrupt. It may be asked, of what use can it be to creditors to exercise this power, when all the estate of the bankrupt company is vested for distribution in the official manager. The answer is, that the creditors may derive considerable benefit through the medium of the bankruptcy. As I have already intimated, the object of the legislature by this act seems to have been, to make the two modes of finally settling the affairs of a company, by means of a bankruptcy and through the machinery provided by the Winding-up Act, unite together into one system. For this purpose, the creditors are to be brought in to take part in the winding up, and are to be called upon by advertisement to meet for the purpose of appointing one or more person or persons, other than the official manager, to represent them in and about the proceedings; and it is expressly declared that, from and after the issuing of the advertisement, all the creditors of the company shall be deemed parties to the winding up. The representative so to be appointed by the creditors is, however, subject to the approval of the Judge or Master, who may reject him if he appears to him to be unfit, or may remove him at pleasure; and therefore, in the selection of a person to represent them, the wishes or judgment of the creditors may thus be controuled and thwarted. But if they desire to be secure of a person to act as their representative, without their choice being subjected to any discretion but their own, they may proceed to make the company bankrupt, and their assignees are, by the 1st section of the act, to be deemed and taken, and are thereby constituted the representatives of the creditors for the purposes of the act, and of course, being statutorily appointed, they are irremovable: even if a representative has been previously chosen or appointed, his authority is immediately superseded by the

appointment of assignees under the adjudication of bankruptcy against the company, and all the rights, powers and authorities previously possessed by the representative become vested in the assignees. Here, there is a ground upon which, even if the whole estate is removed from the operation of the bankruptcy, the adjudication may be beneficial to the creditors; but whether this is so or not, the intention of the legislature appears to me to be too plainly expressed to allow of any other conclusion than that the fiat in the present instance, though obtained after the appointment of an official manager, is valid and cannot be annulled. But, assuming the validity of the adjudication, the question arises upon the equity asserted by the official manager to restrain the creditors from proceeding in bankruptcy upon the principle on which the Court acts, where there is a decree for administering assets which is in the nature of a judgment for all the creditors, and to enable them to be paid rateably, and one creditor will therefore not be allowed to proceed in any manner which will give him an advantage over the rest. But in whom is this equity vested? Clearly in the class who are interested in and entitled to the fund to be distributed, but in the present case the creditors do concur in the propriety of proceeding to bankruptcy. The parties who are urging the equity against them are the shareholders and contributors of the company through the official manager. If the creditors have a legal right (as I think they have) by the act of parliament to proceed in the way which they have preferred, how can I from any sense of inconvenience of the course which they have adopted, restrain them in the exercise of this right? But upon a careful consideration of the case, there appears to me to be an equity of another sort which arises out of the relation of the parties, as established by the act of the 20 & 21 Vict. c. 78, and which calls for and will justify the interference of the Court. In order to render my view of the matter clear, it will be necessary to refer once more to the act of the 11 & 12 Vict. c. 45. By the 30th section of the act, as I have before mentioned, when an order for winding up the affairs of a company is made on petition

by direction of the Court of Bankruptcy, all the estate and effects which were before in the assignees become vested absolutely in the official manager. There can be no doubt that, under this section, the whole power to collect the estate and to distribute it, and to make a final settlement of the affairs of the company is transferred to the official manager, and that the powers and duties of the assignees are completely superseded. Under this act there is no provision made for the interference and controul of the assignees in the winding-up proceedings after they have parted with their power by pursuing the course of petitioning in the manner provided. It seems to me that the legislature, by the provisions in the act of the 20 & 21 Vict. c. 78, intended to place the assignees in precisely the same situation as they would have been upon a petition by them for winding up the affairs of a company under the 11 & 12 Vict. c. 45, but with a power of interference not given under the former act, and with liberty to join and concur, and take part in all the proceedings in and about the winding up of the company. By the appointment of an assignee, therefore, after the order has been made for winding up a company, he is at once the creditors' representative, and they become parties to the winding up. The bankruptcy then is of no further avail than to clothe the assignees with authority to concur with the official manager in the proceedings in and about the winding up of the company. I cannot think that it could have been intended that he should at the same time be left to pursue his own independent course under the bankruptcy, more especially when I consider the futility of his operations, divested as he is of the power over the estate and effects, the inconvenience which would arise from the clashing of the two authorities, and the ruinous expense in which the affairs of the company would be involved by this double action. I have come to the conclusion then, that although the fiat is valid and cannot be annulled, and although the creditors cannot be restrained in the bankruptcy proceedings upon any ground upon which the Court acts in creditors' or administrators' suits, yet that, under the provisions of the 20 & 21 Vict. c. 78, the bankruptcy being only available for a particular

purpose, the assignees ought to be restrained from using the proceedings in any other manner than, in their character of creditors' representatives to co-operate in the winding up of the affairs of the company by the official manager, and that to this extent, therefore, an injunction ought to be granted. The costs on both sides will come out of the estate; the costs to include the costs in bankruptcy and the costs of the adjudication.

May 29. — The following order was made:—That the assignees in bankruptcy of the London and Eastern Banking Corporation, when appointed, be restrained by the order of this Court from using the proceedings in the bankruptcy in any other manner than in their character of creditors' representatives for the purpose of co-operating in the winding up of the affairs of the said company by the official manager. The costs incurred by all parties in this Court, and in the Court of Bankruptcy, to be paid out of the estate.

M.R. }
Feb. 9, 11, 17. } HAYWOOD v. COPE.

Specific Performance—Agreement—Coal Mines—Lease.

An agreement to lease two seams of coal, "known as the two-feet coal and the three-feet coal, lying under land to be hereafter defined, in the Bank-End estate," is not so indefinite as to prevent its being enforced.

In the absence of fraud or misrepresentation, this Court will decree the specific performance of a speculative agreement, and it will exercise no discretion upon the probable value of the undertaking.

A lessor of mines, by delivering the draft of a lease in accordance with an agreement dated in 1855, and not insisting on the execution of the lease until 1857, after the mines had been tried and abandoned, as of no value, does not, by the lapse of time, lose his right to require a specific performance of the agreement. The taking possession of the mine, however, is not an acceptance of the title.

This suit was instituted for the specific

performance of the following agreement, dated the 15th of January 1855:—"Charles Cope agrees with Howard Haywood, for those two seams of coal known as the 'two-feet coal,' and the 'three-feet coal,' lying under lands to be hereafter defined, in the Bank-End estate, near Norton, in the county of Stafford, at the rate of 9d. per ton for all coal and slack going over a weighing machine; minimum rent 100*l.* per annum, on a lease of fourteen years. Mr. Cope to pay for all surface trespass, at the rate of 5*l.* an acre; to commence paying minimum rent within eighteen months from date of agreement. All coal and slack sold or raised in the intermediate time to be paid for at the rate of 9d. per ton. Howard Haywood agrees to let to Charles Cope the before-mentioned two seams of coal, at the price before mentioned."

After signing the agreement the defendant entered upon the mines and proceeded to work, but, finally, he abandoned them without having returned the draft of a lease which had been sent to him for approval. The evidence is noticed in the judgment.

Mr. Selwyn, Mr. Haddan, and Mr. Jessel, for the plaintiff.—The contract made was for a mine; it was made after full inspection, and without any fraud or misrepresentation: the plaintiff was, therefore, entitled to a specific performance of the agreement.—

Ridgway v. Sneyd, Kay, 627.

Jennings v. Broughton, 17 Beav. 234; s. c. 22 Law J. Rep. (N.S.) Chanc. 585; 5 De Gex, M. & G. 126; 23 Law J. Rep. (N.S.) Chanc. 999.

Clapham v. Shillito, 7 Beav. 146.

Atwood v. Small, 6 Cl. & F. 232.

Mellers v. the Duke of Devonshire, 16 Beav. 252; s. c. 22 Law J. Rep. (N.S.) Chanc. 310.

Mr. R. Palmer and Mr. Southgate, for the defendant.—The agreement was wholly indefinite; the mines were never defined. The defendant had been permitted to try some old workings; but these the plaintiff had found useless twenty years before. He suppressed that fact, and extolled the quality of the coal; but though the contract was for coals and slack, it was proved by undoubted evidence that there were no coals distin-

guished from slack. The plaintiff, therefore, had no right to insist upon the defendant taking a lease of what he knew did not exist. The delay in filing the bill also disentitled the plaintiff to insist upon the existence of any agreement.—

Brodie v. St. Paul, 1 Ves. jun. 326.

Boydell v. Drummond, 11 East, 142.

Kenworthy v. Schofield, 2 B. & C. 945;

s. c. 2 Law J. Rep. K.B. 175.

Sugd. Vend. and Pur. 180, 11th edit.

Day v. Newman, 2 Cox, 77.

Wedgwood v. Adams, 6 Beav. 600.

Watson v. Marston, 4 De Gex, M. & G. 230.

Watson v. Reid, 1 Russ. & M. 236;

s. c. 1 Tam. 382.

Southcomb v. the Bishop of Exeter,

6 Hare, 213; s. c. 16 Law J. Rep.

(N.S.) Chanc. 378.

The MASTER OF THE ROLLS.—I think the defendant must be considered to have taken the chance of the mines turning out well or ill. I should, however, like to hear a reply upon the agreement.

Mr. Selwyn, in reply.—The mines were represented as being under the Bank-End estate. It only remained to define the lands under which they were to be worked. This was done by the draft lease, which the defendant never returned. He, however, went down the mines, and, with assistance, proved the same.—

Owen v. Thomas, 3 Myl. & K. 353;

s. c. 3 Law J. Rep. (N.S.) Chanc. 205.

Feb. 17.—The MASTER OF THE ROLLS.—It has been argued that an agreement to lease a mine, under lands to be hereafter defined in the Bank-End estate, is so uncertain and vague, that it cannot be enforced. The plaintiff, however, says that the agreement is to lease seams of coal lying under the lands of the Bank-End estate, the boundaries of which are to be hereafter described and defined. This seems to be not only the meaning of the contract, but also the meaning attached to it by the parties themselves. From the evidence, it would seem that the Bank-End estate is not a large tract of land, but a farm of 27 acres 2 roods 8 perches,

and though contests have arisen on the contract, yet it was never suggested, until the papers came before the professional advisers of the parties, that the subject-matter of the contract was in doubt, or that the extent of the land under which the coal was intended to be demised was uncertain, and to be afterwards agreed on; on the contrary, when the draft lease was sent to the defendant no observation was made, either upon the description or extent of the parcels contained therein. It is evident that the draft lease cannot be used for the purpose of controuling or explaining the contents of the agreement itself. But it shews what intention was existing in the minds of the parties with reference to the subject-matter of that contract. The construction I have put upon this document is the plain and natural one; it is that put upon it by the parties themselves. It never entered into the minds of either of them, until this suit was instituted, to suggest that the mine of coal under the whole of the Bank-End estate was not to be demised, but only a portion, which was afterwards to be agreed on; and that the words "to be afterwards defined" were not intended to be an accurate description of the farm under which the coal was to be taken. The objection, therefore, as to the uncertainty of the contract, fails.

The next objection is, misrepresentation, or rather suppression of the truth. It is shewn that twenty years before, the plaintiff had worked these seams of coal, and then abandoned them, because the working was not profitable. I think this objection also fails. There were two pits already opened on the ground. Before entering into the arrangement with the plaintiff, the defendant applied for leave to have these pits, or one of them at least, cleaned, that he might be at liberty to examine the coal in the shaft. This was done. He went down himself, and took with him three other persons, for the purpose of examining and ascertaining the nature and value of the seams of coal.

It was after this had been done that he entered into this agreement with the plaintiff. He says that he had no knowledge of mines and coal, and that he was wholly ignorant of these matters. He ought, then, to have employed some person who had a

knowledge of mines and mining; and I believe he did. It would be no excuse for a man, who had himself personally inspected a house, to see whether it was in repair, afterwards to contradict his own judgment, on the ground that he was not a surveyor, and was unable to say whether the house was in a good and sufficient state of repair or not. Here he did not trust to his own judgment, but three other persons accompanied him down the pit, and some of them gave him their opinion.

The evidence satisfied me that the defendant took the lease on his own opinion, and on the opinions which he was able to obtain from others as to the value of the mine to be worked. Was, then, the plaintiff bound to say that he had worked the mine, and that he had found it unprofitable? That some one had worked it, and abandoned it, was obvious, for there were the shafts and abandoned workings, which the defendant examined. Was it incumbent on the plaintiff to inform him that he was the person who had worked it some twenty years before and found it not to be worth working? The subject-matter of this contract is a mine; that is to say, seams of coal, which may turn out better or may turn out worse. The question is always in some degree one of speculation, and it is well known that mining leases and sales are always made with reference to this circumstance. With the exception of not knowing that the plaintiff himself had worked the mine, the defendant knew as much as any one else could know by his own examination. Whether the seams were likely to improve or to deteriorate was a matter which could only be ascertained by the future working. The mine has turned out ill; but the defendant cannot on that account set aside the contract, any more than the plaintiff could have repudiated it or have demanded higher terms if the seams had turned out profitable. Another objection is the length of time which has elapsed before the bill was filed. This also must fail. The defendant received the draft lease in May 1855. He continued working the mine until July 1855; then he complained of it, and said it must be abandoned. But from the evidence it seems that the mine was worked on and off for the defendant up to October

1856, though evidence on the subject is not very exact. The solicitor of the plaintiff, who sent the draft lease on the 26th of May 1855, says that he received no communication of any sort, from the defendant or his solicitor, in answer until the month of January 1857, when the defendant's solicitor came to him and stated that the defendant was desirous of abandoning the agreement, and that he sent in a proposal to that effect in writing in the same month, which was declined on the 2nd of February 1857, and the present bill was filed on the 26th of March following. In order to have entitled the defendant to make time an element in this matter, he ought to have given the plaintiff a notice that he repudiated the agreement, that he had abandoned the mine, and that he would have nothing more to do with the transaction. If this had been done, and the plaintiff had not proceeded with due diligence, then, undoubtedly, the Court would not have allowed him to enforce the contract; but the defendant worked the mine regularly until July 1855; he then went on trying it more or less until October 1856. The speculation, however, turned out very bad, and it is said that this is an extremely hard case, and that the plaintiff is insisting upon the defendant paying him 1,400*l.* for a thing that is literally worth nothing; that according to the discretion which the Court exercises, it cannot compel specific performance of the contract, and that matters of specific performance are in the discretion of the Court. It must, however, be exercised according to fixed and settled rules. The Court cannot exercise a discretion by merely considering what, as between the parties, would be fair to be done. What one person may consider fair another may consider unfair. There must be some rule, some settled principle upon which to determine how that discretion is to be exercised. Lord Eldon, in *White v. Damon* (1) observes, "I agree with Lord Rosslyn, that giving a specific performance is matter of discretion; but that is not an arbitrary, capricious discretion. It must be regulated upon grounds that will make it judicial." The Master of

(1) 7 Ves. 35.

the Rolls, in *Burgess v. Wheate* (2), at the conclusion of the argument, cites a well-known passage from Sir Joseph Jekyll, upon the discretion of the Court, and gives his own opinion. He says, page 152, "Although proceedings in equity are said to be *secundum discretionem boni viri*, yet when it is asked *vir bonus est quis?* the answer is, *qui consulta patrum, qui leges juraque servat*. And, as it is said in *Rooke's case* (3), that discretion is a science, not to act arbitrarily according to men's wills and private affections; so the discretion which is to be executed here, is to be governed by the rules of law and equity, which are not to oppose, but each in its turn to be subservient to the other. This discretion, in some cases, follows the law implicitly; in others, assists it and advances the remedy; in others, again, it relieves against the abuse or allays the rigour of it; but in no case does it contradict or overturn the grounds and principles thereof, as has been sometimes ignorantly imputed to this Court. That is a discretionary power which neither this nor any other Court, not even the highest, acting in a judicial capacity, is by the constitution intrusted with.' This description is full and judicious, and what ought to be imprinted upon the mind of every Judge." If, therefore, in the present case, I were to exercise a discretion, and leave these parties to their action at law, upon what principle could I do so, except that the speculation has turned out very favourable to one party and very unfavourable to another? At an auction, if property is sold for an inadequate value, the vendor cannot, on that ground, repudiate the contract. The mere question as to what might have been fair or right to be done between the parties, had all the facts which are now known been known at the time of the contract to both parties, cannot be a ground for exercising or regulating the discretion of the Court. The Court will exercise a discretion in not enforcing the specific performance of a contract to compel a person, who has inadvertently entered into it, to commit a breach of duty; as in the case of trustees,

for instance, to compel them to commit a breach of trust. In such a case, according to fixed rule, the Court will exercise its discretion in not compelling the specific performance of the agreement. But the mere inadequacy of the terms is not a ground for exercising any such discretion. It is a hard case, no doubt, and it may be proper to make an abatement; but that is totally distinct. It rests in the *forum* of the plaintiff's conscience: the Court cannot interfere judicially. This is a contract which was fairly entered into between the parties, and the usual decree must be made for the specific performance of the contract, with costs up to the hearing, and a reference in chambers to settle the lease in case the parties differ. I do not think that possession of the mine was an acceptance of the title; it is necessary in the case of a mine that there should be immediate possession as the property is running out. I cannot, therefore, hold that the defendant has accepted the title.

M.R. }
March 9, 10. }

ROBSON v. M'CREIGHT.

Assurance Company—Winding up—Enforcing Payment of Policy.

An assurance for 300l. was effected with a company registered under the 7 & 8 Vict. c. 110; the policy was afterwards adopted by another company. After the death of the assured, his executrix brought an action to recover the 300l. Judgment was obtained, but it was unproductive. An order to wind up the company was afterwards obtained, and an official manager was appointed; but no advertisement was issued under the 20 & 21 Vict. c. 78, calling upon the creditors to appoint a representative. The executrix proved her debt before the Judge, and then filed a bill against the official manager to obtain payment. Upon a demurrer, it was held, that the suit was rightly instituted.

The bill in this cause was filed by Isabella, the widow and executrix of John Robson, against William Henry M'Creight, the official manager of the London and County

(2) 1 W. Black. 123; s. c. 1 Eden, 177, 214.

(3) 5 Rep. 99 b.

Assurance Company, to obtain a declaration that on the 15th of August 1856 the funds and property, including the capital not paid up on the shares held in the company, became charged with and liable to the payment of 300*l.* to the plaintiff; and praying that the defendant might be decreed to pay the same, with interest thereon, together with the costs of this suit and of a judgment and execution at law, and that the decree might be enforced against every contributory of the company, to the extent of their legal or equitable liability in respect of the plaintiff's claim.

On the 1st of May 1854 J. Robson effected an assurance for 300*l.* on his own life, with "The Oak Mutual Life Assurance and Loan Company." The policy was duly executed, and it was thereby agreed that if J. Robson should die on or before the 27th of July 1854, or should live beyond that day, and he or his assigns should on or before the 27th of July next ensuing, and on or before the 27th of each succeeding three months in every subsequent year during the continuance of the policy, pay to the company a premium of 1*l.* 19*s.* 6*d.*, then the funds and property of the company should, conformably with the rules and regulations thereof contained in the deed of settlement, dated the 25th of May 1852, be subject and liable to pay to the executors, administrators or assigns of J. Robson, within three calendar months after satisfactory proof to the directors of his death, 300*l.*, together with such further sum (if any) as should have been appropriated as a bonus to the sum assured; it was also provided that the stocks, funds and property of the company and the securities thereof, and so much capital of the company for the time being, held in shares, as should not have been then paid up and applied or disposed of (subject to all prior claims and demands), should alone be liable to answer all claims and demands in respect of the policy; and that neither the directors giving the policy, nor any of them, nor any other director or officer for the time being of the company, or their respective executors or administrators, nor any other proprietor or holder of shares in the capital of the company, nor any other member thereof, should be personally or individually liable to any such claim or demand in any action, suit or other pro-

ceeding at law or in equity, nor to any contribution to such claim or demand, except so far as the share or shares then held by them in the capital should not for the time being have been paid up, or required to satisfy all such prior claims or demands as aforesaid; and that upon the legal transfer by any shareholder, in accordance with the provisions of the deed of settlement of the company, of any share, the transferee thereof, and not the transferring proprietor, should be answerable for such unpaid part of such share in the said capital.

The Oak Assurance Company was completely registered under the 7 & 8 Vict. c. 110.

On the 23rd of January 1855, the Oak Assurance Company was unable to continue its business; it therefore agreed with the London and County Assurance Company (which was also duly registered) that the latter should adopt the policy, and, with the consent of J. Robson, an indorsement was made upon the policy as follows:—

"The London and County Assurance Company hereby adopts this policy, and takes the risk of same, and all other matters connected therewith, subject to the conditions therein expressed and thereon indorsed.

(Signed) S. Jessop,
George Arnold, } Directors.
C. J. Wilkinson, }
S. H. Stronberg, Actuary of
the Oak Assurance Com-
pany.

(Countersigned)—

C. B. Roe, pro Managing Director."

The several deeds of settlement authorized each of the companies to enter into such an agreement.

John Robson made his will on the 3rd of December 1855; he gave all his real and personal estate to his wife, and he appointed her his sole executrix.

The testator died on the 16th of December 1855, having duly paid all the premiums under the policy, and observed all the conditions and agreements in the policy and indorsements thereon.

The plaintiff proved the will, and gave the directors notice of her husband's death, and on the 10th of June 1856 she com-

menced an action against the London and County Assurance Company, in the Court of Exchequer of Pleas, and on the 11th of July final judgment was signed for want of a plea for the sum of 300*l.* with 12*l.* 13*s.* 8*d.* taxed costs. The goods of the company at their office were seized under a *f. fa.*, but they were successfully claimed by Mr. Jessop, under a bill of sale, made by the company in July 1855, and the sheriff returned *nulla bona* to the writ.

On the 1st of November 1856 an order was made by this Court that the London and County Assurance Company should be wound up, under the 11 & 12 Vict. c. 45. and 12 & 13 Vict. c. 108, and the defendant was appointed the official manager, but no advertisement had been issued calling upon the creditors of the company to appoint a representative.

On the 23rd of March 1857 the Judge charged with winding up the company allowed the plaintiff's claim.

The plaintiff then requested the defendant to pay her the amount of her claim or to proceed to make a call on the contributories of the company, but he refused, and alleged that there were no funds available to discharge the claim, and that a call would not be of any effect.

The prospectus issued by the company, with the approval of the shareholders, upon the faith of which J. Robson agreed to the adoption of the policy by the company, stated that the capital of the company consisted of 100,000*l.* in 20,000 shares of 5*l.* each, and the plaintiff charged that a large number of such shares had, since the death of J. Robson, been held by contributories liable to the plaintiff's claim, and that a nominal sum only had been hitherto paid up, and that the defendant had or ought to have ample funds applicable to discharge the plaintiff's claim.

The defendant put in a general demurrer for want of equity.

Mr. Selwyn and *Mr. J. H. Humphreys*, in support of the demurrer.—The plaintiff's remedy is against the company and the shareholders, and not against the official manager. He is a mere receiver and can take no steps against any one except by the direction of the Judge. The 20 & 21 Vict. c. 78. has made the creditors parties

to the winding up. The Court, however, could not make any order upon the officer; there were no accounts that the Court could direct; the plaintiff, therefore had made no case for the relief asked—*M'Kenzie v. the Sligo and Shannon Railway Company* (1).

Mr. R. Palmer and *Mr. A. G. Marten*, for the plaintiff.—This bill is properly filed. The 20 & 21 Vict. c. 78. has not made any difference in the relief to which a creditor is entitled, irrespective of the relief at law. The plaintiff has full right to come here to enforce a security, and that right remains notwithstanding the Winding-up Acts. The 20 & 21 Vict. c. 78. is not compulsory upon creditors; their rights are not interfered with; they are not bound to take any steps before the Judge, and it would be disadvantageous to the company if they did. Section 7. relates to the staying of suits, but it does not affect the plaintiff, and section 8. requires the creditor to give security. There was, therefore, nothing to prevent this bill from being filed, or the plaintiff from proceeding, and she may get a decree against the contributories if this demurrer is overruled, as it ought to be, with costs.

Law v. the London Indisputable Life Insurance Society, 1 Kay & J. 223; s. c. 24 Law J. Rep. (N.S.) Chanc. 196.

Halket v. the Merchant Traders' Ship Loan and Insurance Association, 13 Q.B. Rep. 960; s. c. 19 Law J. Rep. (N.S.) Q.B. 59.

Hassell v. the Merchant Traders' Ship Loan and Insurance Association, 4 Exch. Rep. 525; s. c. 19 Law J. Rep. (N.S.) Exch. 183.

Cope's case, 1 Sim. N.S. 54; s. c. 20 Law J. Rep. (N.S.) Chanc. 28.

Smith v. the Hull Glass Company, 8 Com. B. Rep. 668; s. c. 19 Law J. Rep. (N.S.) C.P. 123.

Thompson v. Norris, 5 De Gex & Sm. 686.

Lord Talbot's case, Ibid. 386; s. c. 21 Law J. Rep. (N.S.) Chanc. 846.

In re Phillips, 18 Beav. 629.

(1) 4 El. & B. 119; s. c. 24 Law J. Rep. (N.S.) Q.B. 17.

Prichard's case, 5 De Gex, M. & G. 484; s. c. 23 Law J. Rep. (N.S.) Chanc. 914; 4 De Gex & Sm. 328.

Hill v. the London and County Assurance Company, 1 Exch. Rep. (N.S.) 398; s. c. 26 Law J. Rep. (N.S.) Exch. 89.

Mr. Selwyn, in reply, referred to—

Hallett v. Dowdall, 18 Q.B. Rep. 2; s. c. 21 Law J. Rep. (N.S.) Q.B. 98.

The MASTER OF THE ROLLS.—It has been argued, in support of the demurrer, that the remedy is against the company and the shareholders at law; that an action against them is the proper course; and that the present suit is precluded by the operation of the Winding-up Acts. But whether there is a remedy at law or not, this policy gives a lien or charge upon the property of the company, which can only be made available in a court of equity. According to *Law v. the London Indisputable Life Insurance Society* that is a sufficient authority for coming to this Court. Independently, therefore, of the Winding-up Acts, the plaintiff has a right to come to this Court to obtain payment of this policy, whether she had or not any remedy at law; the plaintiff's case is still stronger, as she appears by the bill to have taken proceedings at law, and that they have been ineffectual. Do the Winding-up Acts, then, preclude those proceedings? Not only do they not interfere in terms with the rights of creditors, but the 11 & 12 Vict. c. 45. s. 58. expressly reserves them. The only fetter imposed is, that no proceedings can be taken at law, and I think it extends to equity, until proof of the debt has been made under the Winding-up Acts, which has been done here. The object of those statutes was not to affect the rights of creditors in the slightest degree, but to enable parties to obtain contribution amongst themselves. It has been questioned several times, whether proceedings under the acts estop creditors from instituting proceedings in this court. *Thompson v. Norris* cannot be distinguished from this case. In that case there was a mortgage upon land belonging to a company, which was being wound up

by arrangement with the official manager. The land was sold, but the proceeds were not sufficient to satisfy the mortgage; the mortgagee proved for the balance, but he was unable to obtain payment; he filed a bill to enforce his claim, and a demurrer to the bill was overruled, it being considered that the Winding-up Acts did not preclude the creditor from enforcing his remedy in equity. *Talbot's case* establishes the same principle. The 20 & 21 Vict. c. 78. does not fetter creditors by requiring them first to obtain leave of the Court before instituting proceedings; it is only after proceedings have been taken to appoint a creditors' representative that a restriction is imposed. The bill states that this has not been done. The demurrer must be overruled.

Walsell v. Hall, 7388 37.
" " 1502262 547.

KINDERSLEY, V.C. } WHITEHEAD v. BENNETT.
Feb. 27.

Landlord and Tenant—Trade Fixtures and Buildings erected for Trade—Right of Removal.

Upon a question arising between landlord and tenant as to trade fixtures, the Court held, that buildings built of brick, with brick foundations let into the soil, although erected for the sole purpose of trade, could not be removed by the tenant; although machinery, engines, vats and utensils, with their accessories, might be removed.

This suit was instituted for the administration of the estate of W. Barker. A portion of the property consisted of certain plots of land near Manchester, upon which there was a building that had been used as a lunatic asylum. The receiver who had been appointed by the Court, entered into an agreement, dated the 19th of September 1852, with W. Ireland, whereby it was agreed that a lease of the buildings and premises should be granted to W. Ireland for the term of twenty-one years, at a rent of 42l. per annum, with a covenant on the part of the said W. Ireland to repair the premises. Under this agreement Ireland took possession of the premises, and converted the building thereon into a cotton-mill, and he also erected on the land a bleaching-house, a drying stove,

a dye-house, an engine-house, and a lime-house, and also a building erected upon cross beams, resting upon two walls, and forming a passage. A dispute afterwards arose as to the terms of the lease, and the lessee claimed a right to remove the buildings which he had erected, on the ground that they were trade fixtures, used for the purpose of his business. An injunction was obtained to restrain the removal of the buildings; and upon a reference to chambers, evidence was obtained as to the nature of the buildings, and from the report of a gentleman competent in such matters, who had been sent down by the Court to examine the premises, it appeared that the various buildings erected by the lessee were made of brick, with brick foundations let into the soil to the depth of from five inches to five feet. The question now came on upon an adjournment from chambers, as to the right of the tenant to remove the buildings.

Mr. Eddis appeared for W. Ireland, the tenant.

Mr. Karlake, for the trustees; and

Mr. Basalgette, for other parties in the suit.

The following cases were cited :—

Elwes v. Maw, 3 East, 38.

Poole's case, Salk. 368.

Lawton v. Lawton, 3 Atk. 13.

Lord Dudley v. Lord Warde, Amb. 113.

Penton v. Robart, 2 East, 88.

KINDERSLEY, V.C.—My opinion is, that these are not trade buildings, removable at the pleasure of the tradesman. It is extremely difficult to come to a conclusion upon the authorities as to any principle which can be safely enunciated. I have carefully considered the subject as to the possibility of deducing any rule from the cases cited, but have been unable to do so. Still there are, no doubt, general principles upon which these cases are founded. In the first place, the question has arisen between the executor and the heir; and, secondly, between the tenant for life and the remainderman; and, lastly, between the landlord and tenant. Again, there have been different views taken by the Court with reference to agricultural

buildings, trade buildings and the ordinary fixtures which a tenant puts in for his own convenience. In this case the most favourable instance arises, namely, the right of removal as between landlord and tenant; and, moreover, the things sought to be removed are of the most favourable character, as being trade fixtures in the sense that they are buildings erected for the exclusive purposes of trade. With respect to anything in the nature of machinery, engines, or plant, or things substantial and solid, such as vats, utensils, &c., these are all clearly within the right of removal as between landlord and tenant. In all these cases, the things sought to be removed might either be taken away bodily, where they are capable of being set up again elsewhere, or, if by reason of their bulk or complexity, it should be necessary to take them to pieces, they could be put together in the same form in some other place. There is no dispute about the right of the tenant to remove such fixtures when they retain the general character of trade fixtures. Take the case, for instance, of a large steam-engine, which it is impossible to remove in its integral condition, yet the right of removal will apply to such an article, notwithstanding that you must take it to pieces. It certainly may be metaphysically argued from this, that a building of the most substantial and solid character, let ten feet into the ground, with cement, is capable of removal, brick by brick, and of being put together in another place in the same form; but the common sense of mankind would determine that an engine is a very different thing from a house, although every stone, brick, tile and chimney-pot might be removed; one, however, is the case of removal of materials, and the other of taking to pieces and restoring to their former state, actual portions of the engine. It would be impossible to admit the validity of such an argument without laying down a rule never intended to be enunciated, and which would alter the broad distinction between trade fixtures and buildings used in trade. Suppose the case of a building or utensil which, by the rule of law, a tenant might remove as a trade fixture, if there is anything which is a mere accessory or adjunct to it, and has no other existence or pur-

pose, then if you may remove the principal thing, you may also remove the accessory. Among the many cases upon this subject, there is not one which has determined that even in the most favourable circumstance of landlord and tenant, a tenant has a right to remove any building which he has erected, merely because it is used only for the purpose of trade; and if the argument used in this case is allowed to prevail, it can only do so in such a manner as may be followed up to its legitimate consequences, and it would be laying down a rule that whatever a tradesman erected, however substantial, and however firmly let into the freehold, yet if the identity is preserved, the tenant might remove it. Such a rule is established nowhere. Not only is there no such decision, but there is not even a dictum that can bear any such construction. The strongest authority is the case of *Elwes v. Maw*, which was a case of agricultural fixtures, and certainly in that case there are dicta which appear distinct at first sight, and if it could be found that Lord Ellenborough ever laid down such a rule of law as that which has been contended for in this case on behalf of Mr. Ireland, I should gladly have followed it, but I can find no such decision. It is evident that those dicta refer only to the particular case in question. Assuming, then, that these buildings were erected solely for the purposes of trade, has the tenant a right to remove them? and are they capable of removal? There is no law, practice or authority, having regard to the nature of these buildings, to justify the Court in saying that they come within the description of trade fixtures so as to bring them within the cases cited. If they are to be so considered, it would be laying down a very alarming rule, not only generally, but particularly with respect to that district of the north of England, in Lancashire and Yorkshire, where the most valuable structures, involving enormous expense, and constituting the whole value of the land, are built for the sole purpose of trade. No doubt great favour has been shewn, and should always be shewn, towards trade, and the modern cases have relaxed the rigour of the old authorities in this respect, but some limit must be put to this indulgence, and the cases seem to

me to have gone quite as far as they ought to go. The question, then, turns upon the nature of these particular buildings. With respect to that which is erected upon the walls forming a passage, it is incapable of being removed in an integral condition, and the same observation applies to the engine-house, although it may in some sense be called an accessory to the engine. But it is not a mere shed; on the contrary, it is a brick building, let into the soil. Take the common case of those gigantic buildings which are raised storey after storey, fitted with spinning-jennies, drums, wheels, &c., which can only be used in such a building. It is clear, *ex concessis*, that you might remove the machinery, or the engine, however large, which is usually in the lower portion, and which works the whole machinery; but if the argument as to accessories were carried out, you might allow the entire building to be removed, and it is impossible to see where such a doctrine would stop. The present case is precisely the same on a smaller scale; and with respect to all and each of these buildings, my opinion is, that they cannot be brought within the proper legal definition of trade fixtures, removable by the tenant.

M.R. } *In re* PEYTON'S SETTLEMENT.
March 23, 25. }

Trustees—Absence—Dividends of Stock—Right to receive.

A sum of stock was standing in the names of four trustees, one of whom was residing abroad:—Held, that the 13 & 14 Vict. c. 60. s. 22. (the Trustee Act, 1850,) empowered the three resident trustees to ask for an order that the dividends of the stock due, and accruing due, might be paid to them without any authority from the fourth trustee.

A sum of 956*l.* 7*s.* 4*d.* Bank stock was standing in the names of O'Reilly, Peyton, Faris and Smith, four trustees of a settlement. O'Reilly was out of the jurisdiction; the remaining three were resident in Scotland and Ireland. It was alleged that neither could personally attend in London

without inconvenience to receive the dividends, nor could they give a sufficient power of attorney, it being necessary that it should be executed by all the stockholders, which could not be done as O'Reilly was inaccessible. It was suggested, therefore, that O'Reilly should be displaced as a trustee under the 13 & 14 Vict. c. 60. s. 22; whereupon the remaining trustees could execute a valid power of attorney.

The *cestuis que trust* objected to the removal of O'Reilly from the trust, and they now insisted that the 13 & 14 Vict. c. 60. s. 22. vested the right to the past and future dividends in the three trustees without interfering with the stock which was vested in the four.

Upon the petition being heard, an order was made that the right to receive the dividends due, or thereafter to accrue due, on the 956*l.*, or any other sum of Bank stock standing in the names of the petitioners Peyton, Faris and Smith, as three of the trustees jointly with O'Reilly, should vest in the petitioners Peyton, Faris and Smith alone. The Bank of England objected to this order, as being likely to cause confusion and a complication of accounts.

Mr. R. Palmer, for the petitioners.

Mr. Cotton, for the Bank of England.—

In effect, the order severs all future dividends for ever from the stock—*In re Hartnall's Trusts* (1).

THE MASTER OF THE ROLLS.—I have to consider whether the 13 & 14 Vict. c. 60. applies to future as well as past dividends. It is admitted that it applies to past dividends, and many orders have been made to that effect. This clause clearly applies to future as well as past dividends. I am unable to draw a distinction between the words of the clause: it says, it shall be lawful for the Court to make an order vesting the right to transfer such stock or to receive the dividends or income thereof in such last-mentioned person, either solely or together with any other person or persons whom the Court shall appoint. It certainly would be a strained construc-

tion to say that that only applied to past dividends and not to future, and it would produce this inconvenience, that if it were impossible and inconvenient for parties to appoint a new trustee—which no doubt would get over the difficulty altogether, and bring it clearly within the scope of the act,—it would be necessary, for a time, to come every year, or at stated intervals, to receive the dividends which had afterwards accrued due, without there being anything in the act to lead to that conclusion.

The case referred to arose upon the 13 & 14 Vict. c. 60. s. 23; it does not, however, follow that the same conclusion is to be arrived at upon section 22: the clause certainly had words very similar to those in section 22, and Parker, V.C. held, that it only applied to past and not to future dividends. There a person, a sole trustee, absolutely refused to act, and therefore if a trustee was necessary it might be fit and proper that a new trustee should be appointed, since in case of a refusal to act it would be impossible to perform the trust. In that case it might seem to be sufficient to vest the right to receive the dividends in some other person, and to confine that right to the dividends which had already become due, but the same reason does not follow upon section 22; there appears, therefore, no ground for restricting those words in the manner suggested.

It was argued that this might be an inconvenience to the Bank of England, and that in every case in which it occurred, it would compel the necessity of opening a separate account, with respect to the right to receive the dividends, and the persons in whom the right to the stock existed; but I am not at liberty to vary an act of parliament in consequence of the inconvenience it may inflict upon particular persons. If it were so, I must take into consideration the possible inconvenience cast upon the persons who are the *cestuis que trust*, who are from various other causes unable either to appoint a new trustee, or are not desirous to do so, as in the present case of the absence of one of the trustees from this country, whose place it is not desirable to fill up by the appointment of any other person, as it is desired that he should still perform the trust when he returns to this

(1) 5 De Gex & Sm. 111; s.c. 21 Law J. Rep. (N.S.) Chanc. 384.

country. I cannot, therefore, take that into consideration. It is clear that it would not be desirable that this Court should as a matter of discretion exercise the power conferred upon it by this clause wantonly to avoid an inconvenience like that suggested, if any such is produced from the necessity of the parties, who seek the benefit of the act to obtain payment of their dividends. The legislature has given that relief; this Court is consequently bound, and the order made upon the petition must stand (2).

done, the company might be ordered to reconvey the land to him upon payment of the present value. To this bill the company demurred, for want of equity, and the demurrer was allowed by one of the Vice Chancellors, and on appeal.

A landowner cannot, under the 127th and 128th sections of the Lands Clauses Consolidation Act, require a reconveyance to him of the land taken from him for an undertaking which has been abandoned, before the expiration of the ten years limited by those sections.

By "disposing of" lands within the 127th and 128th sections, the transfer of them to other persons is contemplated, and not the application of them to a different purpose from that for which they were originally obtained.

This was an appeal, by the plaintiff, from a decision of Wood, V.C. (reported ante, 299), allowing a demurrer for want of equity to a bill filed by the plaintiff against the defendants, praying that it might be declared that the plaintiff was entitled to repurchase, and the company were bound to reconvey certain portions of land which had been previously purchased by the company under the compulsory powers of their act; that the company might be decreed to reconvey the land to the plaintiff; and that, until the reconveyance, the company might be restrained by injunction from carrying on any railway or other works on the land. The company, in the year 1846, obtained an act empowering them to make and maintain certain branch railways, called the "Whaley Bridge and Hayfield Branches," and to enter upon and use such of the lands therein specified, including certain portions of land of the plaintiff as should be necessary for such purpose: and it was enacted, that the compulsory powers of the company should not be exercised after the expiration of three years, and that the railway should be completed within five years, the term limited for the exercise of the compulsory powers being afterwards enlarged to the 27th of July 1851, corresponding with the period at which the railways themselves were to be completed. The bill stated that this Whaley Bridge Branch Railway was a

L.C. { ASTLEY v. THE MANCHESTER,
May 7, 8. { SHEFFIELD, AND LINCOLN-
SHIRE RAILWAY COMPANY.

Lands Clauses Consolidation Act—Superfluous Lands—Abandonment of Undertaking.

Land belonging to A. B. was taken by a railway company, under the compulsory powers of their act, to form a branch line. In 1850 the scheme was abandoned. The company, in 1857, brought a bill into parliament to enable them to make another line, which would pass over the land taken from A. B. A. B. filed a bill charging that the company could not use for any other purpose than that of the branch line the lands which had been taken under their compulsory powers to enable them to form that line, and praying that as the project had been aban-

(2) Upon appeal to the Lords Justices, by the Bank, on the 29th of March, it was suggested by Lord Justice Turner, that the difficulty might be got over by the appointment of new trustees of this settlement; but counsel for the petitioners replied, that as there were other properties subject to the trusts, some difficulty might hereafter arise. Lord Justice Knight Bruce then suggested that the order might be made for payment of the dividends to the three gentlemen and the survivors and survivor of them, but this also was not acceded to. Ultimately their Lordships stated their willingness to modify the order of the Master of the Rolls, by directing the dividends to be paid to these gentlemen, residing in Scotland, "during their joint lives," observing that the petitioners would in that case be under the necessity of proving the continued existence of all three upon each occasion when the dividends were to be received by virtue of a power of attorney executed by them. This offer being accepted, the order was thus modified by consent.

work of great public utility, and particularly advantageous to the plaintiff in respect of the facilities of communication which it would have afforded to him as owner of the Dukinfield estate. It appeared from the statements in the bill that no portion of the Whaley Bridge branch had been completed; that in the year 1850 the company took up a single line of rails from a portion of the plaintiff's land, which they had purchased, and that they gave up their alleged design of completing, and entirely abandoned the Whaley Bridge branch, and that they had never purchased, and were not now able to purchase, any of the land necessary for the construction of a considerable portion of the Whaley Bridge branch, nor had they ever done any act towards the construction of a considerable part of the last-mentioned railway. The company, in 1857, applied for a bill to enable them to make branches substantially corresponding with the Whaley Bridge branch, which had been abandoned. A petition was presented by the plaintiff against that bill, as a landowner who was interested, and the defendants withdrew the bill; but in the present session they were promoting another bill to obtain the authority of parliament for the construction of a railway from Newton to Compstall, and they intended, it was said, to use for the purpose of such proposed railway the lands purchased by them from the plaintiff as though they had become and were the absolute owners of the fee simple. The plaintiff alleged that the line of railway proposed by the bill was only an unimportant portion of the Whaley Bridge Branch, that it was an undertaking of an entirely different character, and one for which the defendants would not have been entitled to have required the plaintiff to have sold to them his land under the powers of the act of 1846. Then the plaintiff alleged that the company, under the pretence of completing the railway on the plaintiff's land under the expired powers of the act of 1846, had sent a large number of workmen to re-commence the formation of a line of railway, not with a view to the construction of the Whaley Bridge branch, but as a part of the line of railway proposed by the bill pending in parliament. The plain-

tiff charged that the company had no right or authority to take and compel the plaintiff to sell and convey to them the said portions of his land, except for the purpose of enabling them to construct their Whaley Bridge branch, and that as they had abandoned the intention of carrying into effect, and were no longer able to carry into effect, the purpose for which alone they were empowered to take the portions of the plaintiff's land, the plaintiff was entitled to require them to reconvey the same to him upon payment of the present value, or upon such other terms of repurchase as the Court should deem just, and to which terms the plaintiff offered to submit.

Mr. Daniel and Mr. F. J. Wood, in support of the appeal.—The 127th section of the Lands Clauses Consolidation Act, 8 Vict. c. 18, regulates the company's acts as to superfluous lands; and upon this and the following section the defendants had relied, as the ten years therein mentioned had not expired. But the defendants were about to do acts which would be in contravention of the plaintiff's right under the 128th section, when the time expired. The bill was not to restrain the defendants from applying to parliament, but to restrain the use of powers for another purpose than that for which they were conferred upon them. The bill sought to place the plaintiff in the same position in which he was before his land was taken, so that he would then have notice of the proceedings of the defendants before parliament, and be enabled to assert his rights there.

They referred to—

Bostock v. the North Staffordshire Railway Company, 4 El. & B. 798; s. c. 24 Law J. Rep. (N.S.) Q.B. 225.

The Queen v. the York and North Midland Railway Company, 1 Ibid. 178, 858; s. c. 22 Law J. Rep. (N.S.) Q.B. 41, 225.

Cohen v. Wilkinson, 12 Beav. 125; s. c. 18 Law J. Rep. (N.S.) Chanc. 378, 411.

Agar v. the Regent's Canal Company, 1 Swanst. 250.

Blakemore v. the Glamorganshire Canal Navigation, 1 Myl. & K. 154; s. c. 2 Law J. Rep. (N.S.) Chanc. 95.

The Solicitor General and Mr. G. L. Russell, in support of the demurrer.—Two cases might be suggested in which a right to come to the Court might exist in the landowner. First, if the company had exercised its powers to obtain land having no *bond fide* intention of applying them for the purposes of their act. Secondly, in the case of a *bond fide* purchase, and an abandonment of the undertaking, if the company were, during the interval before the time for the disposition of superfluous land arrived, making a material alteration of the land, as removing the soil or pulling down a mansion-house. In either of these cases it was possible that a right to come to the Court might exist. But, in the present case, there was no fraud, no mistake. If there had been mistake the right must be correlative, so that the company could require back the money paid by them. The bill was not framed upon the superfluous land clause. As to that clause (127.) there must be an admission that there is superfluous land, which is shewn by the preface to that and the following sections. The company could not be required to abstain altogether from the use of this land. If the company were to proceed to make this railway independently of parliament the landowner could not object: a shareholder might apply, or the Attorney General on behalf of the public might apply; but a landowner could only apply in such a case, if he could shew injury to any right which he had.

They referred to—

The Lancaster and Carlisle Railway Company v. the North-Western Railway Company, 2 Kay & J. 293; s. c. 25 Law J. Rep. (N.S.) Chanc. 223.
Thorne v. the Taw Vale Railway and Dock Company, 13 Beav. 10.

Mr. Daniel, in reply, asked that the Court would not dismiss the bill, but grant an injunction until the act of parliament was obtained. This was the case of a landowner alleging special damage. The company was only entitled to the possession of the property, and could not deal with it as if they had the inheritance. The rights of the landowners were inchoate rights, which might become consummate, but

which could not be set aside. It was not, therefore, competent to the company to despoil the inheritance. He cited—

Spencer v. the London and Birmingham Railway Company, 8 Sim. 193; s. c. 7 Law J. Rep. (N.S.) Chanc. 281.
Hill v. the Great Northern Railway Company, 5 De Gex, M. & G. 66; s. c. 23 Law J. Rep. (N.S.) Chanc. 524.

The LORD CHANCELLOR [after stating the facts of the case] said—During the whole of the argument I have not entertained any serious doubt of the propriety of the Vice Chancellor's decision, that no equity arises on the facts stated in the bill. Where a landowner has been compelled to part with his land to a railway company, no peculiar relation arises between the parties from that circumstance, however beneficial it may be to him that the railway should be made; no obligation is thrown on the company to complete their undertaking, and no right exists in the landowner to compel them to do so. This is clearly established by the case of *The York and North Midland Railway Company v. the Queen* (1). There being, then, no power in the landowner to compel the company to make the railway, if they should altogether abandon the undertaking, and apply the land taken under the powers of this act to a different purpose than the making of the railway, has the landowner any new right, arising from this state of things, which he can enforce in a court of equity? The right must depend either upon the provisions of the Lands Clauses Act, or upon an equity outside that act. The 127th and 128th sections are introduced by a sort of recital as to their object: "And with respect to lands acquired by the promoters of the undertaking, under the provisions of this or the special act, or any act incorporated therewith, but which shall not be required for the purposes thereof, be it enacted as follows:—Within the prescribed period, or, if no period be prescribed, within ten years after the expiration of the time limited by the special act for the completion of the works, the pro-

(1) 1 El. & B. 858; s. c. 22 Law J. Rep. (N.S.) Q.B. 225.

moters of the undertaking shall absolutely sell and dispose of all such superfluous lands, and apply the purchase-money arising from such sales to the purposes of the special act." There is no doubt that the term "superfluous" means "more than is wanted for the undertaking," and it seems to import that the work has been commenced, that land has been applied, but that there is land which is unnecessary to be applied, and which therefore was intended to be allowed to be disposed of; but I think that in the general introduction of these sections the expression "the lands which shall not be required for the purposes thereof," is sufficiently large to embrace the case of an undertaking being abandoned. The 128th section provides that "before the promoters of the undertaking dispose of any such superfluous lands, they shall, unless such lands be situate within a town, or be lands built upon or used for building purposes, first offer to sell the same to the person then entitled to the lands (if any) from which the same were originally severed." If the argument of the counsel for the plaintiff is right, viz., that the plaintiff is entitled here, under the provisions of this act, to his right of pre-emption under the 128th section, he cannot compel the company to allow him the exercise of that right before the expiration of the ten years, unless the company, by some act of theirs, have shewn that they are about to sell or dispose of this land. It has been argued, that there is to be found, from the acts of the company in the present case, in applying to parliament for a different line from the Whaley Bridge branch line, and intending to use for this new purpose a portion of the land previously acquired from the plaintiff, a peculiar equity, which grows out of these circumstances, and entitles the party to insist that the promoters of the undertaking are, in point of fact, disposing of the superfluous lands upon which the right of pre-emption operates. It seems to me that this construction of the word "dispose" cannot be maintained. The act clearly contemplates by the use of the word the transfer of the land to some other person, not the application of it by the company to a different purpose. The plaintiff, therefore,

can have no right to a reconveyance under the superfluous lands clauses of the Consolidation Act, upon the argument which is urged as to the construction of these sections. But then it is said that these clauses have nothing to do with the present question, and that the plaintiff is entitled to a reconveyance wholly irrespective of these clauses. He asserts that where the company have acquired land under the compulsory powers of their act and have abandoned the undertaking, an equity immediately springs up in the landowner to entitle him to require that his land should be re-conveyed to him by the company. I was surprised at the assertion of an equity of this extraordinary character, and looked for some authority to be produced in support of it, but nothing of the kind was offered. Such an equity, if it exists, must be reciprocal, and if a landowner has a right to claim a re-conveyance of his land, the company ought to have a corresponding right, when they abandon the undertaking, to call on the landowner to take back his land and to return them the purchase-money. But then it is urged, on the question of general relief, that the conduct of the company is an abuse of the powers conferred on them by the legislature, and that their application to parliament, under the circumstances stated in the bill, was an evasion of the powers which were intended to be conferred upon them by the legislature, and was an abuse of their powers affecting the rights and interests of the plaintiff in such a manner as to entitle him to apply to a Court of equity for this general relief. I am unable to follow the argument in this respect. It is clear that, supposing a landowner can complain of any peculiar injury which he has received from the acts of the company, affecting his interests in any way, he may come to a Court of equity to restrain those acts; but I cannot understand how the application to parliament, which it is admitted could not be restrained, there being nothing in the way of trust or confidence in the company which would hinder their application to parliament, can induce a Court of equity to interfere and restrain them. I cannot understand how their application for a bill, which may, if it pass into law, enable them to use this portion

of the land which they obtained under the powers of the act of 1846 for a different purpose and undertaking, entitles the plaintiff to say that he has sustained or is likely to sustain such injury and damage as gives him a peculiar interest and a right to that general relief which he prays in substitution of that specific relief which is pointed out by the prayer of his bill. Neither is the plaintiff entitled to an injunction, the right to such relief being incidental to and depending upon the plaintiff's general right to relief.

KINDERSLEY, V.C. }
Feb. 25. } RAMSDEN v. HURST.

*Vendor and Purchaser—Coal Mines—
Compensation to a Purchaser.*

The vendor of an estate had granted to A. B. the right to work coals under the property, with a proviso, that when the workings of the coal had finally ceased, the pits should be filled up, and the land restored to a proper state of cultivation. A. B. ceased to work the mines, and filled in the pits. Upon the sale of the estate A. B. claimed to be entitled to re-work the coal, and the purchaser therefore claimed compensation: The Court considered that there had only been a temporary cessation to work the coals, and held, that the purchaser was entitled to compensation, to be ascertained by an expert appointed by the Judge.

The question in this case was argued upon an adjourned summons from chambers. Certain freehold estates in Yorkshire had been sold under a decree of the Court, and the purchaser claimed compensation in respect of a claim to work coal under the property. It appeared that in November 1823 an agreement had been entered into between the owners of the property and a person named Kaye, entitling Mr. Kaye to work coal under the land, according to certain stipulations contained in such agreement, and it was provided by the agreement, that when the workings of the coal had finally ceased, the pits should be filled in, and the land restored to a proper state of cultivation. The right of working the coal was subsequently vested in a person

named Bastow, who ceased to work the mines in 1843, and thereupon the pits were filled in, and the ground was restored to a proper state of cultivation. A claim had since been raised by Bastow, that he was authorized, if he should think fit, to re-open the pits and re-work the coal under the land. In consequence of this claim the purchaser contended that he was entitled to compensation.

The Vice Chancellor was of opinion, upon the construction of the agreement and upon the evidence respecting the cessation to work the mines, that there had not been a final, but only a temporary cessation to work the coal, and that Bastow was entitled, if he should think fit, to re-work the mines. The principal question, therefore, was, whether the purchaser was entitled to compensation in respect of Bastow's claim. The evidence as to the existence of coal under the surface of the land was of a conflicting nature.

Mr. Baily and Mr. Nalder appeared for the plaintiffs.

Mr. Wickens, for the purchaser; and
Mr. Hobhouse, for Bastow.

The following cases were cited:—

Seaman v. Vawdrey, 16 Ves. 390.

Sugden's Vendor and Purchaser, 353, 11th edit.

Peacock v. Penson, 11 Beav. 355;
s. c. 18 Law J. Rep. (N.S.) Chanc. 57.

KINDERSLEY, V.C., after expressing his opinion that Bastow was entitled under the agreement to exercise his right to re-work the coal, said—The objection to the title on the part of the purchaser is, I think, a valid objection, and it has been held that a purchaser is entitled to compensation not only in respect of that which can be calculated but of the mere chance of the existence of mines which, if existing, might be worked by a third person. It has been held, in many cases, that where a correct calculation cannot be arrived at, still if a probable estimate can be made, by a person competent to judge of such matters, the Court will give compensation. It is, no doubt, a very strong case to give compensation to a purchaser who buys

land where a right exists in some other party to work mines actually in work, but it is still stronger to award compensation where there are mines not in work, and which possibly may never be worked at all; yet it has been held that a purchaser under such circumstances has a right to insist on a conveyance of the property and to a compensation for the outstanding right, and if such compensation can be given the purchaser is entitled to what he contracted for. It is very difficult for any but a practical man to say what is the value of coal under a piece of ground which has not been tested, since it cannot be known precisely whether a vein exists at all, or if it does, what is its depth, or what would be the expense of working, or what space would be required for spoil banks, pits, and other works; and, in addition to all this, there is the question, whether the person who had a right to work the mines will ever come upon the land for that purpose. Yet the Court has held that a purchaser has a right to have the compensation ascertained, and I am bound to follow the decisions upon the subject, although I confess I should have hesitated so to decide if this had been *res integra*. Under the new practice the Judge in chambers is armed with power to appoint what is called an expert, who upon having pointed out to him what it is that the Judge is desirous of ascertaining, is sent to the spot that he may have ocular inspection, so far as it will assist him, taking care at the same time that he is armed with all available evidence. In this way I think the present matter is capable of compensation; and that the purchaser is entitled to it. Assuming, therefore, that the purchaser is entitled to compensation, it must be estimated both in respect of the terms of the agreement and on the general right.

KINDERSLEY, V.C. }
March 9. } GARNER v. BRIGGS.

Judgment Debt—Decree in Equity registered under 1 & 2 Vict. c. 110.

A decree in the court of equity, registered in the Court of Common Pleas, under the

statute 1 & 2 Vict. c. 110, declared that the executor of a testator was liable to make good to the testator's estate a certain sum of money, and that the executor should be charged with the amount in his account of the personal estate:—Held, that this decree did not constitute a judgment debt.

In a suit to administer the estate of the deceased executor, a decree, registered under the above act, directed that an account should be taken of what was due to the testator's estate, and that the plaintiff should go in and prove as a creditor for the amount certified to be so due:—Held, that the plaintiff could not claim as a judgment creditor, and was not entitled to any priority over specialty and simple contract creditors.

The plaintiff in this case was a legatee under the will of Messrs. John and James Houlditch, and the defendants were the representatives of Dr. Moore, the surviving executor of the Messrs. Houlditch.

In 1847 a suit was instituted by the present plaintiff for the administration of the estates of these two testators, and the usual decree was made for taking the accounts.

It appeared that part of the estate consisted of a debt due from a person named O'Farrall; and Dr. Moore, the executor, had insured the life of O'Farrall for 2,500*l.*, and in consequence of the premium not being paid by the debtor, Dr. Moore had paid four different premiums of 90*l.* each.

Subsequently, however, the policy was allowed to drop, and another suit was then instituted by the plaintiff against Dr. Moore, seeking to make him liable for the amount of that policy.

On the 30th of May 1855 a decree was made, by which it was declared that Dr. Moore was liable to make good to the joint estates of John and James Houlditch the said sum of 2,500*l.* secured by the policy, with interest at 4*l.* per cent., from August 1853, the period at which O'Farrall died, after deducting the amount of the premiums paid by Dr. Moore in respect of the policy, and it was ordered that Dr. Moore should be charged with such balance in his account of the personal estate of the said testators, and that he should pay to the plaintiff his costs of that suit. There was also the usual

direction to the Taxing Master, but no reservation of further directions.

Dr. Moore died in June 1855, and on the 23rd of October 1855 the decree of the 30th of May 1855 was duly registered in the Court of Common Pleas, under the provisions of the 1 & 2 Vict. c. 110. s. 18. (1).

A third suit was then instituted by the plaintiff for the administration of Dr. Moore's estate, and the two former suits were revived against his representatives. A decree was made in the third suit, on the 1st of July 1856, whereby it was ordered that an account should be taken of what was due from the late Dr. Moore at the time of his decease and was then due by the defendants to the estate of the Messrs. Houlditch, and of the costs of the second suit so directed to be paid by Dr. Moore, and that the plaintiff should go in and prove as a creditor against the estate of Dr. Moore for the total amount certified to be due from him, with costs, and the accounts were directed to be carried on.

In pursuance of this decree the chief clerk certified, on the 1st of April 1857, that the sum due from the estate of Dr. Moore was 3,833*l.* 17*s.* 3*d.*

The decree of the 1st of July 1856 was registered in the Common Pleas, in pursuance of the act, on the 6th of May 1857. The plaintiff then claimed, on behalf of the estate of the Messrs. Houlditch, to be a judg-

ment creditor on the estate of Dr. Moore for the said sum of 3,833*l.* 17*s.* 3*d.*, under the decrees of the 30th of May 1855, and of the 1st of July 1856, and also to have a prior charge on the estate of Dr. Moore for the said judgment debt by virtue of the registration of the said decrees. The chief clerk certified that the plaintiff was entitled to stand as a judgment creditor to the full amount of his claim. That certificate was brought before the Court, when the Vice Chancellor overruled the decision, but the plaintiff was allowed to stand as a judgment creditor in respect of his costs only, which had been taxed at 189*l.* under the decree of May 1855. As to the rest of the claim His Honour decided that the plaintiff was only entitled to rank as a simple contract creditor, on the ground that as the money was not directed to be paid to any particular person the case was not within the statute 1 & 2 Vict. c. 110. The present summons was then taken out by the plaintiff, who had been advised that, independently of that statute, he was entitled to rank with and be paid *pari passu* with judgment creditors, and the question was now discussed upon the adjourned summons. It appeared that the estate of Dr. Moore was insufficient to pay all the liabilities upon it, but there was sufficient to satisfy nearly all the plaintiff's claim if he succeeded in establishing his priority.

Mr. Greene, Mr. Lewin and Mr. Shebeare appeared for the plaintiff.

Mr. Glasse and Mr. Briggs, for the defendants, contended, that the plaintiff was not entitled to stand as a judgment creditor, since the decree of May 1855 was not final, and was not a conclusive direction to any one to pay a particular sum of money. Nor was the plaintiff entitled to any priority over the specialty and simple contract creditors of Dr. Moore.

Mr. Baily and Mr. Walford appeared for some of the creditors.

The following cases were cited during the argument:—

Morrice v. the Bank of England, 3 Swanst. 573.

Searle v. Hale, 2 Vern. 37.

Stasby v. Powell, Freem. C.C. 333.

(1) 1 & 2 Vict. c. 110. s. 18. "And be it enacted, that all decrees and orders of Courts of equity, and all rules of Courts of common law, and all orders of the Lord Chancellor or of the Court of Review in matters of bankruptcy, and all orders of the Lord Chancellor in matters of lunacy, whereby any sum of money, or any costs, charges or expenses, shall be payable to any person, shall have the effect of judgments in the superior courts of common law, and the persons to whom any such monies, or costs, charges, or expenses shall be payable shall be deemed judgment creditors within the meaning of this act; and all powers hereby given to the Judges of the superior courts of common law with respect to matters depending in the same courts shall and may be exercised by Courts of equity with respect to matters therein depending, and by the Lord Chancellor and the Court of Review in matters of bankruptcy, and by the Lord Chancellor in matters of lunacy; and all remedies hereby given to judgment creditors are in like manner given to persons to whom any monies or costs, charges or expenses, are by such orders or rules respectively directed to be paid."

Smith v. Eyles, 2 Atk. 385.

Perry v. Phelps, 10 Ves. 34.

Rome v. Young, 4 You. & C. Exch. 204.

Jones v. Williams, 8 Mee. & W. 349;
s. c. 10 Law J. Rep. (N.S.) Exch.
253.

The Duke of Beaufort v. Phillips, 1
De Gex & Sm. 321.

Dolland v. Johnson, 2 Sm. & Gif. 301;
s. c. 23 Law J. Rep. (N.S.) Chanc.
637.

Chadwick v. Holt, 26 Law J. Rep.
(N.S.) Chanc. 76.

KINDERSLEY, V.C.—After having heard this case fully and ably argued, I find that I have no serious doubt upon the question before me. There are two points raised: first, whether the decree of the 30th of May 1855, continued by that of the 1st of July 1856, made the plaintiff a judgment creditor in respect of the sum of 3,833*l.* 17*s.* 3*d.*, representing the amount secured by the policy of which Dr. Moore was trustee, with interest thereon, and after deducting the amount paid as premiums upon the policy, so that it can be proved as a judgment debt in the suit to administer the estate of Dr. Moore; and, secondly, whether the plaintiff is entitled to priority in respect of his claim over the other specialty and simple contract creditors. The principle of the decisions, subject to exceptional cases with respect to judgments at law, is this:—to constitute a judgment debt, the judgment must not be interlocutory but final, for the payment of a specific sum of money, upon which there is nothing left to be done except to compute interest, and the party must also have an actual right to receive the money. Now, it is impossible to suggest any case at law exactly analogous to the present. There is the old judgment *quod computet*, which is almost obsolete; then there is the final judgment, which directs the actual payment to the plaintiff of a certain sum of money. There is another principle, which is now well established, and is quite irrespective of the 1 & 2 Vict. c. 110, that is, that a decree in the courts of equity stands upon the same footing as a judgment at law, but this would not be so if the decree itself was not analogous to the judgment in its effect. When this Court directs an account to be

taken, that has an effect analogous to the judgment *quod computet* at law; but if this Court not only directs an account, but goes on to make a decree on interlocutory matters connected with the account, there is nothing analogous to that at common law that I am aware of. Interlocutory directions are not final to determine the question of debt, and do not exist at law. Now, if the decree of May 1855 had directed that the 2,500*l.*, the amount of the policy, with interest, after deducting the premiums, should be paid by Dr. Moore to the plaintiff, that would, upon the authority of *The Duke of Beaufort v. Phillips*, have been final, and would have constituted a judgment debt, for although the accounts were involved, still the order would have been final, and there would have been an actual direction to pay the money to a particular person. In this case, however, instead of a decree for payment of the money, there was a direction that Dr. Moore was liable to make good the money—not to the plaintiff, but to the estate of the Messrs. Houlditch, and that in the accounts which were then to be taken, he should be charged with that balance as an item of account. It was contended that this decree was final, and, in one sense, no doubt, it was so, there being no reservation of further directions, but it was not final in the sense of there being a final direction to pay a particular sum of money to a particular person, and consequently that decree could not create a judgment debt. It is remarkable that not a single instance can be produced by the industry of counsel, in which a decree or order has been held to constitute a judgment debt, except where it has been a final decree, with an actual direction to pay the money. That alone is almost conclusive to my mind as to the state of the law, because the subject must have occurred over and over again. If this matter, as to the policy, had occurred before the institution of any suit, the question would, no doubt, have been raised by the pleadings, and relief would have been prayed, and it would have been asked that Dr. Moore should be declared liable to be charged in the account with the particular sum of money; but it seems to me impossible to contend, that the mere charge of

an item in the account can constitute a judgment debt. It so happens in this case that these matters occurred after the institution of the suit, and moreover were made the subject of another suit. It was in consequence of this, that the declaration was, that the estate should be charged with the amount. It is only a decree that the plaintiff may introduce this sum into his claim upon the estate. The decree, therefore, is only final so far as it determines that, in taking the account, Dr. Moore is to be charged with a certain balance, but it is not final as to directing him to pay the particular amount. I think, under these circumstances, that it does not constitute a judgment debt. The second contention, as to the other balances for which the plaintiff was to go in and prove as a creditor against the representatives of Dr. Moore, was that the decree was not actually a decree against Dr. Moore, but that it stood upon the same footing as a judgment recovered against his executors. It appears to me that the preceding observations apply here, and that the decree cannot be said to be final in any sense, particularly as there was a direction to continue the accounts. But if it were assumed to be final, what would then have to be done with the amount? It is not to be paid to any one, but it is the subject of a mere direction. As to both the points, therefore, it appears to me that there is nothing in the case to constitute the plaintiff a judgment creditor, or to give him the priority for which he contends.

LORDS JUSTICES. { ADKINS v. BLISS.
March 30. { VALE v. BLISS.

Practice—Writ of Fieri Facias—Record and Writ Clerks Office—Service—1st Order of May 1839.

On the 4th of June 1857 A. was ordered to pay certain sums of money within eight days after the date of the chief clerk's certificate. The certificate was made and was dated the 8th of August following. The certificate was not approved until after the long vacation, and was not served on A. until November. A. refused to pay on account of this irregularity. A notice of motion was served on him to

obtain an order for him to pay. He did not appear, and on the 19th of November, on affidavit of service, an order was made for him to pay the amount mentioned in the certificate, "on or before the 1st of December next, or within four days of service upon him of this order." The order was not served on A. or his solicitor, and was not passed and entered until the 2nd of December. After a month's delay from the last-named day a writ of fi. fa. was issued for each sum mentioned in the certificate, under which the sheriff levied on the goods of A, who on the 17th of February 1858 moved to set aside the writs and to have the money levied repaid to him. Vice Chancellor Stuart refused to make any order other than that A. should pay the costs of the sheriff of the motion:—Held, upon appeal, reversing that decision, that the order of the 19th of November not being perfected till the 2nd of December, was until that time a nullity, and A. had no opportunity of complying with the first part of it, and the order not being served upon A. the period limited in the latter part had never arrived, wherefore the writs were wholly irregular and void.

This was an appeal from a decision of Vice Chancellor Stuart. The facts were as follows:—Jabez Adkins, the plaintiff in the first of these suits, filed a bill for the administration of the estate of Mary Saunders, of whom he was a creditor. He obtained a decree for administration, and, subsequently, an order for the sale of the real estate was made. In the mean time the plaintiffs in the suit of *Vale v. Bliss* who were entitled to legacies charged on the real estate, filed a bill and obtained a decree for sale. On the 4th of June Adkins moved to stay proceedings in the second suit, and on that occasion an order was made by consent that an account should be taken of what was due to the plaintiffs in *Vale v. Bliss*, and that Adkins should pay the sums which should be found due, and also the costs, within one week after the date of the chief clerk's certificate. The chief clerk's certificate was dated on the 8th of August, but was not served until after the long vacation, when Adkins refused to pay the amount on the ground of irregularity in the service. The plaintiffs in *Vale v. Bliss* accordingly

served a notice of motion on Adkins to enforce payment of the sums mentioned in the certificate, or that in default he might be committed, or that the order of the 4th of June might be discharged, and the plaintiffs in *Vale v. Bliss* might be at liberty to proceed with their suit.

The motion was made on the 19th of November, Adkins not appearing, when Vice Chancellor Stuart made an order "that the plaintiff Jabez Adkins should on or before the 1st of December then next, or within four days after service of this order, such service to be verified by affidavit, pay" to the plaintiff Samuel Vale certain sums, and to others named certain sums, and that the costs of the plaintiffs Vale and wife and Glover of that application should be included in the costs ordered to be taxed by the order of the 4th of June, and that the same should be paid by the plaintiff Adkins.

This order was left for entry at the office of the Clerk of Records and Writs on the 2nd of December, the day after the time mentioned in it for payment of the money, but the order was never served on Adkins, either personally or on his solicitor. On the 13th of January 1858 the sheriff of Northamptonshire levied upon the goods of the plaintiff Adkins under two writs of *fiery facias*, issued out of the Court of Chancery: one for a sum of 122*l.* 17*s.* 8*d.*, by or on behalf of the plaintiff Samuel Vale; the other for a sum of 353*l.* 3*s.* 8*d.*, by or on behalf of the plaintiff Glover; both sums being payable under the above-mentioned orders of the Court, together with sheriff's poundage, officers' fees, charges for possession, and other incidental expenses.

Adkins then moved before the Vice Chancellor that the writs might be set aside and the monies be repaid to him, and filed an affidavit in which he swore that the order of the 19th of November, or a copy, was never served upon him personally or left at his abode or place of business, nor, as he was informed and believed, upon his solicitor personally or otherwise. The Vice Chancellor considered that as Adkins was already in default under the former order of the 4th of June 1857, the irregularity in not serving him with the order of the 19th of November was not

such as to justify the Court in setting aside the writs, and he made the following order: "It appearing that at the time of issuing the writ of execution the plaintiff Adkins was in default as to the payment of the sums of money in respect of which the writs of execution were issued, and which, pursuant to the order of the 4th of June 1857, ought to have been paid within a week of the chief clerk's certificate, dated the 8th of August 1857, this Court doth not think fit to make any order on this motion, except that the sheriff's costs are to be paid by the plaintiff Adkins."

Adkins now appealed from this order, and on his behalf it was urged that the Clerk of Records and Writs was not justified in issuing the writs of *fiery facias* until an affidavit had been filed, verifying service of notice of the order upon the plaintiff Adkins; that such affidavit had never been filed; that the proceeding by execution was a surprise upon him, as he had had no notice of the order; that he had always been ready and willing to pay the amounts certified to be due from him; and that the order was in the alternative:—the plaintiff was to pay either "on or before the 1st day of December," or "within four days of service of the order";—the second alternative had never arisen, inasmuch as the order had never been served at all; and as to the former, the order was not entered at the office of the Clerk of Records and Writs until the 2nd of December, the day after that appointed for payment. For the respondents it was argued that the clerk of Records and Writs had acted in conformity with the practice. By the first order of the 10th of May 1839, it is directed:—"That every person to whom, in any cause or matter pending in this court, any sum of money or any costs have been ordered to be paid, shall, after the lapse of one month from the time when such order for payment was duly passed and entered, be entitled by his clerk in court to sue out one or more writ or writs of *fiery facias*, or writ or writs of *elegit* of the form hereinafter stated, or as near thereto as the circumstances of the case may require." Reference was also made to the act, 1 & 2 Vict. c. 110, and to *Seton on Decrees*, 2nd edit. 648, note b, which is as follows:—"By

General Order 1 of the 10th of May 1839, the party prosecuting is entitled to sue out the writs of *feri facias* or *elegit* after the lapse of one month from the time an order for payment of money or costs is passed and entered; but since, by General Order 12 of the 11th of April 1842, every decree or order for payment should limit a time, or time after service, the Record and Writ clerks will, in that case, not issue the writs until the time (and if the order has been served, the time after service) has expired. If, however, the order does not limit any time, or only limits a time after service, and has not been served, the Record and Writ clerks will issue the writs after the lapse of one month from the entry: *Ex relatione* Mr. Veal, late clerk of Records and Writs." *Streeten v. Whitmore* (1) was also cited.

Mr. Bacon and Mr. Roxburgh, for the appellant.

Mr. Malins and Mr. Faber, for the respondents.

Mr. Bacon was heard in reply.

LORD JUSTICE KNIGHT BRUCE said, that in his opinion the first General Order of the 10th of May 1839 was not open to the construction which the respondents had contended ought to be put upon it. The particular order in this case (of the 19th of November 1857) ordered that the sums mentioned should be paid by the appellant on or before the 1st of December 1857, or within four days of service of the order. As this order had not been passed and entered until the 2nd of December, it was for every substantial purpose no order at all until the 2nd of December. Therefore the first alternative of the order of the 19th of November became impossible, and the period mentioned in the second had never arrived. For these reasons, the writs of *feri facias* issued were irregularly issued, and they must be set aside; and if the plaintiff Adkins would now consent to the principal being paid, he having interest allowed to him, and if he would undertake, moreover, not to take proceedings against any person or persons for the irregularity which had been committed—his Lordship thought that he was entitled

to have all the costs which he had been put to in the motion. But unless he would consent to such an arrangement, his Lordship should certainly be inclined to refuse him all costs in this court.

LORD JUSTICE TURNER entirely concurred.

LORDS JUSTICES. { *Ex parte* DAVIDSON, in re
April 19. { THE NORTH SHIELDS
QUAY COMPANY.

Company—Winding up—Contributory—Payment in Shares—Subscription Contract.

D. agreed with the promoters of a joint-stock company to execute works, for which he was to be paid partly in shares. D, to assist the formation of the company, signed the subscription contract for 620 shares, and an act of parliament was obtained. The company failed, and was ordered to be wound up. On the share register D's name appeared as holder of only ten shares, but when that document was settled only one shareholder was present, who held the proxies of two others:—Held, on appeal, affirming a decision of one of the Vice Chancellors, that the name of D. was rightly placed on the list of contributories for 620 shares, he having signed the subscription contract for that number.

This was an appeal from a decision of Vice Chancellor Wood, placing the name of Mr. Davidson on the list of the contributories of the above-named company for 620 shares. The circumstances of the case will be gathered from the following narrative:—

The company was established for the purpose of forming a quay on the river Tyne, at North Shields. A bill was promoted in parliament by the inhabitants of the town, and an act was passed, called "The North Shields Quay Act, 1851." The corporation of Tynemouth were thereby constituted Commissioners to construct a quay and approaches, and to levy dues. Power was given them to borrow on mortgage of the dues a sum not exceeding 30,000*l.*, for the purposes of the undertaking. The Commissioners endeavoured to raise money by mortgage, but failed,

(1) 5 Beav. 228.

and nothing was done under the act. Towards the end of 1853 it was proposed to form a joint-stock company, to which the powers vested in the Commissioners by the act of 1851 should be transferred, the necessary capital being raised by shares. Mr. Davidson, who was a contractor, was applied to by Mr. Notman, a person very active in getting up the proposed company, as to taking the contract for executing the works, the contract money to be paid partly in money and partly in shares, the number of which was to be fixed by the engineer of the company when the amount of the contract was ascertained. Mr. Davidson consented to accept the contract upon these terms, and to assist the company to obtain their act of incorporation by signing the subscription contract for such an amount as would be necessary to enable the company to comply with the standing orders, but did not, as he said in his affidavit, agree to become a shareholder in the company, except for such number of shares as he might be compelled to take in part payment of his contract money. The subscription contract was dated the 15th of December 1853, and fixed the capital of the company at 21,000*l.*, in 2,100 shares of 10*l.* each. It was signed by Mr. Davidson for 620 shares. The company, on the 31st of July 1854, obtained their act, which was styled "The South Shields Quay Transfer Act, 1854." By the 3rd section certain persons therein named, and all other persons and corporations who had already subscribed or should thereafter subscribe to the undertaking, were united into a company for the purposes of the act, and were thereby incorporated. Prospectuses were issued by the directors, and means taken to obtain subscriptions for shares, but without success, and the company had been virtually abandoned in 1855. Liabilities were incurred, and an order for the dissolution and winding up of the company was obtained upon the petition of one of the directors. During the existence of the company in 1854 some discussion had taken place as to the tender for the works made by Mr. Davidson. It was ultimately arranged that Davidson should take 3,000*l.* in shares, in part payment of his contract, which was fixed at 24,000*l.* Nothing was ever done under

this contract, and it appeared upon the production of the share register in the Judge's chambers upon the proceedings to settle the list of contributories, that Mr. Davidson's name was only inserted in the register for ten shares, which was explained by the secretary to have been a merely nominal number, as the precise amount of shares which Mr. Davidson was to take in proportion to the contract could not then be ascertained.

It also appeared in chambers that at the meeting convened for the purpose of completing the share register, only one shareholder was present, but as he held the proxies of two others, he considered that there was virtually a quorum of them who were sufficient to proceed to business.

Mr. Davidson having been placed on the list of contributories by the chief clerk, he appealed to the Vice Chancellor Wood, who, after hearing the case argued for the appellant, said, that both on principle and authority he must hold Mr. Davidson liable in respect of 620 shares. After signing the subscription contract the co-contractors were bound to each other by its contents, and could not be affected by dealings between some of their co-contractors and others of them. The question in effect was, whether by virtue of their authority as directors those gentlemen had any power to introduce a new provision in addition to the original terms, so that Mr. Davidson was not to pay upon 620 shares, but to work out the amount, that is, to take so many shares as might be necessary for the contract, and to pay for them in work, and not in money. The application to parliament was prosecuted only on the faith of the contract as signed by Mr. Davidson and the other subscribers; nor was it competent for the directors, after obtaining their act, to release him from the contract entered into by him in signing the subscription contract, or to allow him to pay in work, and not in money. An agreement had been deliberately entered into which affected the rights of other parties, and he could not say that it was competent for the directors to vary that effect by private arrangement, either before or after the formation of the company. There might possibly be some equity attaching to these shares entitling Mr. Davidson to set off the work

done by him against the calls made upon them, but at any rate the company had a clear right to insist upon his name being inserted on the list in respect of them. No equity could arise from the fact of Mr. Davidson's name being on the share list for only ten shares as against the shareholders. There was nothing to call the attention of any of them to the amount of Mr. Davidson's shares; no works were executed, and nothing whatever was done by which their attention could be directed to their liabilities or anything else. The mere fact of the insertion of his name for a nominal amount could not be binding on the rest of the shareholders who had no knowledge of the transaction; therefore, however unfortunate the result might be for Mr. Davidson, he was not entitled, as against the company, to maintain that he had not been rightly settled on the list for the 620 shares.

From this decision Mr. Davidson now appealed to this Court.

Mr. Daniel and Mr. Rogers, for the appellant, argued that he had never agreed to become a shareholder, but only to take shares in part payment for the works he contracted to execute on behalf of the company; that there was an express agreement between himself and the company that he should take 3,000*l.* in shares or 300 shares, and in no sense could he have become or at any time been chargeable with more; that the consideration for which he was to have taken those 300 shares (value 3,000*l.*) had wholly failed on the part of the company, and Mr. Davidson was absolved from liability; and that if he could be fixed with any shares at all, he could only be so with the number appearing against his name in the register—namely, ten. The following cases were cited and relied on:—

Newry and Enniskillen Railway Company v. Edmunds, 5 Rail. Cas. 275; s. c. 17 Law J. Rep. (N.S.) Exch. 102.

Ex parte Nash, 15 Q.B. Rep. 92; s. c. 19 Law J. Rep. (N.S.) Q.B. 296.

Mowatt and Elliott's case, 3 De Gex, M. & G. 254; s. c. 22 Law J. Rep. (N.S.) Chanc. 578.

The National Exchange Company v. Drew, 2 Macq. App. Cases, 103.

Mr. Rolt and Mr. Roxburgh, for the official manager, were not called upon.

LORD JUSTICE KNIGHT BRUCE said, that the question was not whether Mr. Davidson was or was not entitled to be indemnified by any person or persons against the consequences of the order of the Vice Chancellor or against the order of the Court of Appeal. That question remained, and would remain, wholly unaffected. Nor was the question then before the Court in what manner, or in respect of how many shares, in what degree, or to what extent, Mr. Davidson would be liable to a call. That question also remained, and would remain, wholly unaffected. The only question which the Court had then to decide was, whether his name ought to remain on the list of contributories of the company. He had willingly allowed his name to remain on the subscription contract, and himself to be held out to the other shareholders as a contributory for 620 shares, and liable to that extent with the other shareholders. There was an undertaking in which he had apparently joined with them, and that being so, notwithstanding the possible deception practised upon the legislature, his Lordship was of opinion that there were some persons concerned in the project who were entitled to have Mr. Davidson's apparent liability considered as not differing from his true liability. That being so, his name was most clearly placed with propriety upon the list of contributories. That might possibly produce him no damage; but, if it did, it might entitle him to an indemnity. The circumstance that his name was omitted from the register when it was sealed, at a meeting of one person who called himself three, could of course require no consideration.

LORD JUSTICE TURNER concurred, observing that Mr. Davidson must be taken to have been undoubtedly a subscriber for 620 shares for the purpose of obtaining the act of parliament, and after the act had passed he continued liable. The question had occurred to his Lordship whether the subsequent contract of 1854 for executing

the works, by which he was to take in shares an amount representing 300 shares, could operate to discharge him from his liability in respect of the remaining 320; but he was of opinion that there was certainly no power by means of that contract to discharge him with respect to that number. The appeal must be dismissed.

Ultimately the appeal was dismissed with costs.

LORDS JUSTICES.
March 16, 18, 25. } SWINFEN v. SWINFEN.
April 22. }

Attorney and Client—Suit—Compromise—Counsel.

A compromise of a trial at law, made by counsel, upon the suggestion of an attorney that it would be desirable, was held by the Master of the Rolls not to be binding upon the client who was not aware of it, had not sanctioned it, and would not acquiesce in it; and a bill to enforce the specific performance of the compromise was dismissed by the same Judge, but without costs, the Court being of opinion that the compromise arose from the mistake of parties acting for their respective clients, and a new trial of the issue was directed in the original suit. On appeal by the plaintiff in the suit for specific performance,—Held, affirming the decision, that an attorney has no authority to compromise a suit without the sanction and consent of the client, and that the bill must be dismissed, but, differing from his Honour, that (the client having repudiated the compromise from first to last, and refused to comply with it) the bill must be dismissed, with costs.

The facts of this case are stated in detail, *ante*, page 35, when the same was before the Master of the Rolls. The following short narrative will suffice in this place:—In the original suit of *Swinfen v. Swinfen* an issue *devisavit vel non* was directed by the Master of the Rolls, to try the validity of the will of Samuel Swinfen, and on its coming on for trial and during its progress a compromise was made by the leading counsel on both sides and reduced to writing, and a juror was withdrawn.

In this issue Mrs. Patience Swinfen, the devisee under the will and defendant in the original suit, was the plaintiff, and she denied that she had ever given authority to her attorney or to her counsel to compromise, and soon after the trial her solicitor in the suit wrote to the solicitor for the heir-at-law (the plaintiff in the suit and defendant at law), wholly repudiating the agreement. Nevertheless the agreement was embodied in an order at Nisi Prius, and was made a rule of Court. Mrs. Swinfen refusing to carry the agreement into effect, a rule *nisi* (1) for an attachment was obtained against her in Trinity term, 1856, but the same was discharged. Another rule *nisi* was obtained for the same purpose in Michaelmas term following, but it was discharged after argument for making it absolute, on the ground that it was doubtful whether Mrs. Swinfen was bound to perform the agreement, as being one made without her authority. Thereupon a supplemental bill was filed by the heir-at-law, praying that the agreement of compromise might be specifically performed, but it was dismissed by the Master of the Rolls, though without costs, the compromise having arisen, in his Honour's opinion, from the mistake of parties acting for their respective clients. From this decision the plaintiff, the heir-at-law, Capt. Swinfen appealed.

The argument for the appellant was, that an attorney has an implied authority to bind his client to a compromise of an action, and that in this case Mr. Simpson, the attorney for Mrs. Swinfen, was present throughout the treaty for this compromise, and in no instance objected to, still less repudiated it. Then, with regard to the client herself, her conduct shewed that she acquiesced in and accepted the agreement, and her answer to the bill in the original suit, which bill had been amended and the answer put in on the 10th of June 1856, referred to the agreement in the following terms (not appearing in the former report of the case):—"The said Frederick Hay Swinfen, although, as I am advised, he is bound by the said order and the compromise thereby effected as

(1) This and the other proceedings at law are referred to *ante*, p. 39, in note.

aforesaid to admit the validity of the said will, and to derive his title to the Swinfen estate from me as the devisee under such will, has since such order still affected to dispute the validity of such will, and has insisted upon my putting in my answer to his amended bill in this cause, in which all mention of the said Judge's order and of the said compromise is omitted, and in which the said plaintiff has still retained all the charges of fraud alleged against me with respect to the said testator's will, for the purpose of impeaching the validity thereof. And by the said amended bill, which I am so required to answer, he still continues to pray for an issue to determine the validity of the said will exactly as if the said order at Nisi Prius of the 17th of March 1856 had not been made, and as if the whole question settled by the said compromise, including the validity of the said will, still remained open, and he has threatened to issue and execute against me an attachment for want of an answer, unless I put in my answer to his said amended bill. I believe that he also, in violation of the true intent and meaning of such compromise, intends to proceed with the aforesaid suit in the Prerogative Court to recall probate of the said will, on the alleged ground that such will is invalid; and I believe that he is thereby endeavouring to raise and litigate again, both in the said suit in the Prerogative Court and in this suit, the same question which the said compromise was intended to settle; although I am advised that the matters alleged in the said amended bill with respect to the alleged circumstances under which the said will of the 7th of July 1854 was executed, have now by reason of the said compromise become as irrelevant and improper for the purposes of this suit as they are false in fact."

Mr. Roundell Palmer and *Mr. Hobhouse* supported the appeal. Many of their arguments are referred to in the judgment. Besides some of the cases cited in the court below, they relied upon

Gilfillan v. Brown, 11 Court of Sessions Cases, 1st series, 548.

Currie v. Glen, 9 Ibid. 2nd series, 308.

Duke of Beaufort v. Neeld, 12 Cl. & F. 248.

Swinfen v. Swinfen, 18 Com. B. Rep. 485; s.c. 25 Law J. Rep. (N.S.) C.P. 303; 1 Com. B. Rep. N.S. 364; 26 Law J. Rep. (N.S.) C.P. 97.

Mr. Kennedy and *Mr. Cole* appeared for *Mrs. Swinfen*.

At the close of the appellant's argument the cause stood over, and on the 25th of March it was placed in the paper as "part heard."

Mr. Kennedy, counsel for *Mrs. Swinfen*, made several attempts to speak on the point of costs of the supplemental suit, but was stopped by the Court.

LORD JUSTICE KNIGHT BRUCE said that the main question on this appeal was of the title of the plaintiff, who was the appellant, to obtain specific performance of an agreement made on the 17th of March 1856, at the Staffordshire Spring Assizes, between eminent lawyers, who were counsel for the different parties at the trial of an issue—a question, as his Lordship conceived, depending on the construction to be put on the subsequent conduct of *Mrs. Swinfen*, the defendant in the present suit. The agreement was signed by learned counsel, both now on the Bench, and the jury was discharged on the 17th of March. That, under these circumstances, there was a case for specific performance against her, was impossible to be maintained; it was plain that neither before nor after the agreement had *Mrs. Swinfen* ever directed, authorized or sanctioned any compromise. In effect, by means of the proceedings, in one of which the compromise was come to, *Mrs. Swinfen* was seeking to establish her right to a landed estate of considerable value under the will of Samuel Swinfen, of which estate she was then substantially in possession, though much of it was in the occupation of tenants. That was the question substantially before the Court under the issue *devisavit vel non*: and to barter her case for a mere life annuity of 700*l.*, and on that footing to abandon the issue without a verdict, was a thing entirely out of the ordinary course of business, and one for which she had never given instructions, either to her counsel or her attorney. Nor

was this only an act which she could not have expected to be done without her consent ; but it was one, moreover, to which she had expressly refused her consent. Nor was it immaterial to remember that her case was one not only of feeling, but that it also implicated her character for honour and upright dealing. Witnesses had been examined on Saturday, the 15th of March ; none of the attesting witnesses to the will had given evidence, but they would have done so on the 17th. The price to be paid to her under the compromise was very inadequate, unless there was a probability of a verdict against her, and that that verdict would be upheld by the Court of equity, for, of course, a verdict either for or against her would not have been of any avail unless confirmed by the Court of equity—a circumstance, perhaps, not sufficiently taken into the account by those who settled the compromise. Failures both at Nisi Prius and in this court would have been seriously damaging to her credit and to her position in society, and would leave her open to an imputation that her conduct had not been that of a person of integrity. It was also to be observed that the compromise only affected the real estate, and that it left the personal estate to be pursued through its double course in equity and at Doctors' Commons ; but it was unnecessary to proceed further upon this head. The agreement must have been committed to paper without either hurry or haste, and the respondent possibly was not assisted by this consideration, or by any obscurity to be found in the document itself ; but at all events, there was enough to shew that it would be contrary to the most elementary and clearly-recognized principles by which this Court was guided, to decree specific performance of this agreement, unless by her subsequent conduct Mrs. Patience Swinfen had so far confirmed the arrangement as to make it one binding on her. His Lordship was of opinion, on the evidence, that although the lady might, on some occasions subsequent to the compromise, have conducted herself in an ambiguous manner, and one which was, perhaps, fairly open to observation, yet that she had never acquiesced in fact, that she had never shewn herself satisfied with

the agreement, or at any time not desirous of being released from it. And the affidavits of the 11th of June, made in the Court of Common Pleas, established that the overt acts of herself and her attorney were at and after that time uniformly, and before that time occasionally, such as to shew her dissatisfaction with what had been arranged. Allowance surely must be made for the not usual position in which she was placed ; her counsel were against her, which his Lordship said with the highest sense of the purity and honour of the motives of the counsel ; and her attorney felt himself hampered. The order at Nisi Prius of the 17th of March was subsequently made a rule of the Court of Common Pleas, which, it had been argued, shewed that, in the judgment of that Court, the agreement was not a nullity, but that she was bound by it. She had accordingly had two narrow escapes of imprisonment, and, but for the opinion of Mr. Justice Crowder, that would have been her condition. It would have been a very singular state of things if there had been no right of appealing, as, independently of the question of contempt, there was a doubt whether the agreement did or did not bind her at law. It was difficult for her to know how to act under such peculiar circumstances. His Lordship was of opinion that this was the most correct construction to be put upon her conduct ; for he thought it would be less than just to her, and more than just to the heir, to hold that she had so bound herself as to justify this Court in pronouncing a decree for specific performance of this agreement. If she was legally bound — on which his Lordship would express no opinion—she would probably be liable in a court of law ; but he was satisfied that the claim made on this appeal was groundless, and that the appeal ought to be dismissed, with costs. Without giving any opinion whether the conduct had been commendable on either side, he agreed with the Master of the Rolls that the issue *devisavit vel non* must be tried again. His Lordship had been taking it for granted that, if the plaintiff had any title to specific performance, the proceedings at common law would not have enforced that title, although he was not sure that they would not have done so ; beyond

all doubt the point might have been tried in this court, whose judgments in every branch were unquestionably subject to appeal. Instead of this, however, two applications had been made to the Court of Common Pleas for contempt—one in Trinity term, 1856, and the other in Michaelmas term of the same year—of which there were reports in the 18th volume of the old series, and the 1st volume of the new series of the *Common Bench Reports*. This supplemental bill for specific performance now under appeal was not filed before the 14th of February 1857. It was suggested that a receiver should be appointed, but for this he thought there was no ground; the respondent undertook at the Rolls to find security for the rents she should receive, and the undertaking was introduced into the decree. Much stress had been laid on the length of time which had elapsed since March 1856, but in his Lordship's judgment it was to the appellant or his advisers that the circumstance must be attributed that the fresh issue was not tried in the spring of 1857, or even at the Summer Assizes of 1856. At the Rolls, it was to be observed, that the bill had been dismissed, without costs: Mrs. Swinfen had never been represented as having authorized, or personally sanctioned, the agreement; and before that agreement was entered into, as the lady was herself expected to come to Stafford, the expression by herself of her wishes might have been awaited—a remark which, with all deference and respect to the learned counsel on both sides, his Lordship applied universally.

LORD JUSTICE TURNER said, that it was not necessary to express any opinion on the power of counsel and attorney to bind their clients, and it was not his intention to give any; if it became necessary to have recourse to this Court on any agreement of this nature, the Court must be guided by its ordinary rules and principles in enforcing it. According to those rules and principles he was of opinion that this agreement could not be enforced; for there had been too much pressure and surprise upon Mrs. Swinfen for this Court to feel itself warranted in enforcing against her a specific performance of the agreement. That she would not herself have

entered into the agreement was certain, and she was in circumstances where it was impossible for her to revoke what had been done. She had protested against it, and that she had done so was known to her counsel and solicitor, and therefore the agreement could not have been other than a surprise to her. That the agreement was entered into with a view to her benefit, was beyond a doubt, but she had had no opportunity of considering and deciding for herself. But it had been urged that her subsequent conduct amounted to an acquiescence in the arrangement, but his Lordship found no ground for saying that she ever consented, except from passages in her answer to the amended bill; but, looking to the circumstances under which that answer had been filed, these passages could not be considered as binding and conclusive against her. It had been further urged by the plaintiff in this suit, that there had been no fault on his part or on that of his advisers; that it was impossible for him or them to be aware that Mrs. Swinfen's advisers were acting without her consent, or against her determination, and that it was impossible for him (Capt. Swinfen) to be restored to his former position; but his Lordship did not think that the question could be decided on this ground in this Court: so far as the plaintiff had been damnified in any of these respects, he might seek his remedy elsewhere. The appeal must be dismissed with costs.

Mr. Kennedy then resumed his argument on the question of costs, observing that as the whole decree of the Master of the Rolls was open upon the appeal, he should shew that the same ought to be varied by directing the plaintiff to pay to Mrs. Swinfen the whole costs of the supplemental suit. The learned counsel had proceeded some time, when he was told that as the Court had other business before it, he had better, if his observations were likely to be of any length, postpone them to a future day.

April 22.—*Mr. Kennedy* proceeded.—He argued that the so-called agreement for compromise was valid neither at law nor in equity; and as the conduct of Mrs. Swinfen had been wholly free from blame,

more especially in not misleading the plaintiff into the belief that she had consented to the compromise, the plaintiff had never had any reasonable or even sustainable ground for the filing of the supplemental bill for specific performance. For these reasons Mrs. Swinfen ought to receive the costs from the plaintiff. The following cases were cited—

Elworthy v. Bird, Tam. 38.

Nichols v. Roe, 5 Sim. 156; s. c. 3 Law J. Rep. Chanc. 90.

Woodley v. Johnson, 1 Moll. 394.

Hawlayne v. Bourne, 7 Mee. & W. 595; s. c. 10 Law J. Rep. (n.s.) Exch. 224.

Meynell v. Surtees, 3 Sm. & G. 101; affirmed 25 Law J. Rep. (n.s.) Chanc. 257.

Collen v. Wright, 26 Law J. Rep. (n.s.) Q.B. 147.

Ahiibol v. Benedetto, 3 Taunt. 225.

Randell v. Trimen, 18 Com. B. Rep. 786; s. c. 25 Law J. Rep. (n.s.) C.P. 307.

Thomas v. Hewes, 2 Cr. & M. 519; s. c. 3 Law J. Rep. (n.s.) Exch. 158.

Kennedy v. Gouvica, 3 Dowl. & Ry. 503.

Blore v. Sutton, 3 Mer. 237.

Mr. Hobhouse, for the appellant, said the respondent admitted that the appellant had been deceived at the trial, for his counsel believed that the advisers of Mrs. Swinfen had authority to compromise, and they had no means of knowing whether such authority really existed or not. If, from such mistakes, he was led to institute the supplemental suit, the consequences ought to fall not on him who had been misled, but upon the party who had been, however inadvertently, the cause of the mistake. He submitted that, at any rate, the appellant ought not to be ordered to pay the costs.

Mr. Kennedy was not called upon to reply.

LORD JUSTICE KNIGHT BRUCE said, that the Court had already decided, for reasons stated at the time, that the supplemental bill which had mainly or solely for its object the specific performance of the agreement for compromise entered into at the Staffordshire Assizes, was filed without any good ground, and could only be dis-

missed. It was dismissed by the Master of the Rolls without costs, and Mrs. Swinfen's counsel exercised his right of arguing whether the decree which had been appealed against by the plaintiff, could not be made more beneficial to his client, by ordering that the bill should be dismissed with costs. That point had now been argued. The plaintiff's claim in respect of the costs could only be maintained on the ground either that the plaintiff was misled by the conduct of Mrs. Swinfen, or had plausible grounds for his claim. The opinion of the Court was stated on the former occasion, that neither the plaintiff nor his agents were misled by the conduct of this lady on the subject of the compromise. She succeeded, by what he must consider singular good fortune, in escaping imprisonment, with which she was threatened. While these proceedings against her were in progress she made certain statements, worded, it was true, with sufficient strangeness; but his Lordship was perfectly satisfied that these statements misled no one, and that from the beginning and throughout every proceeding the heir and his advisers knew that Mrs. Swinfen meant to resist his claim to the utmost—that she repudiated the agreement, and would escape from it if possible. Was there then ever any plausible ground for the plaintiff's bill? His Lordship was of opinion that every chance of success was taken away by the double application to the Court of Common Pleas. If there had been no more in the case than this, he should have thought that specific performance of the agreement was impossible. But when the particular circumstances were considered—that notice to the agents of the heir was given from time to time, of the lady's objection, he thought it impossible that the plaintiff could have received advice from any practitioner in this Court that he had any chance of success in Chancery. He believed that the proceeding was resorted to as a *pis aller*, and not until every substantial method had failed. His Lordship, therefore, saw no ground on which the heir-at-law ought not to pay the costs of the supplemental bill, having, as it had, for its main object specific performance of the compromise, he having never had any reasonable chance of success. With respect to the costs of the ineffectual

trial, the consideration of those costs would be open to the Master of the Rolls after the new trial of the issue had taken place. If there would be any difficulty in this, he was willing that an order to that effect should be inserted in the decree.

LORD JUSTICE TURNER said that the cause came before their Lordships on an appeal from the dismissal of the bill for specific performance, and they thought that the plaintiff's case failed, and that the appeal must be dismissed. The defendant's counsel then exercised the right which he undoubtedly had to try to have the decree altered in his favour as to the costs, and the question was argued before the Court, whether the bill should be dismissed with or without costs. How the case would have stood if the bill had been filed on the faith of the correspondence with Mr. Simpson, or on the answers of Mrs. Swinfen to the original bill, it was unnecessary to say, because, beyond all doubt, the affidavits filed in November 1856, in the Court of Common Pleas, three months before the filing of the bill, had put the plaintiff in full possession of the fact that the defendant did not intend to be bound by the agreement, and therefore with full knowledge that the compromise would be disputed. On what ground, then, was the plaintiff to be exonerated from the payment of costs? It was said that the Judges of the Court of Common Pleas decided that there was a valid agreement, and that the plaintiff came here on the strength of that opinion. But his Lordship was unable to find any opinion expressed by the common law Judges, that this was a distinct and concluded agreement, still less that it was such an agreement as a Court of equity would enforce. Even if there had been such an opinion, the defendant could not be injured by the opinion of a Court of common law on this point, if this Court came to a contrary conclusion. But there was no such opinion. The case, therefore, rested on the correspondence with Mr. Simpson and the answer of the defendant. But the effect of these being negated by the affidavits of November 1856, they furnished no ground for filing this bill. The supplemental bill must therefore be dismissed with costs.

LORDS JUSTICES. } In re ILMINSTER
 May 24, 25. } CHARITIES.

*Charity—Free School and other Objects
 —Primary Object—Trustees—Dissenters.*

Certain inhabitants of the town of I. purchased in 1549 property (long leasehold houses and buildings), and conveyed it to trustees, upon trust to provide an honest and discreet person to be schoolmaster, who should instruct as well in all godly learning and knowledge as in other manner of learning all such children as should be brought to him. The trusts then provided for the payment of the schoolmaster and repair of the buildings out of the rents, and the surplus to be applied in mending and repairing the highways, bridges and watercourses of the parish of I. Dissenters had for a very long period been appointed some of the trustees, and upon an application for the appointment of new trustees, the Master of the Rolls being of opinion that, the charity being substantially founded for other objects besides a school, dissenters might be the trustees, appointed several who were not members of the Church of England; but, upon appeal, held, reversing his Honour's decision, that the primary object of the charity being education, including religious education, it must be understood as education in conformity with the tenets of the Church of England, and therefore that the trustees ought to be persons who were members of that Church.

This was an appeal from a decision of the Master of the Rolls, by way of motion, made on behalf of the Rev. A. H. P. Trewman, vicar of Ilminster, and two other gentlemen, that it might be declared that persons dissenting from the doctrines of the Church of England as by law established were not eligible to be trustees of the above-mentioned charity, and that the order made by his Honour, on the 24th of February, whereby certain persons who were not members of that Church were appointed trustees, might be discharged. The charity was founded in the reign of King Edward the Sixth, by the purchase of houses, buildings and lands, by several persons inhabitants of Ilminster, and by a deed, dated the 18th of May 1549, it was made known that Humfrey Walrond and Henry Greynfielde, tendering the virtuous

education of youth in literature and godly learning, whereby the same youth so brought up should the better know their duty, as well to God as to the King's Majesty, and for other good causes and considerations, did assign to John Balche and other persons all that the houses and buildings and courtlages, called the chantry houses in Ilminster, and the messuages called Moody's tenements, situate at Winterhony, in the said parish of Ilminster, which had been shortly before granted to them by the Crown, to hold the same for the remaining terms of years therein, to the uses and purposes therein declared, namely, that they, the said J. Balche and others, "should by their discretion, or by the discretion of most part of them, provide and get one honest and discreet person of good behaviour, name, fame, conversation and condition, to be schoolmaster, which should freely instruct, teach, induce and bring up, as well in all godly learning and knowledge as in other manner of learning, all such children and youth as should be brought to him to the same intent and purpose, according to the tender wit and capacities of such youth and young children, as the said schoolmaster from time to time should think meet and convenient." The deed contained clauses providing a residence for the master, for his removal by the trustees in case of negligence in teaching or any notable crime or default, and for the appointment of another schoolmaster in his place, and for the receipt of the rents, and their application in the repair of the buildings and payment of the schoolmaster, and the surplus of such rents in the payment of king's silver and towards "the mending and repairing the highways, bridges, watercourses, and conduits of water wherewith the inhabitants of the said parish of Ilminster were or should be charged or chargeable, as far as the same sums of money would extend unto." And it was provided that, when the grantees should die, so that the number should be reduced to four, the four remaining trustees should assign their terms of years then enduring "to as many other honest persons of the said parish of Ilminster, to the number of twenty, as should be by the grantees then living thought most conve-

nient to the uses, intents and purposes afore rehearsed." And Walrond and Greynfield were directed to act as trustees in the same manner as the others.

New trustees of the charity had been from time to time appointed, but the original number had not been regularly kept up, and it appeared that, as far back as the year 1701, dissenters had been elected trustees, and for a very long period children of dissenters had been admitted to the school, and they had not been required to learn the Church Catechism, or to attend the parish church.

The income of the charity was between 700*l.* and 800*l.* a year, considerably more than sufficient for the support of the schools, and the trustees had from time to time, besides repairing the highways, established in the parish branch schools for the children of the poor inhabitants of Ilminster. From the charity documents, it appeared that the schoolmaster had always been a member of the Church of England, and that the present master was a clergyman of the Church, but that the trustees had been some dissenters and some churchmen. The number of the trustees having become reduced to seven, meetings of the remaining trustees were held for the appointment of new trustees; five of the trustees were in favour of appointing some persons who were dissenters, but the other trustees objected to the appointment of persons who were not members of the Church of England. The vicar of the parish, the Rev. A. H. P. Trewman, also objected to the appointment of dissenters. An application was made to the Charity Commissioners, who advised that some of the new trustees should be dissenters, and accordingly the trustees appointed several dissenters as new trustees, two of whom were Unitarians. A summons was then taken out in the chambers of the Master of the Rolls to obtain the sanction of the Court to the appointment of these gentlemen as trustees; and his Honour ordered it to stand over until the case of *The Stafford Charities*, then pending before him, was disposed of. In that case, on the 24th of November 1857, it was decided that the trustees of the charities, which were for the benefit of a grammar-school

under Royal foundation, must be members of the Church of England (1). The summons in this case was then adjourned into court.

After a full discussion in open court, the Master of the Rolls, on the 24th of February, delivered judgment as follows:—"I am of opinion that this cannot be called a charity exclusively for Church of England purposes. The school, undoubtedly, was for Church of England purposes, but the surplus rents were to be applied to the 'mending and repairing the highways, bridges and watercourses.' It must be admitted that for the latter purposes all persons are just as competent to perform the duties of trustees as members of the Church of England, and this cannot be considered as an immaterial and insignificant part of the charity, and merely colourable; such, for instance, as if 40s. had been given out of the charity for a purpose which was not connected with the Church of England, in which case it might be said that it did not alter the character of the charity. But here the whole of the surplus is given for purposes not connected with the school, and although it is a surplus after the application of an indefinite amount, yet that indefinite amount must have certain limits, because it is only to supply a sufficient number of teachers, and the surplus may be very considerable. I am of opinion, therefore, that the course which has hitherto been adopted in respect of the appointment of trustees is a proper one, and I see no reason why the Court should interfere to restrict the appointment to persons who are members of the Church of England."

From this decision the present was an appeal.

Mr. Baggallay (with *Mr. Roundell Palmer*) appeared for the vicar and such inhabitants as objected to the appointment of dissenters, and said that the question was whether dissenters could be legally appointed trustees of a school belonging to the Church of England. He contended that at the time when the school was established,—namely, in the time of Edward

the Sixth,—the words 'honest and discreet person,' as a schoolmaster, must have meant a member of the Church of England, as no other would then have been considered to come within such a category. The Master of the Rolls, in his judgment, admitted that the school was a Church of England school, although the charity was for far wider purposes, and that there was nothing to shew that dissenters could not act as trustees. The vicar of the parish felt that the school was the primary object of the charity, and, although there could be no possible objection to any of the trustees on the score of personal respectability, he also felt that the fact of their respectability was a reason why especial care should be taken not to loosen the rule to be observed; and he further contended that the surplus of the rents available towards the repairs of the highways was an immaterial portion of the fund, and therefore, according to the decision in the *Stafford school* and other cases, dissenters could not be trustees. To let them in as such, the portion of the funds to be appropriated to secular purposes must be an essential part of the charity.

[*LORD JUSTICE KNIGHT BRUCE*.—Is it known what are the particular religious views of such of the trustees as are dissenters?]

Mr. Toller.—There are three trustees who are dissenters, one an Independent and two Unitarians; and among the new trustees there are three others who are not members of the Church of England.

[*LORD JUSTICE KNIGHT BRUCE*.—But the declaration at the Rolls seems to say that all may be dissenters. Is that insisted on?]

No; it is not insisted on.

Mr. Baker appeared for many rated inhabitants of Ilminster, who supported the views of the present trustees who were favourable to dissenters being trustees, but was not regular in not having appealed. He was, however, permitted to argue the case, to shew whether the school was or was not a Church of England school. He contended that this was not a Church of England school at all, because the foundation deed was not made at a time when the religion of the Church of England was

(1) See *ante*, p. 381.

the established religion. The date of this deed was the 18th of May 1549 (the purchase having been made on the 14th of March preceding), when the property was conveyed to eighteen trustees, to hold the same from the feast of St. Michael the Archangel then last past. At that time there was no act in existence for regulating the religion of the land. By the 1 Edw. 6. c. 12, it was enacted, that "all and every act or acts of parliament concerning doctrine, or matters of religion and all and every branch, article, sentence and matter, pains and forfeitures contained, mentioned or in anywise declared in any of the same acts of parliament or statutes, shall from henceforth be repealed and utterly void and of none effect." This act was passed in 1547, and there was no act on the subject of religion until the 2 & 3 Edw. 6. c. 1. legalizing the use of a liturgy in English from and after the Feast of Pentecost ensuing. This act was passed in the year 1548, and came into operation in June 1549, the Ilminster Charity estates having been purchased in March previously, if not before, and absolutely vested in the trustees from Michaelmas 1548, being a month before the parliament met, and upwards of seven months before the act came into operation. It could not, therefore, be contended that this school was founded for the exclusive purposes of a church which at that time had no existence. If any religion could be considered to have been established at the time, it was that of Henry the Eighth, whose doctrines (except that of his own supremacy) were all in direct opposition to the present Church of England system, and in whose reign Catholics and Protestants were alike burnt at the stake, as appeared by various passages in *Neale's History of the Puritans*. It might, indeed, be said, that this was altered by Edward the Sixth; and so it was, but by slow degrees. It was even declared as late as 1555, that the king desired the rites and ceremonies used under Popery to be altered by degrees. The forty-two Articles, afterwards reduced to thirty-nine, and known as the Articles of the Church of England, were first promulgated in 1551,—two years after the foundation of the Ilminster School. And then,

in 1552, and not before, was passed the Act of Uniformity, 5 & 6 Edw. 6. c. 1, which was the first act containing any reference to the people, and which once more made dissent by them illegal.

[LORD JUSTICE TURNER.—The Court finds this school a Church of England school, and it cannot, on a motion for the appointment of new trustees, enter into a discussion of this nature.]

[LORD JUSTICE KNIGHT BRUCE.—Nor does the fact that a school is a Church of England school preclude the attendance of sons of dissenters; nor, when they enter the school, are they obliged to attend the offices of the Church of England.]

The principal objection the ratepayers felt to the decision of the Master of the Rolls was founded on that passage in his judgment where he says "the school, undoubtedly, was for Church of England purposes"; whereas, they contended that there was nothing to shew that it was so.

[LORD JUSTICE KNIGHT BRUCE.—We can alter anything with which we disagree in the order of the Master of the Rolls, but can by no means interfere with the wording of his verbal judgment.]

The trust in this case was not created by an individual who, in the absence of proof to the contrary, might be held to be a member of the only legalized church existing at the time in England, but by a body of parishioners, some of whom must be presumed to have held other doctrines than those of the Church of England. In decided cases relied on by the other side, the presumption was, that the religion of the Church was intended, because the founders, having left the matter in doubt, must be presumed to be of the only religion which was legal at the time of foundation. No such presumption could arise here, for many reasons. The words were clear and explicit. No religion was established. Dissenters had always shared in the management of the trust (which was proved as far back as 1702, being as early as the existing records, shewing the religious tenets of any of the trustees, extended), which was thus distinguished from a Church school. The trustees were to be "honest persons of the parish of Ilminster,"—not, as in the *Lady Hewley*

case (2), "godly ministers," but simply "honest," which might, therefore, include men of all religious opinions; and new trustees were to be selected by the survivors, who were to be the sole judges of their fitness for the office; and the schoolmaster was to be an "honest and discreet person, of good name, fame, conversation and condition," without any restriction as to his religious opinions. No visitor was appointed, and the management of the charity, including not only the appointment, but also the discharge of the schoolmaster, was to be without the controul of any ecclesiastical authority (unlike the *Sherborne case* (3), where the rules were to be approved by the bishop), nor was either of the original trustees a clergyman or connected with the Church. This was not a grammar-school in the legal sense of the term; on the contrary, it was a school for the general benefit of the parish, independent of sects and parties; and it was remarkable that, amid all the changes of religion, the school has maintained its general unsectarian character. It was submitted, therefore, that it was now too late to fetter it with restrictions. The terms of the deed establishing the trust were plain and explicit. They required that a schoolmaster should be provided "who should be an honest and discreet person, of good behaviour, name, fame, conversation and condition, which shall freely instruct, teach, induce, and bring up, as well in all godly learning and knowledge as in other manner of learning, all such children and youth as shall be brought to him to the same intent and purpose, according to the tender wit and capacities of such youth and young children as the same schoolmaster shall think meet and convenient." What did the founders mean by "all godly learning"? Could they intend to limit the instruction to one particular code of religious doctrine? and if they did, what was it? "All" meant "every," and the founders must have intended to include under

this expression every system of godly learning claiming its derivation from the Bible. They could not mean the exclusive doctrines of a church which had not then been established. It could not be said that there was no godly learning before, or that there was none independent of the Church of England. The former decisions on subjects such as this went upon the assumption that dissent was unlawful at the time of the foundation of the respective charities, and therefore that the founders were not to be supposed to include dissenters, who could have had no legal existence; but at the time of this endowment there was nothing upon the Statute Book,—nothing, in fact, except the burning,—to prevent the open profession of any religious opinion whatever, and it was clear that all kinds of opinions were professed and held at the time. Even in the reign of Henry the Eighth dissent from his system existed, exemplified by the slaying of Papists and Reformers alike. The probability was, that in Henry's time few of the people conformed to his standard, as they were more likely to follow the leaders of the Reformation, respecting whom Bishop Burnett says (vol. 2, p. 110), "that the chief foundation Luther laid down was, that the Scripture was to be the only rule of Christians,"—a sentiment which manifestly must have been in the minds of the founders of the Ilminster school, when they directed that the children should be taught "all godly learning and knowledge." The sagacious founders of this charity used the most comprehensive terms, in order that the children of future generations might be educated in the school, whatever might be the theological tenets held by their parents consistent with the law for the time being. It was not contended that "all godly learning" meant that every system of theology was to be taught, any more than that all "other manner of learning" meant that every species of learning and language should be taught to each child. Neither could those words mean that the peculiar doctrines of one church only should be taught, or that only one kind of secular learning should be given to all alike, without reference to capacity or calling. They did not restrict

(2) *The Attorney General v. Shore*, 11 Sim. 616; s. c. 9 Cl. & F. 355, 499.

(3) *The Attorney General v. the Sherborne Grammar School*, 18 Beav. 256; s. c. 24 Law J. Rep. (N.S.) Chanc. 74.

the master to any particular church or set of opinions, neither did they require such master to force the distinctive doctrines of his church on those who disagreed with them. This case was further distinguishable from any other on which there had been a decision, not only by the use of the word "all," but by the addition of the words "knowledge" and "other manner of learning." Those words taken together were too extensive to be applicable to any mere Church of England school or national school. Even suppose "all godly learning" to mean Church of England learning, surely all godly "knowledge" took a step further, and must have reference to the other kinds of religious knowledge then existing, or which might afterwards be known. And, further, supposing the Court to say that "all godly learning and knowledge" must be restricted to such as was afterwards alone made lawful by King Edward and his successors, what was to be said of "all other manner of learning"? There was nothing to restrict those words to mere secular teaching; nothing, therefore, to prevent the learning of dissenters from being taught. In this case, usage of upwards of a century and a half was proved. No dissatisfaction had ever been expressed by any body of the inhabitants, but the contrary, with the manner in which the trust had hitherto been executed. Suppose this religious question had now for the first time been presented to the Court, and such a case as Lady Hewley's had never been heard of. Here was an endowment established for no ecclesiastical purpose whatever,—a school for teaching "all manner of learning." The trustees are simply to be "honest men," and some of them have always been dissenters. On no ground could the Court be asked to decide that this was a Church of England school, and that dissenters were not eligible to assist in the trust, seeing that Catholics and Protestants are put on the same footing by act of parliament, that every diversity of Christian doctrine is not only tolerated, but recognized, and that the law of the land requires that the rights of dissenters shall be dealt with in the same manner as if they had never been oppressed. These principles had been recently embodied in

a public document, as follows:—"The infliction of disabilities upon any class of Her Majesty's subjects solely on the ground of their conscientious adherence to their faith savours of persecution, and is totally inconsistent with those principles of religious liberty which, in the case of more powerful communities, have been applied by parliament with such happy effects." These sentiments were unanimously adopted by the House of Commons, and one of the acts of parliament to which it refers was the Dissenters' Chapels Act, 7 & 8 Vict. c. 45, from the 1st section of which it is clear that if this was not a grammar school within the meaning of the Grammar-School Act, 3 & 4 Vict. c. 77, it fell within the Dissenters' Chapels Act, and secured to dissenters the share they had always had in the management of the trust. A grammar-school, legally speaking, was an endowment for teaching Greek and Latin, and for no other purpose; or, in other words, according to the construction put on the 1 Edw. 6. c. 14, grammar schools were only to prepare for holy orders, which this school never was. The spiritual Court had jurisdiction over grammar schools but not over other schools—*Cox's case* (4). It was not pretended that the spiritual Court ever had jurisdiction, directly or indirectly, over this school. The schoolmaster for a long time was not a clergyman, nor had he ever a licence from the ordinary, as required in grammar-schools. This was a school for the benefit of all classes, dissenters as well as churchmen. The learned counsel further cited the cases of *The Attorney General v. Calvert* (5) and *The Attorney General v. the Haberdashers Company* (6), and concluded by objecting that the order appointing the vicar for the time being was irregular, as he should have been indicated by name.

Mr. Toller and Mr. Roundell Palmer agreed to this alteration.

Mr. Toller and Mr. Nalder, for the trustees, in favour of the appointment of

(4) 1 P. Wms. 29.

(5) 26 Law J. Rep. (N.S.) Chanc. 682.

(6) 19 Beav. 385; s. c. 24 Law J. Rep. (N.S.) Chanc. 329.

dissenters as trustees, contended, that the charity was founded by individuals for the benefit of all the parishioners. The objects of the charity were not entirely educational; there was a surplus applicable to wholly secular purposes, namely, to the repairs of the highways, bridges, and other specified matters. There was nothing in the deed of foundation with respect to the religious tenets of the persons to be appointed trustees of the charity, or to shew that the education of the children should be according to the principles of the Church of England; and the custom for a long period had been to appoint dissenters as trustees.

They relied upon the following cases—

In re the Norwich Charities, 2 Myl. & Cr. 275.

The Attorney General v. the Haberdashers Company.

The Attorney General v. Calvert.

The Attorney General v. the Sherborne Grammar School.

In re the Stafford Charities (7).

Mr. Roundell Palmer, in reply, said, that in the introductory part of the declaration as to this charity provision was made for instruction in "godly learning," and the express object of the school being established was, that the youth brought up there should better know their duty, as well to God as to the King's Majesty, and therefore the same limit and distinction was obviously intended with regard to the schoolmaster. Every tenet of every sect was not intended to be taught, and the whole scope and object, considering at what time the charity was founded, must necessarily be considered to have been the inculcation of Church principles. In such a case the admission of dissenters into the trust would probably lead to the introduction of religious disputes among the governing body highly prejudicial to the charity. Inasmuch as the primary object of the charity was the school in which "godly learning" was to be taught, it was manifest that the doctrines and tenets of the Church of England would be those

which the Court would direct were it now engaged in settling a scheme, and in such case the trustees would be directed to be members of the Established Church. The moment it was shewn that religious instruction was intended, then the duty of the Court was plain. In *The Chelmsford Grammar School* case (8) Vice Chancellor Wood adverted to the case of *The Attorney General v. Cullum* (9), decided by one of their Lordships, then a Vice Chancellor (Lord Justice Knight Bruce), who held that as some sort of religious education was intended, it must necessarily mean "according to the tenets of the Church of England." If trustees in such a case were appointed they should be members of the Established Church, they being persons who would sympathise, and not dissenters, who could have no sympathy with the purposes for which the school existed. As to the secondary purposes of the charity, they could be as properly performed by churchmen as dissenters. That this should be the view adopted by the Court was plain from the fact that when this charity was established no dissent whatever was allowed.

Mr. Baker again drew attention to the statute 1 Edw. 6. c. 12.

LORD JUSTICE KNIGHT BRUCE said, that in this case the foundation deed was dated the 18th of May 1549, in the reign of King Edward the Sixth, and had for its primary object education,—not necessarily religious education alone, but education partly religious. When religious education was to be provided, it must be, as his Lordship conceived, in conformity with the doctrines of the Church of England. The objects of the charity in this case not connected with education were secondary and subordinate. It must also be remarked that the master was to be appointed and removed by the trustees, whose duty was also to fix his salary. It was not suggested that for the last two centuries the master of the school had ever been a dissenter. In these circumstances, it appeared

(8) 1 K. & J. 543; s.c. 24 Law J. Rep. (N.S.) Chanc. 742.

(9) 1 You. & C. C.C. 411.

(7) See *ante*, p. 381.

to his Lordship that the trustees ought all to be members of the Church of England, although the sons of dissenters had very properly enjoyed, and his Lordship hoped would continue to enjoy, the advantage of being educated in the school without being instructed in the peculiar tenets of the Church of England, or being compelled to attend a place of worship where these peculiar tenets were inculcated.

LORD JUSTICE TURNER said, that this case had been argued on behalf of some of the inhabitants of Ilminster, as if the Court had been engaged in settling a scheme for the management of the charity. This was beside the question. Their Lordships found that the school had been conducted for many years as other Church of England schools were conducted, admitting, and, as he thought, most wisely, children of dissenters, without enforcing on them tenets of the Church of England, or attendance at a place of worship of the Church of England. Any alterations to be made, if at all, must be introduced through a scheme for the entire remodelling of the charity. The question was, whether to a school, constituted as this school was, dissenters ought to be admitted as trustees. It had been argued that the effect of their admission must be the introduction of religious disputes prejudicial to the charity. Suppose that by deaths of trustees the dissenting trustees should become the majority, the effect would be, that the master would be appointed by the dissenters exclusively; but they were also empowered to remove the master, and they were also to fix the salary, and to provide and maintain the school-house, and these were things which he (the Lord Justice) was of opinion ought not to be committed to the hands and keeping of dissenters, for it might so happen that by the deaths of trustees a few, say five in number, might remain, of whom three might be dissenters and two Churchmen, and the majority might remove a master and appoint a new master, whose opinions would be in conformity with those of this small majority. It had been argued that the trusts in this instance were not confined to the school, but in such a case the duty of this Court was to look to

the primary object, and, indeed, it was so much so that if there were funds applicable to the secondary purpose, the Court, in settling a scheme, would look to an increase of scholars rather than to the secondary objects, and its duty would be to provide for the introduction of additional scholars. Another point which had been urged was, that for many years dissenters had been appointed among the trustees, but those appointments were not the act of this Court, but of the trustees themselves, and the Court could not be bound by them. It had been said, that an appointment of trustees who were exclusively of the Church of England would tend to the prejudice of the dissenting inhabitants; and his Lordship would sincerely and heartily express his wish that this might not be so, and if it should so prove, he had no doubt but that the Court would be able to remedy it, and in applying a remedy his Lordship would afford his most cordial concurrence.

The order made, so far as it was settled in court, was, that the name of the vicar should be inserted as a trustee instead of "the vicar for the time being," and the names of the three new dissenting trustees appointed by the order should be omitted, "they not being members of the Church of England."

M.R. { DAVEY v. DURRANT.
March 20, 23. { SMITH v. DURRANT.

Practice—Expenses of Witness—Party to Suit.

A party to a suit is entitled to his expenses and allowance as a witness before he can be required to be cross-examined on an affidavit filed by him under a decree (1).

George Durrant, a solicitor, was the mortgagee of the Branksome estate, near Bournemouth, Hampshire, and under a power of sale contained in the mortgage, he sold some considerable parts of the estate. This suit was instituted to redeem the mortgage.

(1) See 26 Law J. Rep. (N.S.) Chanc. 830.

Under the decree made in the cause, G. Durrant was directed to bring in an account of his receipts, including an account of the monies received by the sale. He was also required to state what monies remained due to him by virtue of his mortgage. These accounts were accordingly brought in and verified by affidavit.

The plaintiff then took out a summons requiring him to attend before the examiner that he might be cross-examined upon his affidavit.

The defendant, who resided in the country, attended at the examiner's office, but he refused either to be sworn or cross-examined, as the plaintiff refused to pay him his expenses and his allowance as a witness. There was, therefore, no cross-examination.

Mr. W. W. Cooper, for the plaintiff, now moved that the defendant should attend and be cross-examined, or that he should be committed. A party to a suit could not claim expenses. He was not an ordinary witness. His costs were a question in the suit. Under the former practice he was compellable to answer the interrogatories filed without the payment of any costs.

Mr. R. Palmer and *Mr. Baggallay*.—The practice was to pay the costs of a witness called upon to give evidence.

Clark v. Gill, 1 Kay & J. 19; s. c. 23 Law J. Rep. (N.S.) Chanc. 711.

Nokes v. Gibbon, 26 Law J. Rep. (N.S.) Chanc. 208.

Hayward v. Hayward, Kay, App. xxxi.

Besemeres v. Besemeres, Ibid. App. xvii; s. c. 23 Law J. Rep. (N.S.) Chanc. 198.

The MASTER OF THE ROLLS.—I find upon inquiry that the practice of the other Courts is to give a party to a suit called upon to be examined the usual expenses and allowance as a witness; I must, therefore, adhere to this rule, and refuse the motion, with costs.

M.R. { DAVEY v. DURRANT.
April 17. { SMITH v. DURRANT.

Practice—Change of Process—Previous Costs.

A party to a suit cannot abandon one proceeding for another to obtain the examination of a witness who was also a party to the suit without first paying the costs of the first proceeding.

The plaintiff afterwards abandoned the cross-examination upon the affidavit mentioned in the preceding case, and he filed interrogatories for the examination of the defendant as an accounting party.

It was now objected that this could not be done until the expenses incurred by the attendance to be cross-examined upon the affidavit were paid. The question was, therefore, adjourned from chambers into court.

Mr. W. W. Cooper.—The plaintiff is entitled to forego the cross-examination, and to adopt a new proceeding for the examination of the defendant.

Mr. Baggallay.—The plaintiff cannot abandon one process and adopt a different proceeding for the same object until the expenses incurred by the first attempt have been paid. The object of filing interrogatories is to avoid the payment of the expenses of attending before the examiner—*Oldfield v. Cobbett* (1).

The MASTER OF THE ROLLS.—The plaintiff cannot abandon one mode of proceeding and adopt another without paying the costs of the party who has been put to expense in consequence of the first proceeding. The plaintiff, therefore, must pay to the defendant what he may be found entitled to before he can compel him to answer the interrogatories. He must also pay to him the costs of this application.

(1) 12 Beav. 91.

KINDERSLEY, V.C. } PARTINGTON v. REYNOLDS.
 Feb. 8 ;
 March 16. }

Practice—Administration Summons—15 & 16 Vict. c. 86. s. 45.—Wilful Default.

The only administration decree which can be obtained upon summons in chambers under the 45th section of the 15 & 16 Vict. c. 86. is the usual decree to make an executor or administrator account for the personal estate which he may have received. The Court cannot in any stage of a suit engraft upon such a decree, whether made upon bill, or upon claim, or upon summons in chambers, a decree to make an executor or administrator account for what he might, without his wilful neglect or default, have received: a decree of this nature being totally different in its principle from the usual decree.

This was an administration suit commenced by summons in chambers, under the 15 & 16 Vict. c. 86. s. 45. to administer the estate of a lady named Shard, who died intestate in the year 1819. The estate had been taken possession of by the Crown in default of any next-of-kin appearing. The plaintiff subsequently claimed as representative of the next-of-kin of the intestate. The Court declared that the plaintiff had substantiated his claim, and the usual decree was made for the administration of the personal estate of the intestate. In the course of taking the accounts under that decree, the plaintiff had reason to believe that he had discovered that the administrator had been guilty of wilful neglect in not getting in or realizing some part of the personal estate, and thereupon he applied for a summons in the following terms:—"That in addition to the accounts and inquiries directed by the order made in this matter and cause, dated the 8th of November 1855, the following inquiry may be made, that is to say:—Inquiry when and to whom and for what sum or sums, and under what circumstances, the intestate Frances Mary Shard's house, land and premises, at Peighton, in the county of Devon, called Torbay House, and the fixtures therein were sold and disposed of by the late George Maule, Esq. in the said

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order named; and whether, but for his wilful neglect or default, the same might have been sold and disposed of by him at any and what earlier time, and for any and what greater sum or sums; and whether payments made by him in respect of the said house, land and premises since that time ought to be allowed; and whether the defendant Henry Reynolds ought to be charged in respect of the said house, land and premises and fixtures, with any and what sum or sums beyond the sum or sums actually received by the said G. Maule upon the sale or disposition thereof." The case now came on upon an adjourned summons from chambers upon the question whether the above order could be made under the 20th of the General Orders of the 16th of October 1852.

Mr. Baily and Mr. Sheffield appeared in support of the summons, and contended that the Court had power, under the 45th section of the 15 & 16 Vict. c. 86, to engraft upon the usual decree a decree for what the defendant but for his wilful neglect or default might have received. That section gave power to the Judge, if in his discretion he should think fit so to do, to make the usual order for the administration of the estate of the deceased, with such variations, if any, as the circumstances of the case should require. The plaintiff in this case, after the usual decree had been made, discovered reasons for believing that the defendant had been guilty of wilful neglect and default in getting in the estate, and it was therefore necessary to enlarge the decree in order that justice might be done. They cited—

Mutter v. Hudson, 2 Jur. N.S. 34.

See also *Brooker v. Brooker*, 26 Law J. Rep. (N.S.) Chanc. 411.

Mr. Wickens, for the Crown, submitted that the decree now asked for was of a totally different nature from the usual administration decree, and could not be obtained upon summons in chambers. The variations alluded to in the 45th section could only apply to variations in the usual order for taking the accounts of what might have been received by the defendant, and could never have been intended to give the Court a power to make a different

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order. In the case of *Hodson v. Ball* (1), where there had been a bill filed for the common account, the Court held, that a supplemental bill for an account of what the defendant might, but for his wilful default, have received, was a supplemental bill in the nature of a bill of review, and such a bill could not be filed without the permission of the Court. This clearly shewed that the second decree asked for was of a totally different nature from the usual decree.

-KINDERSLEY, V.C.—In this case the representative of the next-of-kin of an intestate obtained upon summons in chambers, under the 15 & 16 Vict. c. 86. s. 45, a decree against the administrator in the usual form, for the administration of the personal estate of the intestate. In the course of taking the account under that decree of the personal estate received by the administrator, the plaintiff discovered reason to think that the administrator had been guilty of wilful neglect or default in not duly getting in or realizing some part of the personal estate; and he has taken out this summons, asking the Judge in chambers to make an order to take an account of what the administrator might, but for his wilful neglect or default, have received. It is contended that such an order may be made under the 20th of the General Orders of the 16th of October 1852. I am of opinion that such an order cannot be made, but as a different opinion has been expressed, I will, out of respect for that opinion, state my reasons more fully than I should otherwise have done; and with a view to the interpretation of the General Order just referred to, I will first consider what were the rules and principles which, previously to the making of that order, governed the practice of the Court with respect to calling an executor or administrator to account, and about which there cannot, I conceive, be the least doubt or question. There are two different modes of accounting to which an executor or administrator may be subjected by the Court, and, accordingly, there are two different forms of decree in use to compel him to account. One is a decree compelling him

to account only for what he has received of the testator's or intestate's personal estate; the other is a decree compelling him to account not only for what he has received, but also for what he might, without his wilful neglect or default, have received. These are two perfectly different decrees. It is not merely that the latter is a modification of the former; they are totally distinct from each other in principle, and they proceed on totally distinct grounds. The one supposes no misconduct; the other is entirely grounded on misconduct. As the proposition that these two decrees differ essentially in principle, lies at the root of the matter which I have to consider, I will quote the language of Lord Lyndhurst, in *Hodson v. Ball*. That was an administration suit, instituted by one of the testator's sons against Ball and Richardson, and the personal representatives of the testator's widow, in which, after stating that the three executors had, in the month of February 1816, proved the will and undertaken the trusts thereof, and that the widow had, with the knowledge and concurrence of her co-trustees, entered into possession of the testator's personal estate, and into the receipt of the rents and profits of her real estate, it was alleged that she had, during her lifetime, wasted and misapplied the assets; but the bill contained no charge of default against the other executors, and it prayed merely for the usual accounts of those receipts and payments of the testator's estate since the death of the widow, with the usual account against her representative of what was due from her to the estate at the time of her death. At the hearing of the cause an account was decreed against them in the common form. The defendant Richardson having died after that decree, it became necessary to revive the suit against his personal representatives; but instead of filing an ordinary bill of revivor for that purpose, the plaintiff filed a bill of revivor and supplement against the personal representatives of Richardson and the surviving parties to the original suit, charging, by way of supplement, that since the accounts of the executors had been brought into the Master's office, the plaintiff had, for the first time, discovered that Ball and Richardson had, as well dur-

(1) 1 Phill. 177; s.c. 12 Law J. Rep. (N.S.) Chanc. 80.

ing the life of the testator's widow, as since her decease, repeatedly interfered, and acted in the trusts of the will and in the management of the trust estate, and were privy to and cognizant of all her dealings in relation thereto; and further charging that, in taking the accounts before the Master, it appeared, as the fact was, that Richardson had connived at the widow's misappropriation of the trust property, and had been guilty of great negligence in the investigation of her accounts; but that by reason of the defective nature and frame of the decree in the original suit, it was not competent for the plaintiff to charge the defendant Ball and the representatives of Richardson, as they ought to be charged, with the loss which the trust estate had sustained by reason of their misconduct; and after the usual prayer of revivor against the representatives of Richardson, the bill prayed, amongst other things, that Ball and the estate of Richardson might be declared liable for, and be charged with such sums as, but for their wilful neglect and default, might have been received by them in respect of the trust estates. That supplemental bill having been filed without leave of the Court, an order was made by the Vice Chancellor, directing that it might be taken off the file, on the ground that he considered it a supplemental bill, in the nature of a bill of review, and that it had been filed without the permission of the Court. A motion was subsequently made before the Lord Chancellor to discharge that order. On the part of the defendant Ball, it was insisted, that as the decree prayed for by the supplemental bill was essentially different from the decree pronounced by the Vice Chancellor upon the original bill, the supplemental bill ought to be taken off the file, it having been filed without the permission of the Court. In answer to that, it was said that the bill was not a supplemental bill in the nature of a bill of review, but a supplemental bill in aid of a decree. In that case his Lordship observed, "I apprehend that a supplemental bill in aid of a decree cannot vary the principle of the decree. Its province is to carry out the principle of the decree, to give full and complete effect to the decree as it exists. The in-

stance that is generally given of a supplemental bill in aid of a decree is of this description—where there has been a decree to account, but directions have not been sufficiently given as to the manner of accounting, and a further decree is therefore required for the purpose of supplying this defect, that is, of carrying into full effect the original decree." "Now the decree prayed for in this case is quite contrary to the principle of the original decree. The original decree was merely for a common account. The supplemental bill prays for an account of quite a different nature and character, founded on the wrongful conduct of the parties; for it calls upon them to account, not for what they have received, or what has come to their hands, or to the hands of others for their use, but for what they might have received had it not been for their wilful default. This, therefore, cannot be considered as a supplemental bill in aid of a decree, because it proceeds upon a principle quite different from that of the original decree. It does not seek to carry out that decree; it is not in furtherance of that decree, but it is for the accomplishment of quite a different object: and I think the plaintiff himself has pronounced his own opinion of the nature of the bill upon the very face of the bill itself, for he has introduced an averment that the supplemental matter has been discovered since the original decree was pronounced,—an averment which is necessary for the purpose of supporting a supplemental bill in the nature of a bill of review, but which is not required in a supplemental bill in aid of a decree. On this point, therefore, I am of opinion that the objection to the Vice Chancellor's order cannot be sustained.

To obtain the account of what the executor or administrator has received, the plaintiff (whether he be creditor or legatee, or residuary legatee or next-of-kin) needs not to allege or prove anything special with respect to the personal estate of the deceased or the dealings or intromissions therewith. It is sufficient that the defendant holds the office of executor or administrator. To obtain the other decree, the plaintiff must allege and prove that there is some part of the deceased's personal estate which ought

to have been and might have been received by the defendant, and which he has omitted to receive by his own wilful neglect or default. The former decree is, therefore, called, not only in the ordinary language of the profession, but properly and technically called, the *usual* decree to account. The latter is never so called, and it would be altogether inappropriate and wrong to apply to it that designation. Whenever the term "the usual decree" is used, it denotes exclusively that decree by which the executor or administrator is required to account merely for what he has received. Now, in proceeding against an executor or administrator by bill, whenever the usual decree only is made, the plaintiff in taking the accounts under that decree, cannot charge the defendant with a single farthing beyond his actual receipts. Of course I include in the term "actual receipts" what may have been received by any other person by the order or for the use of the defendant. The plaintiff cannot be permitted to shew that there is some part of the deceased's estate which the defendant ought to have got in, and might easily have got in, and has failed to get in through his own wilful neglect or default, however gross and culpable may have been his misconduct in failing to get it in, or however clear may be the proof of it. Any such attempt would be instantly and peremptorily rejected : and for this purpose it would signify nothing whether the plaintiff was previously cognizant of the circumstances, or only discovered them in the course and by the means of taking the accounts under the decree. Nor would it for this purpose at all signify whether the bill had or had not prayed that the defendant might account for what he might, without his wilful neglect or default, have received, the decree being only the usual decree ; and after the account has been taken and the report made when the cause comes before the Court for further directions, still the plaintiff is precluded from obtaining an order on further directions to take an account of what the defendant might, without his wilful neglect or default, have received ; and this rule must inflexibly prevail whether the bill had or had not prayed for it, and whether the plaintiff was or might have

been previously aware of the circumstances or only discovered them by means of taking the account under the original decree. These rules are perfectly clear and unquestionable ; and they apply not only to the case where it is sought to make an executor or administrator account for what he might, without his wilful neglect or default, have received, but also to any attempt to make him accountable for any misconduct with respect to the personal estate, whether such misconduct amounts to actual fraud, or is a simple breach of trust, or other mal-administration. In order to obtain a decree to make him account for any such misconduct, it must be alleged by the bill, and proved at the hearing ; and if the plaintiff only obtains the usual decree, such misconduct cannot be noticed in taking the accounts under the decree, nor on the hearing of the cause for further directions. The only exception to this (if it be an exception) is, that the Court will, upon the hearing of the cause for further directions, entertain the question whether the executor or administrator ought to be made liable for interest on balances improperly retained in his hands unproductive, although the original decree contained no reference to the matter. It must not, however, be supposed, because a plaintiff who has obtained only the usual decree against the executor or administrator cannot, either in taking the accounts under the decree or on the hearing for further directions, charge him with what he might without his wilful neglect or default have received, that the plaintiff is therefore remediless if he discovers ground for so charging him ; all that I am insisting on is, that he has no remedy in that suit. If in the process of investigating the accounts under the usual decree in that suit or otherwise, he discovers that the defendant has been guilty of wilful neglect or default in getting in the assets, or of other misconduct, his remedy is by filing (with the leave of the Court) a supplemental bill adapted to the purpose, which is to all intents and purposes a bill of review.

Such being the rules of the Court when the proceeding is by bill, they are equally applicable where the proceeding is by claim. And until the Act for the Improvement of the Jurisdiction in Equity (15 & 16 Vict.

c. 86.) there was no other way of proceeding in this court against an executor or administrator than by bill or claim. That act introduced a new way of proceeding, viz., by summons in chambers. The 45th section enables any creditor, legatee, residuary legatee, or next-of-kin of a deceased person to obtain by summons in chambers, without bill or claim filed, the usual order for the administration of the estate of the deceased, with such variations, if any, as the circumstances of the case may require; and such order is to have the force and effect of a decree to the like effect made on the hearing of a cause or claim. Now it is quite clear—and, indeed, it has been fairly admitted before me—that the only decree which can be made upon summons under this section of the act, is the usual decree; that is, a decree that the executor or administrator shall account for the personal estate which has been received by him; and that it confers no jurisdiction to make on summons in chambers a decree that he shall account for what without his wilful neglect or default he might have received, or to make him accountable for any misconduct. The words “with such variations, if any, as the circumstances of the case may require” are only intended to enable the Judge to adapt the precise terms of the usual decree to the circumstances of the case, and not to enable the Judge to make a decree which is not the usual administration decree, but which (as Lord Lyndhurst observed in *Hodson v. Ball*) differs altogether in principle from the usual decree. If such a special decree is wanted, the party seeking it must proceed by bill, and he cannot obtain it upon summons. And I believe that not a single instance could be found of such a decree being granted on summons by any one of the Judges. I have myself refused over and over again to make any but the usual decree, with such variations only as may be necessary to adapt it to the circumstances of the case. Now, when the usual decree has been made upon summons, that decree differs in no respect from a similar decree made upon bill. The proceeding to obtain the decree is indeed different; but such decree, when once made, is precisely the same, and stands on the same footing, and has the same force and effect,

whether made upon bill or upon summons. Such decree when made upon summons is carried into effect, and the accounts directed by it are taken, in precisely the same manner as would have been done if the decree had been made upon bill. The rules and principles which apply to such a decree, when made upon bill, apply to it equally when made upon summons; and it is no more possible in the latter case than in the former, either in taking the accounts under it or on further directions, to attempt to make the defendant account for wilful neglect or default, or any other misconduct, the decree being only the usual decree.

I consider, then, that at the time of issuing the General Orders of the 16th of October 1852, the following principles were well settled:—First, that a decree to make an executor or administrator account for what he might without his wilful neglect or default have received is not only a different decree from the usual decree, making him account for what he has received, but a decree totally different in its principle—so different, that a bill afterwards filed to obtain an account of what he might without his wilful neglect or default have received (by which alone it can then be obtained) is not a mere supplemental bill, but a bill of review, which cannot be filed without the leave of the Court. Secondly, that where the usual decree only has been made, you cannot in any stage of that suit, or by any proceeding in it, graft on that decree the taking an account of what the defendant might without his wilful neglect or default have received. Thirdly, that when the usual decree has been made, it signifies nothing for this purpose whether it has been made upon bill, or upon claim, or upon summons in chambers. Fourthly, that the only decree to make an executor or administrator account which can be obtained upon summons in chambers, is the usual decree. What, then, is the effect of the 20th of the General Orders of the 16th of October 1852? That order is in these words:—“If in the prosecution of the order” (which word “order” includes decree and decretal order) “it shall appear to the Judge that it would be expedient that further accounts should be taken or further inquiries made, he may order the

same to be taken or made accordingly, or if desired by any party may direct the same to be considered in open court." And the question is, whether under this order the Judge in chambers has power, in prosecuting a decree, to direct further accounts to be taken or further inquiries made which are inconsistent with the principle of the decree he is prosecuting. I am of opinion that he has not; and that this is not a sound construction of the order. Consider the consequences of such a construction. It is clear that this order applies indiscriminately to the prosecution in chambers of any decree, of whatever nature or kind, and whether made upon bill, or upon claim, or upon summons. If, therefore, the Judge has power to do this when prosecuting in chambers a decree made upon summons, he must equally have power to do so when prosecuting a decree made upon bill; and if he can do so when the decree was made without opposition or discussion, he may equally do so when the decree was fully contested and strenuously opposed. So that, according to this construction of the order, when the Court has, after full deliberation, founded on an examination of the pleadings and evidence in the cause, and the arguments of counsel, made a decree proceeding upon a certain principle, and directing certain accounts and inquiries in conformity with and for the purpose of carrying out that principle—the Judge in chambers, while prosecuting those accounts and inquiries, has power to direct other accounts and inquiries which are at variance with the principle of the decree, and which could only be justified by a decree founded on a totally different principle; in other words, the Judge in chambers prosecuting a decree is, by virtue of this order, armed with the power to do what up to the date of this order could only be done by a rehearing or a bill of review—to reverse or vary the principle of the very decree which it is his function, sitting in chambers, to prosecute. Now this is in truth what I am asked to do by this summons. Here is a decree founded on a certain principle, viz. the usual decree for the administrator to account for what he has received. I am sitting as a Judge in chambers to prosecute that decree. I am asked by the plaintiff

to make an order that the defendant shall account not only for what he has received, which is in conformity with the principle of the decree that I am prosecuting, but also for what, without his wilful default, might have been received, which is totally at variance with the principle of the decree that I am prosecuting, and which could only be justified by a decree founded on quite a distinct principle. If I can do what is asked while prosecuting this decree, which has been made on summons, I can equally do so when prosecuting a similar decree made upon bill—for the 20th order is equally applicable to both; and if I can do so in a case where the plaintiff only asks by his bill for the usual account, I can equally do so in a case where the plaintiff, by his bill, asks for an account of what might have been received by the defendant without his wilful default, and fails to obtain it at the hearing—for the language of the 20th order is just as applicable to the one case as to the other. And if I can do that, I can, when sitting in chambers, without a bill of review or even a re-hearing, reverse in effect the decree made by the Court on the hearing of the cause, and substitute for it a decree founded on a different principle. Such a result as this would of course be rejected by every one; and yet it is a legitimate deduction from the interpretation sought to be put upon the general language of the 20th order by the applicant for the summons.

There is another obvious anomaly which would result from this construction of the order. It will of course be admitted that, when a creditor or other party first applies by summons in chambers for a decree to administer the personal estate of a deceased person, the only decree which can be made is the usual decree: the Judge has no jurisdiction to make a decree to take an account of what the defendant might, without his wilful default, have received, even though the clearest proof be adduced before him of the most culpable default. The 45th section of the 15 & 16 Vict. c. 86, which alone gives the Judge power to make any decree at all in chambers for administration, is too precise and clear to admit of a doubt on this point; and it was fully admitted in the argument before me. Then, what a strange anomaly it would be

that the Judge, though absolutely precluded from making such a decree on the first summons, should yet have power, upon a second summons, to engraft such a decree upon the proceedings in chambers under the usual decree which he has made upon the first summons. It is impossible, I think, to put upon the language of the 20th Order, though that language is general, an interpretation which leads to such results as these. Such could not have been the intention of its framers. I know that it is of small account for me to say that, having myself assisted in the preparation of the Orders of the 16th of October 1852, I had no conception that any one of those Orders could bear such an interpretation, or to say that I am persuaded that no such idea was contemplated by any one of the other Judges who were parties to the framing of them. Those Orders must of course be taken as they stand, and construed like any other Orders. And thus construing this 20th Order, it appears to me that the sole object and purpose of it is, that if, in prosecuting the accounts and inquiries directed by the decree, the Judge thinks that it might enable the Court, when the cause comes on for further consideration, to make a complete and final decree, without the necessity of referring it back to chambers for further accounts or inquiries, he may proceed at once to direct such further accounts or inquiries to be made or taken. The design was to enable the Judge in chambers to do, in aid and furtherance of the decree, that which the Court would otherwise direct to be done upon the cause coming on to be heard for further consideration; and as upon the cause coming on for further consideration the Court could not direct any further account to be taken or inquiry made which would be at variance with the principle of the former decree, so neither can the Judge do so when prosecuting that decree in chambers. In fact, the object of the Order was to meet an inconvenience of not unfrequent occurrence. It sometimes happens that a decree has omitted to direct some specific account or inquiry, either from inadvertence, or from its utility not being apparent at the hearing of the cause; such, for example, as a class inquiry, or some subsidiary account which might be auxiliary to the account

directed by the decree. In any such case previous to the Orders of the 16th of October 1852, if in the course of the proceedings under the decree in the Master's office it became apparent that such additional account or inquiry would be useful for the purposes of the decree on further directions, and that the case presented by the report would be incomplete without it, it was necessary either to go back to the Court by way of rehearing to get the desired direction inserted in the decree, or else to wait till the cause should come on for further directions, and by the decree then made to have it referred back to the Master to take the additional account, or make the additional inquiry. The purpose of the 20th Order was to obviate that sort of inconvenience and nothing else. The further accounts or inquiries which the Judge is thereby empowered to direct to be taken or made, must be such accounts or inquiries only as are auxiliary to the final working out of the decree which has been pronounced by the Court, and not such as are at variance with its principle.

That such is the true construction of this Order is, I think, confirmed by this further consideration. The Order must, of course, be construed with reference to the authority under which it is made, and it ought not to receive such a construction as would cause it to go beyond the scope of that authority. Now, the Orders of the 16th of October 1852, of which this Order is one, were not made in pursuance of the act for amending the practice and course of procedure in the Court of Chancery (15 & 16 Vict. c. 86.); but in pursuance of the act for the Abolition of the Master's Office (15 & 16 Vict. c. 80.), and the authority by which these Orders were made is given by the 38th section of the last-mentioned act, which directs the Lord Chancellor, with such consent as therein mentioned, to make and issue general rules and orders for regulating the times and form and mode of procedure before the Judges sitting in chambers and their chief clerks, and generally to regulate the practice of the Court in respect of the matters to which the act relates. The Orders which are thus authorized to be made are confined to the matters to which the act re-

lates. Now (with the exception of the clause for appointing a third Vice Chancellor, and the clause authorizing the Lord Chancellor, after resigning the Great Seal, to give judgment in any case previously heard by him,) the act relates exclusively to the abolition of the office of Master, and to the transfer of the prosecution of decrees and orders, and other matters and things previously under the management of the Masters, to the Judges sitting in chambers, and to the machinery for effecting those objects. The sole purpose of the act was to give to the Judge in chambers, instead of the Master, the prosecution of decrees and orders made by the Court, and to confer on him such powers as might be proper for their due prosecution; and it was not a purpose of the act to give to the Judge in chambers any power to alter or depart from the decree which by the act he is required to prosecute, nor to direct any account or inquiry to be taken or made which should be at variance with its principle. Therefore, by construing this 20th Order as enabling the Judge, in prosecuting a decree in chambers, to direct any further accounts or inquiries to be taken or made which are in conformity with its principle, and will assist in finally working it out, the Order comes within the scope of the authority given by the 38th section of the act; but if the Order is to receive the construction insisted upon by this summons, then it is an order which there was no authority to make. And even if it should be thought too strong a proposition that such an Order would be absolutely beyond the scope of the Lord Chancellor's authority under the act, this, at all events, can hardly be denied, that it is utterly improbable that the Lord Chancellor, intending to make a set of Orders for the purpose of working out the objects of the act, should introduce this one Order, having for its object a matter which was not in the least degree contemplated by the act. The effect of such an Order would be to overturn and change the very principle by which the Court is governed with respect to decrees; and if it had been intended to do so the Order would not have been thrust inappropriately into this set of Orders, but would have formed one of the Orders of the 7th of August 1852, made in

pursuance of the 15 & 16 Vict. c. 86, which was the act for amending the practice and course of procedure in the Court of Chancery. I have thus stated the reasons which induce me to arrive at the conclusion, that the Judge cannot, in prosecuting the usual decree against an executor or administrator—i. e., the decree that he shall account for what he has received—engraft upon it an order to take an account of what he might without his wilful default have received, or to make him accountable for any other misconduct; and that, whether the usual decree was made upon bill or upon summons. A different opinion, however, has been expressed by one of my learned colleagues, for whose judgment I entertain so much respect that, notwithstanding my own decided views on the subject, I should have been greatly disposed to defer to his judgment, especially as it is of great importance that the proceedings and practice in the Judges' chambers should be uniform. But as uniformity of practice in two of the Judges' chambers would be of no value, if it did not extend to all the four, I thought it right to ascertain what practice had been adopted on the point in question in the chambers of the other two Judges, or at least what were their opinions as to the practice which ought to be adopted with reference to the matter now under consideration; and, upon consulting them, I find that their opinions coincide with my own. I cannot, therefore, hesitate to decide this case in accordance with my own views, when I find them so confirmed. The summons will be dismissed without costs.

FULL COURT
OF
APPEAL.
March 5, 8,
9, 10;
April 24.

HEATHER v. O'NEILL.

Mortgage — Equity of Redemption — Wife's Estate.

In November 1817 a married woman suffered a recovery of real estate belonging to her, the uses being declared to be as the husband and wife should jointly appoint, with remainder to husband for life, re-

mainder to wife for life, and an ultimate remainder to the wife in fee. Two days afterwards the husband and wife jointly appointed to A. and B. upon such trusts as the husband should appoint, and in default upon trusts similar to the uses before-mentioned. In March 1818 the husband appointed, and A. and B. conveyed the estate to C. upon trust to sell, and to pay a sum advanced to the husband, and to pay the residue to the husband, his executors, administrators or assigns, and to convey the unsold estate to the husband, his heirs or assigns, or as he or they should direct:—Held, (overruling the decision of the Master of the Rolls), that the deeds of 1817 and 1818 could not be regarded as one transaction; and that the deed of 1818 was not merely a mortgage, but that the ulterior uses of the deed of 1817 were completely changed thereby.

This was an appeal, by the plaintiff, from the decision of the Master of the Rolls, who had dismissed the bill, with costs. The plaintiff was the heir-at-law of Mr. Heather, and the defendants were the heirs of Mrs. Heather his wife; and the plaintiff's claim arose under the following circumstances. In 1817 Mrs. Heather was entitled, as tenant in tail in remainder after the death of her mother, to one undivided fourth part of certain real estate; and in November in that year a recovery of this fourth part was suffered by Mrs. Heather.

By an indenture, dated the 24th of November 1817, the uses of this recovery were declared to be, subject to the mother's life estate, to such uses as Mr. and Mrs. Heather should jointly appoint, and in default of appointment to the husband for life, with remainder to the wife for life, with remainder to the children of the marriage, with the ultimate remainder to Mrs. Heather in fee. On the 26th of November 1817 Mr. and Mrs. Heather, in exercise of their joint power, appointed the property (subject to the life interest) to Hunter and Cox, upon trust to hold the same upon such trusts as Heather should appoint; and in default for the husband for life, or until bankruptcy or insolvency, then for the wife for life; and then upon the same trusts as those expressed in the deed of the 24th of November 1817.

NEW SERIES, XXVII.—CHANC.

By an indenture of mortgage, dated the 25th of March 1818, and made between Heather of the first part, Hunter and Cox of the second part, Staples and Wheeler of the third part, and Murch (a trustee for Staples and Wheeler) of the fourth part, after reciting a previous contract for sale of the property, and reciting the before-mentioned deeds, and that Staples and Wheeler had advanced to Heather 340*l.*, Heather appointed, and Hunter and Cox conveyed the one-fourth part of the estate upon the trusts thereafter declared; and Heather appointed and assigned one-fourth part of the purchase-money to Murch upon trust, in case the 340*l.* should not be paid, with interest, before the 24th of June then next, to sell and receive the one-fourth share of the estate and purchase-money, and thereout to pay the 340*l.* and interest, and to pay the residue thereof to Mr. Heather, his executors, administrators or assigns, and if any of the real estate remained unsold, to convey the same to Mr. Heather, his heirs or assigns, or as he or they should direct. In 1825 the mortgage was discharged by Heather's solicitor. Heather died in 1829, and his widow took out letters of administration to his estate, and paid the amount of the mortgage-money to the solicitor. In 1843 Mrs. Heather's mother died. The question, therefore, was whether this real estate devolved, under the deed of March 1818, upon the plaintiff as the heir-at-law of Mr. Heather, or, under the deeds of November 1817, upon the defendants, the heirs-at-law of Mrs. Heather. On the 22nd of December 1857 the Master of the Rolls decided in favour of the defendants, his Honour being of opinion that the deeds of 1817 were executed in contemplation of and for the purpose of the mortgage of 1818, and that they must be taken together; the consequence of which would be that the deed of the 25th of March 1818 only affected the property to the extent necessary to make the mortgage effectual; and in the events which had happened the equity of redemption belonged to the heirs of the wife, and not of the husband.

Mr. R. Palmer and Mr. W. D. Lewis,
for the plaintiff, the appellant.

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Mr. Lloyd and Mr. Smythe, for the defendants.

Mr. Palmer, in reply.

The following cases were referred to :—

Ruscombe v. Hare, 6 Dow, 1.

Jackson v. Innes, 1 Bligh, 104.

Reeve v. Hicks, 2 Sim. & S. 403; s. c. 4 Law J. Rep. Chanc. 85.

Barnett v. Wilson, 2 You. & C. C.C. 407; s. c. 12 Law J. Rep. (N.S.) Chanc. 428.

Fauconberge v. Fitzgerald, 6 Bro. P.C. 295; s. c. Fitzgibbon, 207.

Whitbread v. Smith, 3 De Gex, M. & G. 727; s. c. 23 Law J. Rep. (N.S.) Chanc. 611.

Eddlestone v. Collins, Ibid. 1; s. c. 23 Law J. Rep. (N.S.) Chanc. 480.

Hipkin v. Wilson, 3 De Gex & Sm. 738; s. c. 19 Law J. Rep. (N.S.) Chanc. 305.

Plowden v. Hyde, 2 De Gex, M. & G. 684; s. c. 21 Law J. Rep. (N.S.) Chanc. 796.

Anson v. Lee, 4 Sim. 379.

Clark v. Burgh, 2 Coll. 221; s. c. 14 Law J. Rep. (N.S.) Chanc. 398.

Jackson v. Parker, Amb. 687.

April 24. — The LORD CHANCELLOR (after stating the facts of the case) said, that the question entirely turned on the indenture of the 25th of March 1818, which had been executed by Mr. Heather, whether it was intended to be only a mortgage to secure the sum of £400, or a re-settlement of the property to new uses. The answer to the question depended very much upon circumstances, as it involved considerations rather of fact than of law. If it were allowed to speculate upon the intentions of the parties, the probability was, that it was never intended to give to the husband more power over the property than to raise money by mortgage. Different minds, however, were differently affected by circumstances in judging of intention; therefore, though the question was one more of fact than of law, it had been contended that where the equity of redemption had been reserved in a different manner from the previous estate, there must have been an intention to effect something more than a mere mortgage. But in stating the

question as one of intention, it would be more correct to say that the principle in such cases was to presume against an intention to alter the old settlement further than was necessary to effect the object immediately contemplated. When the wife concurred with her husband in mortgaging her estate, she was considered, in the absence of evidence to the contrary, as having joined merely to effect the mortgage; and the terms in which the equity of redemption was limited would not affect her right, unless there was a sufficient indication of intention to vary the previous limitation of the estate. In *Whitbread v. Smith* Lord Cranworth said, "when a mortgage is executed, the intention *prima facie* is, that it is a mortgage, and a mortgage only; and it is not on slight expressions in the proviso for redemption that this Court will infer any contrary intention." This principle was most usually illustrated in mortgages by husband and wife. After alluding to *Ruscombe v. Hare* and *Jackson v. Innes*, his Lordship referred to *Fauconberge v. Fitzgerald*, as reported in *Fitzgibbon*, 207, where the limitations were very similar to those in the present case, and the decision had a close application. If he could treat all the deeds of 1817 and 1818 as constituting one transaction, he should act as the Master of the Rolls had done, and dismiss this bill. But he considered that the deed of March 1818 must be regarded as completely detached from the deed of 1817. It would therefore be improper to refer to any of the considerations in the deed of 1817 for the purpose of construing the deed of 1818. With reference to the authorities, it was not unimportant to remember that here the power was executed by the husband only by the deed of 1818, and therefore that the Court had not to deal with a possible conflict of intentions, as would have been the case if the power had been executed by the husband and wife. His Lordship was compelled to conclude that the ulterior uses limited by the settlement of 1817 were completely changed by the deed of 1818; that the latter deed was a re-settlement, the trustees, Hunter and Cox, having passed the legal estate, which they took under the deed of 1817, to new uses; that the new trustee was not brought in

for the purpose of carrying into effect the old uses, but for the new uses which were substituted; and that neither Heather nor Murch could be declared a trustee for the old uses.

LORD JUSTICE TURNER said that he was of the same opinion. The question was whether the deed of March 1818 operated only to charge this estate by way of mortgage, or to alter the limitations of the estate? That depended on the intention of the parties, which was to be collected from the deed. On this subject there could not be said to be any general rule applicable to all cases, but each case depended on its own circumstances. The Court, however, would not impute an intention to change the uses of the settlement, unless it appeared by recital or other special circumstances. The mere fact, that the equity of redemption had been reserved differently, was not of itself sufficient. That might be ascribed rather to inaccuracy or mistake than to intention. Certainly a deviation in a slight degree from the mode in which the equity of redemption was originally settled, did not of itself afford good ground for holding that the old settlement was disturbed. This was, however, not an ordinary case of mortgage. The deed of 1818 was not properly an indenture of mortgage, but a trust for sale. It was an appointment by Mr. Heather, and conveyance by Hunter and Cox, the trustees, to a trustee upon trust for sale, and after payment of the mortgage-money, to pay the surplus to Heather. It was not merely an appointment by persons having absolute power over the estate, but also a conveyance by trustees who took in default of appointment. These facts were of importance, in considering the question of intention: for there was a great difference between a mere appointment and an appointment coupled with a conveyance by the trustees. The trustees would not be justified in conveying to new uses, unless the clear intention was to destroy the old settlement of which they were trustees. If there were not such an intention, they would be committing a breach of trust. In ordinary cases of mortgage by husband and wife of the wife's property, where the reservation of the equity of redemption differed from the limitations of a settle-

ment, the Court had no such clue to the intention of the parties. But where the trustees conveyed to altered uses, and they could only be justified in doing so if there had been an intention to alter the uses, either the Court must impute to them a breach of trust, or else it was bound to consider that there was an intention to alter the uses. The intention here evidently was not only to create a charge, but also to alter the ultimate limitations. Reliance was placed on the part of the respondents, on the recital of the power of appointment in the deed of 1818; but that recital shewed nothing as to the extent to which the appointor intended to go. The fact of the recital not extending beyond the power was rather unfavourable to the respondents than otherwise. It was also contended by the respondents, that the limitations of the equity of redemption in the deed of 1818 ought to be disregarded. Such a contention was not warranted by the cases, and was not maintainable here. If the limitations could not be referred to mistake or inaccuracy, they must take effect according to the terms in which they are made. The most important point in the case had been suggested by Lord Justice Knight Bruce, viz. to whom would the estate have gone upon the payment (when due) of the money to secure which it had been conveyed? His Lordship thought it would have gone to Heather under the ultimate trust: he was entitled to the equitable fee, subject to the payment of 340*l*. The respondents' argument required the Court to assume that the surplus money, if the estate had been sold under the trust for sale, would have reverted to the uses of the original settlement. But that was wholly irreconcilable with the provisions of the deed of 1818. There were not wanting authorities in support of this view. The case of *Fauconberge v. Fitzgerald* was quite in point here. The cases were almost identical. The observations of Lord St. Leonards (1) on the case of *Martin v. Mitchell* (2) were very much in favour of the conclusion come to in this case by the Lord Chancellor and himself. The present case was

(1) 1 Sugd. Powers, 370, 6th edit.

(2) 2 J. & W. 413.

the exact converse. His Lordship was of opinion that Heather, under the deed of 1818, became entitled to the equitable estate in fee subject to the mortgage, a conclusion to which the Master of the Rolls would probably have also come, if he had not considered that the three deeds were all to be taken together and to be considered as part of the same transaction.

LORD JUSTICE KNIGHT BRUCE said, that upon the question whether the deeds of 1817 ought to be viewed as parts of the same transaction, of which the deed of March 1818 was another part, he should abstain from expressing any opinion. He considered, however, that the deed of March 1818 ought to be regarded as a mortgage only.

M.R.	}	NOBLE v. BRETT.
1857.		
Dec. 22.		
1858.		
Jan. 13.		

Executors—Testator's Covenant—Liability of Appropriated Legacies.

*A testator, by his will, gave several legacies, among which were two legacies of 2,000*l.* each, upon which a duty of 10*l.* per cent. was paid, and the sums set apart until the legatees attained twenty-five. The residuary estate was given to one of the executors, who was allowed to receive and apply it for his own use, as the debts and legacies of the testator were considered to be satisfied. After this, upon the expiration of a lease which had been granted to the testator, an action was brought against the executors for breach of covenants contained therein. One of the executors then instituted two suits, the one to administer the estate of the testator, and the other to get the two appropriated legacies into court. Orders were made in each of these suits in accordance with the prayer, but the residuary legatee, when pressed to pay the residuary estate into court, took the benefit of the Insolvent Act. Upon a petition by the creditor to obtain payment of his debt,—Held, that he was entitled to enforce the orders made in the suits, and that the two appropriated sums were liable to make good the debt claimed in the action, together with*

all costs incurred, though one of the legacies had been sold and assigned by the legatee to a stranger.

By a lease, dated the 25th of October 1824, Samuel Webb, Kenrick Collett and Mary Ann his wife, and Roland Wimbourn, demised to Samuel Hodges, his executors, administrators and assigns, certain messuages in Webb Street, Bermondsey, for thirty-one years from the 29th of September 1824 at a yearly rent of 63*l.*, and subject to divers covenants, conditions and agreements.

The reversion in the premises demised became vested in William Dyson as a trustee, to receive, pay and apply the rents, issues and profits thereof for the sole and separate use of Elizabeth Helen the wife of John Launse, and he had power to give receipts and discharges for all monies received.

Samuel Hodges, by his will, dated the 31st of May 1843, bequeathed to his two sons, Samuel and William Hodges, 2,000*l.* each; and he directed that immediately after his decease, 4,000*l.* should be invested in the public funds in the joint names of his executors and S. and W. Hodges, and so remain until his two sons should severally attain the age of twenty-five years, at which time he directed that the sums of 2,000*l.* might be paid to them respectively, and he desired that either or both of them, after the age of twenty-one, might, if he pleased, bequeath the money therein bequeathed to him, to his lawful wife or his issue by her, and he desired that until they respectively attained twenty-five, the interest of the money so invested should be paid into the hands of their mother Sarah Brett as their natural guardian, for their maintenance and education, or in case of her decease, then into the hands of the plaintiff William Noble for the same purpose; and should either of his said sons die before he attained twenty-five, and without having made a will according to the condition above named, then the testator bequeathed the whole 4,000*l.* to the survivor of them; and should they both die before they attained twenty-five, and without having made a will or wills as aforesaid, then he desired that the interest of the 4,000*l.* should be paid to

Sarah Brett for life, and at her decease be divided rateably amongst her next-of-kin; and the testator bequeathed all the rest of his estates whatsoever and wheresoever to Sarah Brett, for her free use and benefit; and he appointed as trustees and executors of his will the plaintiff W. Noble, Sarah Brett and Joseph Davis. The testator died on the 13th of March 1846. Under the impression that all debts had been satisfied, each of the two legacies of 2,000*l.*, after the payment of legacy duty, was invested in the purchase of 1,872*l.* 11*s.* 3*d.*, consols: the one in the names of the executors and Samuel Hodges, and the other in the names of the executors and W. Hodges, and Sarah Brett was allowed to receive the residue of the estate of the testator, amounting to about 308*l.* 8*s.* 11*d.*

On the 11th of October 1852, Sarah Brett and S. Hodges mortgaged the legacy of 2,000*l.* to secure the repayment of 500*l.* and interest to Thomas Pickworth, and on the 18th of November 1853, they, in consideration of 600*l.*, charged the same 2,000*l.* in favour of William Balderoon, with an annuity of 45*l.* for the term therein mentioned. On the 26th of October 1855, Thomas Hayley purchased the same legacy of 2,000*l.* for the sum of 1,500*l.*, and out of the purchase money he discharged the claims of Messrs. Pickworth and Balderoon, and paid the balance of 343*l.* 1*s.* 3*d.* to S. Hodges, and they joined in assigning the legacy to T. Hayley, his executors, administrators and assigns.

On the 6th of May 1856, W. Dyson brought an action in the Court of Queen's Bench against the plaintiff W. Noble and Sarah Brett, as executor and executrix of the testator S. Hodges deceased, to recover damages for some dilapidations consequent upon a breach of the covenants contained in the lease of the 25th of October 1824.

On the 10th of July 1856, the plaintiff W. Noble filed his claim in this court, and thereby stated that J. Davis, his co-executor, had gone to Australia, and had, as was believed, since died; that Sarah Brett had received the testator's residuary estate, about 300*l.*; that he had not retained any assets in hand to pay the debt for which W. Dyson had brought the action, and that if it was allowed to proceed, he should be compelled to pay the

amount out of his own proper monies; and that he was desirous of accounting for what he had received of the testator's estate, and of having it administered in this court in the presence of Sarah Brett and the other persons interested. On the 22nd of November 1856, an order on the claim was made, directing an account of the testator's estate and of his debts to be taken. On the 15th of December 1856, before any inquiries were made, the plaintiff filed the bill in the suit of *Brett v. Hodges* in this court, and after stating the facts before detailed, and that T. Hayley had presented a petition stating that S. Hodges attained twenty-five on the 12th of July 1856, and that an order had been made by this Court on the 19th of July 1856, ordering that the right of transfer of the last-mentioned sum of 1,872*l.* 11*s.* 3*d.* consols, should vest in W. Noble, Sarah Brett and S. Hodges, and that T. Hayley had required the plaintiff to concur in transferring the 1,872*l.* 11*s.* 3*d.* consols to him as purchaser; that there were doubts as to the age of S. Hodges, who, it was believed, was still under the age of twenty-five years, and that proposals had been made that Sarah Brett and W. Hodges should give a bond of indemnity to W. Noble: it prayed that the two sums of 1,872*l.* 11*s.* 3*d.* consols, and the dividends thereof, might be secured in court for the benefit of the persons entitled thereto, and that the rights and interests of all parties therein might be declared, having regard to the circumstances therein mentioned, and that this suit might be supplemental to the former suit of *Noble v. Brett*.

On the 27th of January 1857, an order was made by one of the Judges of the Queen's Bench, that further proceedings in the action by W. Dyson should be stayed, and that he should go in and prove his claim in the suit of *Noble v. Brett*, and that the costs should abide the event.

The chief clerk, by his certificate filed on the 3rd of April 1857, certified that the only debt of S. Hodges, the testator, unpaid was the sum of 188*l.* 19*s.* 1*d.*, which together with 3*l.* 1*s.* 10*d.* for interest (less property tax) at 4*l.* per cent. per annum from the 22nd of November 1856 to the date of the certificate, and 12*l.* 15*s.* 6*d.* the costs of the action, and 3*l.* 3*s.* for costs

of proof, making together 207*l.* 19*s.* 7*d.*, then remained due to W. Dyson in respect of the breach or non-performance of the covenants contained in the lease of the 25th of October 1824; and that the personal estate of the testator, applicable for the payment of such debt, consisted, first, of the sum of 308*l.* 8*s.* 11*d.* received by Sarah Brett in 1846 as the residuary legatee; secondly, the two sums of 1,872*l.* 11*s.* 3*d.* consols.

By an order made on the 1st of July 1857, in the suit of *Noble v. Brett*, Sarah Brett was directed to pay into court the sum of 308*l.* 8*s.* 11*d.*, and the costs of all parties and of the action were ordered to be taxed and paid thereout; and it was ordered that W. Dyson's debt should then be paid, and that the balance should be paid to S. Brett.

An attachment having been issued against Sarah Brett for non-compliance with the order, she was arrested, but obtained her discharge under the Insolvent Debtors Act on the 2nd of November 1857.

By an order made on the 1st of July 1857, upon a motion for a decree in the suit of *Brett v. Hodges*, W. Noble, Sarah Brett and S. Hodges were, before the 4th of November 1857, directed to transfer the 1,872*l.* 11*s.* 3*d.* consols, standing in their names jointly with Joseph Davis, into the cause of *Noble v. Brett*, to an account to be entitled "The Contingent Account of S. Hodges and his assignee T. Hayley"; and a like order was made with respect to the other sum of 1,872*l.* 11*s.* 3*d.*, which was placed to an account entitled "The Contingent Account of W. Hodges." The dividends, in one instance, were ordered to be paid to T. Hayley, and, in the other, to Sarah Brett, for the maintenance of W. Hodges. No order was made as to the costs of this suit; and the funds were not to be transferred without notice to the parties in the suit of *Noble v. Brett*.

No further steps were taken to pay the demand; and, finally, Mr. Dyson presented this petition, praying that the costs of it might be taxed and added to his debt, and that the same with subsequent interest might be paid. It also prayed the Court to order out of what fund the debt, interest and costs should be paid; and that the petitioner might be at liberty to

prosecute and enforce the order of the 1st of July 1857 made in *Brett v. Hodges*, so far as the same related to the transfer of the two sums of 1,872*l.* 11*s.* 3*d.* consols; and that, if necessary, a moiety of the debt, interest and costs might be paid out of each of the said sums.

Mr. G. L. Russell, for the petitioner.—An executor can proceed against a legatee if any demand is made against him in respect of his testator. The whole of a testator's estate, however it may be situate, is liable to indemnify the executors; and even if the residuary legatee becomes bankrupt or insolvent, still it will not vitiate any rights which the executors may have against the residue. Legatees are not now required to give any security to refund upon a deficiency of assets, but notwithstanding that, the legatee's liability to refund remains.

Waller v. Barrett, ante, 214.

Brewer v. Pocock, 23 Beav. 310.

Dean v. Allen, 20 Ibid. 1.

Knatchbull v. Fearnhead, 3 Myl. & Cr. 122.

March v. Russell, Ibid. 31; s.c. 6 Law J. Rep. (N.S.) Chanc. 303.

Taylor v. Hawkins, 8 Ves. 209.

Gillespie v. Alexander, 3 Russ. 130.

Kinderley v. Jervis, 22 Beav. 1; s.c. 25 Law J. Rep. (N.S.) Chanc. 538.

Ram on Assets, 59.

Williams on Executors, 1216, et seq. and 1308, et seq. 5th edit.

Mr. Haig, for W. Hodges.

Mr. Lloyd and *Mr. Hardy*, for T. Hayley, insisted that he was a purchaser for value without notice; that a general creditor could have no lien upon the assets of the testator; and that he could not follow them into the hands either of the legatees, or of a purchaser, and that his only remedy was against the executors.

Orr v. Kaines, 2 Ves. sen. 193.

Coppin v. Coppin, 2 P. Wms. 291, 296.

Anon. 1 Ibid. 495.

Jewon v. Grant, 3 Swanst. 659.

Fordham v. Wallis, 10 Hare, 217; s.c. 22 Law J. Rep. (N.S.) Chanc. 548.

Underwood v. Hatton, 5 Beav. 36.

Jan. 13.—The MASTER OF THE ROLLS.

—The payment of this debt out of the sums to be brought into court and placed to the credit of the cause of *Noble v. Brett*, is opposed by T. Hayley, the purchaser of the 1,872*l.* 11*s.* 3*d.* set apart for S. Hodges, on the ground that he is a purchaser of that legacy for value, without any notice of the petitioner's claim, or indeed any possible belief that he would not be entitled to the legacy, if S. Hodges attains his age of twenty-five years. He contends, in support of his claim, that, so far as the petitioner is concerned, a general creditor can have no specific lien on the assets of the testator, and that he cannot follow them into the hands of the legatees, and still less into those of the purchaser from them, but that the creditor's remedy in such case is confined to a personal remedy against the executors. Assuming this to be the principle applicable to the present case, still practically the petitioner must be paid; and ultimately this question will resolve itself into a contest between W. Noble, the executor, and T. Hayley, the purchaser. There is no doubt but that the petitioner is, in any view of the case, entitled to be paid his debt; the Judge at law stopped the action, and made the costs of it depend on the fact whether the plaintiff W. Dyson could establish his debt in equity. He has done so, and the propriety of the certificate is not objected to, nor is his debt disputed; and although the Judge did not (as is usual in Chancery, as a condition for staying an action) direct judgment to be entered up for the plaintiff in the action, to be dealt with as the Court of Chancery should direct, still the petitioner must, in this Court, be treated as if he were in exactly the same situation and had recovered a judgment against W. Noble, and if no other means of payment were open to the petitioner, he is entitled to the benefit of the personal remedy against the executor, W. Noble. If that should be so, is W. Noble, the executor in that case, to bear the loss himself, or if not the whole, is he to bear any portion of the loss; and if so, to what extent? He has been guilty of no intentional breach of trust, nor has he in any respect failed in his duty, unless it be a failure by not having set apart assets

to meet a possible contingency which no one knew of or anticipated. But, on the other hand, it is contended, that he must take the consequences of having acted not under the authority of the Court, and that an executor, having once assented to a legacy, and parted with the fund, has thereby lost all right to follow it, or to obtain a restitution of the fund itself, and that his remedy is confined to a personal remedy by action against the legatee whom he has paid, or to whom he has delivered the legacy; which remedy, however, in the present case would be futile. This I do not consider myself called upon to decide on the present occasion, because admitting, as it has been argued, that the right of the creditor and of the executor to attach the fund itself, is limited to the case where the executor or the Court has not parted with the controul over it, I am of opinion that this principle does not apply upon the present occasion; but that the executor has not parted with his dominion over the fund, and that the Court has possession of the fund for the purpose of administering the estate of the testator. I think it immaterial for this purpose whether the orders of the 1st of July 1857, directing these two sums to be brought into court, have or have not hitherto been acted upon. They may be enforced; and I shall deal with this case in the same manner as if they had been carried into effect before the petition was presented. The fund stood in the names of the three executors and the legatees, who had not attained the age when each was entitled to receive the capital, and the dividends were applied for maintenance. It is argued that this was as complete a payment as if three other persons had been constituted trustees, into whose names the funds had been transferred; that as soon as the transfer took place, the office of executor ceased and that of trustee began, as it did in the case of *Phillipo v. Munings* (1), and to a certain extent this is undoubtedly true; but it is impossible to hold that in consequence of such transfer the executor is bound personally to pay any debt of his testator which he was ignorant of, and that although assets of that very testator are standing in his name,

jointly with that of others, he must be driven to an action against the *cestui que trust* to recover payment of the debt, or of his proportion of it. He is, no doubt, bound justly to apportion the debt amongst the persons equally liable to contribute, and he must also exhaust the funds primarily liable for this purpose; and the principal difficulty I felt in this case during the argument arose from this circumstance: whether the question did not now arise as to the propriety of the payment made by the executor to the residuary legatee, and whether the legatees are not entitled to say to the executor, "You have paid away the residue, which is the fund primarily applicable to the payment of this debt, and you have done so in your own wrong, and because you cannot repair the effect of your own incaution, you are not entitled to make us pay for it, any more than you would be entitled if the funds were all here, or if there were no residue, to throw the whole debt on that particular legacy which has not been parted with by the legatee." If I thought that Mr. Hayley was to be treated as the purchaser of a fund or legacy which had been paid or delivered to the legatee, I should find it extremely difficult, consistently with authority or principle, to make him pay any portion of the debt, and in that case it would be equally difficult to make the remaining legatee pay the whole debt. And if, according to principle and authority, it is settled that the legatee is only liable to pay his proportion of the debt, without regard to the fact whether the remaining proportion can be recovered from the other legatees, who are equally liable, it would seem difficult to hold that the same principle did not also apply to the case of a residue, where the residuary legatee had received the fund which was primarily liable for payment of the debt. I am, however, as I before observed, relieved from deciding this question at present, because, in my opinion, the order of this Court I have already referred to places the funds under the authority of this Court for the administration of the testator's estate, and the certificate, which has been duly approved, and is not contested, finds these sums to be specifically applicable to the payment of this debt of the petitioner. I am of opinion,

therefore, that Mr. Hayley cannot, as the fund still remained in the names of the executors, together with that of the legatee, successfully contend that they had parted with all controul over it, or that it was freed from all claims in respect of the testator's estate, as he might have done if the fund had been actually paid or transferred to the legatees. Mr. Hayley made no inquiry of the executors, and did not act on the faith of any assurance made by them to the effect that he might safely advance his money upon the security of this legacy, nor has he or any other person disputed the accuracy of the certificate. I am consequently of opinion that the petitioner is entitled to be paid his debt out of these two sums, whatever may be the rights of the legatees, or of the persons claiming under them, if any, as against the executors, which is a question that does not properly come before me on this petition. I shall therefore, on the present occasion, make an order, which will be substantially according to the prayer of the petition: viz. Order payment of the amount found due to the petitioner, together with the costs of the petition, to be paid in equal moieties, out of the two sums of 1,872*l*. 11*s*. 3*d*.; and for this purpose the petitioner is to be at liberty to prosecute the order of the 1st of July 1857. This order is to be without prejudice to any question in the cause; and let the costs of all the respondents to this petition be costs in the cause.

LORDS JUSTICES.

Feb. 19, 20, 22, 23; } KNIGHT v. BOWYER.
May 7.

Statute of Limitations—Express Trust—Stale Demand—Champerty—Redemption by Annuitants—Offer by Bill not enforced if Inequitable—Accounts—Constructive Notice.

Sir G. B., the tenant for life of the R. estate, in March 1814, granted six redeemable annuities charged on his life estate. By a deed of even date he appointed a receiver of the rents of the R. estate, and directed that the six annuities should be paid pari passu. By another deed of even date he conveyed his life estate to a trustee, upon

trust, if default should be made in payment of the six annuities, to sell the estate and pay the annuities. In August 1814 Sir G. B. granted three annuities, and by deed of even date he directed the receivers and the trustee to pay the whole nine annuities out of the rents *pari passu*. Notice was given to the receivers and trustee, and the latter entered into possession and paid the annuities, and also the interest on a mortgage (charged on the estates, and which had been assigned by Sir G. B. after the grant of the three annuities), but only for a very short time, after which the rents were only sufficient for payment of the six annuities. In 1846 G. B., the tenant in tail of the R. estate, purchased the six annuities, and having become entitled to the above-mentioned mortgage he obtained possession of the estate. In 1855, forty years after the last payment in respect of the three annuities, the three annuitants filed their bill for an account. During the pendency of another suit, relating to the incumbrances on the R. estate, the interest of some of these annuitants was purchased by the solicitor of one of the other parties to that suit, who covenanted to indemnify his vendors against past and future acts, and he joined as a plaintiff in this suit. The Master of the Rolls decided that the deed of receivership and trust created a trust for the benefit of the incumbrancers; that the plaintiffs were not barred by the Statute of Limitations; that they were entitled to an account; that the purchaser of the mortgage from Sir G. B. had notice of the trust; that after his death the interest on the mortgage was subject to the payment of the annuities; and that the purchase by the solicitor was not open to objection as champerty. On appeal, it was held, by Lord Justice Turner, affirming the decree of the Master of the Rolls, (Lord Justice Knight Bruce doubting, and not assenting,) first, that an express trust under the 25th section of the Statute of Limitations (3 & 4 Will. 4. c. 27.) was created in the receivers and trustee, and that that section applies to the case of one *cestui que trust* excluding another, and that, therefore, the plaintiffs were not barred by the statute; secondly, that by reason of the express trust the plaintiffs' claim was not a stale demand; thirdly, that although the plaintiffs had by their bill offered to redeem prior incum-

brances, the Court would not hold them to that offer, the same being inequitable; fourthly, that the purchaser of the mortgage had constructive notice of the trust for the annuitants by receiving interest on the mortgage from the trustee; fifthly, that the purchase by the solicitor was free from champerty, and that even if it had been a purchase from his own client no objection on that ground could be maintained by a third party; and sixthly, that the direction of the accounts was correct.

The foregoing head-note will, with the preliminary statement of Lord Justice Turner and the details he gives from the report of this case in *Mr. Beavan's Reports* (1), be a sufficient introduction of this appeal from a decision of the Master of the Rolls.

There were two petitions of appeal, one by Mr. George Bowyer and the other by Mr. Edward Kynaston Bridger and other defendants.

Mr. Selwyn and *Mr. Hislop Clarke*, for the plaintiffs, supported the decree of the Court below.

Mr. Roll and *Mr. Wickens*, for the appellant, Mr. George Bowyer.

Mr. Follett and *Mr. Freeling*, for the defendant Donovan.

Mr. Roundell Palmer and *Mr. Druce*, for the six annuitants.

The arguments urged on the appeals are fully and carefully stated by Lord Justice Turner, and the principal cases are enumerated in the judgment. There were some others cited, not referred to in the Court below, as follows:—

Williams v. Protheroe, 5 Bing. 309.

Harrington v. Long, 2 Myl. & K. 590.

Holford v. Burnell, 1 Vern. 448.

Burrell v. Lord Egremont. 7 Beav. 205, 235; s. c. 13 Law J. Rep. (N.S.) Chanc. 309.

Melling v. Leak, 16 Com. B. Rep. 652; s. c. 24 Law J. Rep. (N.S.) C.P. 187.

Ware v. Lord Egmont, 4 De Gex, M. & G. 460; s. c. 24 Law J. Rep. (N.S.) Chanc. 361.

(1) 23 Beav. 609; s. c. 26 Law J. Rep. (N.S.) Chanc. 769.

The Attorney General v. Stephens, 6
Ibid. 111; s.c. 25 Law J. Rep.
(N.S.) Chanc. 888.

May 7.—LORD JUSTICE TURNER.—In this case there were two appeals from a decree of the Master of the Rolls. The general outline of the case may be thus stated. The plaintiffs in the suit, and some of the defendants, are interested in three several annuities which were granted by the defendant Sir G. Bowyer, by three several indentures, dated the 30th of August 1814, and which were by those indentures charged upon the defendant Sir G. Bowyer's life interest in an estate called the Radley estate. The other defendants are variously interested in a mortgage upon the Radley estate; in a sum charged upon that estate for portions; in a judgment entered up against the defendant Sir G. Bowyer, by the late Alexander Donovan, for securing an annuity granted to him; and in six other several annuities which were granted by the defendant Sir G. Bowyer, by six several indentures, dated the 14th and 16th of March 1814, and which were by those indentures also charged upon the defendant Sir G. Bowyer's life interest in the Radley estate. The bill is filed for the purpose of rendering the life estate of Sir G. Bowyer available for the payment of the annuities in which the plaintiffs are interested, and which are called "the three annuities"; and for establishing the priority of these annuities over some of the other charges on the life estate, or, failing that case, for redeeming those other charges. It has never been disputed that the mortgage and the charge for portions had priority over the three annuities, and it is not now disputed that the six annuitants have priority over the plaintiffs in respect of the three annuities, but the plaintiffs by their bill claim to rank *pari passu* with the six annuitants; and it was not until shortly before the hearing of the cause that this claim was abandoned. The defendant Mr. G. Bowyer, who claims to be entitled to the mortgage and the charge for portions, and to be entitled also to the six annuities, subject to the mortgages which he has made of them in favour of some of the other defendants, has been for some time past in possession or receipt of the

rents and profits of the estate; and it appears that the defendant Edward Kynaston Bridger, who has some interest as mortgagee in the six annuities, or some of them, was also many years ago in receipt of the rents of the estate for some short period of time. The decree has directed an account against these defendants; and they are the parties by whom the appeals before us have been presented. Such is the general outline of the case; but it involves many points, and, in order to arrive at a just conclusion upon them, it is necessary to apply to the consideration of each point the facts and circumstances by which it is more immediately affected. The decree under appeal has treated the three annuities as subsisting charges on the estate, and has given the plaintiffs relief upon that footing; but the appellants contend that these annuities are barred and extinguished by the Statute of Limitations, 3 & 4 Will. 4. c. 27. I propose, first, to consider that question. The facts of this case are stated with quite sufficient accuracy, for the purpose of the observations that I have to make, in the report in 23 *Beav.* 609. It appears by that report that Sir G. Bowyer, in and prior to the year 1814, was equitable tenant for life, without impeachment of waste, of the Radley estate, subject to four incumbrances: first, a mortgage for 9,560*l.*, to which Mr. G. Bowyer now claims to be entitled, which was vested in Henrietta Lady Bowyer, for life, with the absolute interest in reversion in Sir G. Bowyer; secondly, 7,125*l.* due to the four brothers and sisters of Sir G. Bowyer (being a residue of a charge of 10,000*l.* upon the estate for portions of the younger children of the prior owner of the estate); thirdly, an annuity of 30*l.*, which has determined; and fourthly, another annuity of 250*l.*, which has since determined. That was the state of the matter in 1814. While Sir G. Bowyer was thus entitled, Donovan obtained a judgment against him in respect of the security for three annuities, the consideration of which was 7,758*l.*, and this judgment was entered up in March 1814. On the 25th of June 1814, Sir G. Bowyer, in consideration of 15,994*l.*, granted the six annuities to six persons whom I have mentioned, and afterwards executed a deed of the 28th of June 1814,

made between Sir G. Bowyer, of the first part, the six annuitants of the second, third, fourth, fifth, sixth and seventh parts, and two gentlemen, of the names of Ballachey and Ralfe, of the eighth part (being a deed which is called throughout "the receivership deed"). It recites first of all the deed granting the annuities; it then recites an agreement that it should be lawful for Sir G. Bowyer, by mortgage or grant of annuity, to raise any further sum not exceeding in the whole (including the considerations for the six annuities already granted, and including also any judgment which, at the time of such further sum being raised, might be available against the said hereditaments) the sum of 20,000*l.*; so that he had power to raise rather more than 4,000*l.*, subject to the question whether Donovan's judgment would fill up the 4,000*l.*; and that such further grants or mortgages should stand and be entitled *pari passu* with the six. Then there was the recital of the six annuities; and the deed witnessed that, in consideration of these sums which had been paid, amounting to 15,994*l.*, Sir G. Bowyer appointed Ballachey and Ralfe his agents to receive the rents of the estate, and to take all lawful steps, by action, distress or otherwise, to obtain payment thereof; and he directed the tenants to pay to Ballachey and Ralfe, and declared that their receipts should be good discharges to the tenants. The indenture then went on to declare that all the rents and profits so to be received by Ballachey and Ralfe, should be applied upon and for the trusts, intents, and purposes after mentioned, that is to say, upon trust, first, to pay taxes and rates; in the next place, to pay the interest on the 10,000*l.*, that being the charge upon which the 7,125*l.* arose, the charge for portions; and in the next place to pay two annuities of 250*l.* and 30*l.*; and, in the next place, to pay to the six annuitants, and such other grantees of annuities and mortgagees as might advance any further sum or sums of money on the security of the said hereditaments, pursuant to the terms of the proviso, that is, referring to the power Sir G. Bowyer had to create further charges so as to make up this 15,994*l.* to the 20,000*l.*; to pay all these annuities *pari passu*; and, lastly, that they should pay

to Sir G. Bowyer or his assigns, or to such person or persons as he or they should direct, the clear residue of the rents and profits; and that out of such residue should be deducted a commission of 5*l.* per cent. on the gross amount received, and also the costs and expenses to which the receivers might be put. The deed also contained a covenant by Sir G. Bowyer not to revoke the powers therein contained without the consent of the six annuitants, and that if the receivers, or any of them, should die, or refuse, or become incapable of acting, Sir G. Bowyer should appoint such other person or persons in their place as the six annuitants, or the major part of them, should appoint. Then a power was given to the six annuitants themselves to make that appointment, if Sir G. Bowyer refused or neglected to make it. That deed, it is to be observed, took no notice of the 9,560*l.* mortgage which was the first charge on the Radley estate. The receivership deed having been executed, Sir G. Bowyer, on the same day, the 28th of June 1814, executed another deed, called "the trust deed," by which he appointed Bridger, who, it appears, was a partner of Ballachey, one of the receivers, to be a trustee of the Radley estate; and by that deed, which was made by himself of the first part, the six annuitants of the six following parts, and E. Bridger of the eighth part, after reciting the receivership deed and the agreement made when the six annuities were granted, that the hereditaments, charged with the annuities, should be conveyed to the use of E. Bridger, his heirs and assigns, upon trust for better securing the payment of the six annuities, and also any other annuities, or the interest of any mortgages, which might thereafter be charged upon the hereditaments, under the proviso already mentioned; it was witnessed, that in consideration of the sums paid for the purchase of the six annuities, Sir G. Bowyer conveyed the Radley estate, and all his estate, right, title and interest therein, to hold to Edward Bridger, his heirs and assigns, during the life of Sir G. Bowyer, subject to the charges of 10,000*l.* (that is, the portions) and the two annuities of 250*l.* and 30*l.*, upon trust, to permit Sir G. Bowyer to receive the rents until default should be made in payment of some one of the six

annuities or other annuities to be granted as aforesaid, for the space of sixty days, and thereupon to sell the said hereditaments, and stand possessed of the proceeds and apply the same, first, in payment of the expenses, then to pay the six annuitants and subsequent annuitants, and subject thereto, for Sir G. Bowyer, his executors, administrators and assigns. I observe in this report that it is not mentioned that there was in this deed a trust of the rents and profits until sale. Whatever interpretation might be put on those words, in my view of the case, as it at present appears, the omission of that in the report is not material to the present case. Under these deeds, Ballachey was put into the possession of the rents as receiver. Afterwards Sir G. Bowyer (professing to act under the power which was contained in the original receivership deed and trust deed, to raise a further sum amounting to 4,000*l.* and upwards) granted three annuities to Knight, Bernard, and King, in consideration of a further sum of 3,997*l.*, and charged those annuities on his life interest in the Radley estate. Therefore, he at that time treated the judgment of Donovan as not being included in, and not forming any part of, the 20,000*l.* which he had reserved power to raise under the annuity deed. Then by these deeds of the 30th of August 1814, he granted to Knight, Bernard, and King, three several annuities of 285*l.* for his life, issuing out of, and charged on, his life interest in the Radley estate. Each of these deeds recited that he was seised of the Radley estate for an estate of freehold during his life without impeachment of waste, subject to the sum of 10,000*l.*, portions and interest charged thereon, and to an annuity of 250*l.* to Henrietta Lady Bowyer, again omitting any reference to the 9,560*l.* mortgage; and in each of these three annuity deeds, Sir G. Bowyer covenanted to pay the three annuities, that he had good right to grant the three annuities, and to grant powers and remedies for compelling payment of them, and to charge them upon the Radley estate, and that the estate should continue charged with them, and liable to distress and entry for the recovery of the same, and he indemnified them against the charges and incumbrances

thereinbefore mentioned, and all other charges and incumbrances whatsoever. I need not enter into the question, but it appears that the three annuitants had constructive notice of Donovan's judgment. It is immaterial in the present view of the case, whether that was so or not, the claim of the parties to rank *pari passu* having been abandoned. Some questions were raised before the Master of the Rolls which have not been raised before us, on the validity of these annuity deeds, with reference to the defects in the memorial. Nothing was said before us on that question. But a very important point of the case arises on the next deed, which was executed by Sir G. Bowyer. It appears that on the same day on which he granted the three annuities, he executed a deed, which has been called the deed of direction, to the receivers, Ballachey and Ralfe, and to Bridger, the trustee, by which he directed them to pay certain rents of the Radley estate to the three annuitants. That deed was made between Sir G. Bowyer of the first part, and the three annuitants of the second, third, and fourth parts. It recited the granting of the six annuities, and recited the trust deed by which the life estate had been conveyed to Bridger, upon trust for sale to secure the annuities. It recited the receivership deed, by which the trusts had been declared of the rents and profits to be received by Ballachey, the receiver. Then it recited the granting of the three annuities, and witnessed that in pursuance of an agreement made with Sir G. Bowyer in that behalf, Sir G. Bowyer authorized, empowered, required and directed Ballachey, Ralfe and Bridger respectively, to exercise the power and authority in them respectively reposed by virtue of the trust indenture and receivership deed respectively; and to do so for the purpose of raising and paying, not only the annuities to the six annuitants, but also the three annuities to Knight, Bernard, and King, and to make such payments unto the six annuitants, and unto Knight, Bernard and King respectively, of their several annuities, *pari passu*, and without any preference or priority whatsoever: and further, he directed Ballachey, Ralfe and Bridger, the receivers and trustee, to withhold from him pay-

ment of every part of the trust monies which might come to their hands by virtue of the several trusts aforesaid, until Knight, Bernard and King, as well as the six annuitants, should be respectively fully paid all arrears of their annuities. And then he further covenanted with Knight, Bernard and King, that Ballachey, Ralfe and Bridger, the receivers and trustee, should act in all respects touching the premises pursuant to the directions and authority by him, Sir G. Bowyer, to them given. Immediately after the execution of that deed, notice of it was served upon the receivers and upon the trustee. It appears that some time after the execution of that deed, in October 1816, there had been some sale of timber, and some question arose on the application of the proceeds of that sale; and in a letter which Ballachey and Bridger who were in partnership as solicitors,—one of them being the receiver under the receivership deed, and the other being the trustee under the trust deed, for securing the annuities,—wrote to the solicitors of the three annuitants on the occasion of some question arising about the application of the proceeds of the sale of the timber, they express themselves thus: "There are some arrears due to the first class of annuitants, after payment of which, there seems no objection to apply the surplus of the timber money in hand towards payment of the arrears of the second class, upon an indemnity." They, therefore, express their willingness to apply the surplus profits of the sale of the timber, after payment of the arrears of the six annuities, in discharge of the arrears of the three annuities. A further correspondence, much to the same effect, went on between the parties, more particularly with reference to the claim which Donovan put in, alleging that he was entitled to come in under the trust for filling up the 20,000*l.*, so as to fill up that sum, and exclude the three annuitants from coming in *pari passu* with the six annuitants. In consequence of that, it appears that two quarterly payments of the annuities were made to the three annuitants by Sir George Bowyer, but no further payments were made to them, Donovan having come in and filled up the 20,000*l.*, and the three annuitants

being therefore shut out from the right which they might otherwise have had to claim *pari passu* with the six annuitants. It appears that the rents of the estate were received by Ballachey or by Bridger down to the death of Bridger, in 1846, but that they were insufficient, after paying interest on prior charges, to pay both Donovan and the six annuitants; therefore, Donovan and the six annuitants came to an arrangement by which Donovan was to take interest at a certain amount upon the sums which were secured to him by the judgment, and the six annuitants were to take their annuities, and there was to be a rateable division between them of the rents and profits of the estate: and this bill states that the arrangement was made between Donovan and the six annuitants for the purpose of excluding the three annuitants; that is part of the allegations in the bill. Then, down to the year 1846, as I have stated, the rents were received by Ballachey or by Bridger, and that question is very much discussed in the observations I have to make upon the question, whether the possession was the possession of Ballachey as receiver, Bridger assisting him as his agent, or whether it was the possession of Bridger as trustee. At all events, I do not consider that will be found to be material, but I notice it as I pass on in the statement of the facts. Of course very great litigation arose on the subject, and in 1846, after the death of Bridger, E. K. Bridger received the rents for about one year, and then Mr. G. Bowyer who had become entitled to the 9,560*l.* mortgage in the mode that I will presently state, got into possession of the estate, and has been in possession of the estate ever since. These are the facts, which I believe are material to be stated with reference to the question upon the Statute of Limitations. Now, under these circumstances, I agree with the Master of the Rolls that the Statute of Limitations neither bars nor extinguishes the rights of the plaintiffs in respect of these three annuities. This point involves, as it appears to me, these three considerations: Was there a trust for the payment of these annuities? Was the trust, if any, express, or implied, or constructive? If express, can the Statute of

Limitations operate to bar the plaintiffs' claim? First, then, as to the existence and nature of the trust. It was argued for the appellants that the receivership deed was, so far as Sir G. Bowyer was concerned, a deed of agency merely, revocable by him, so far as respects his interest; that it was binding only to the extent of the security for the 20,000*l.*, and that, it being now admitted that the consideration for these three annuities formed no part of the 20,000*l.*, the plaintiffs can have no claim under the trusts of that deed. And as to the trust deed—the deed which vested the life estate of Sir G. Bowyer in Bridger—it was urged that the same considerations applied; and further, that upon the true construction of that deed, there was no trust of the rents and profits created by that deed, except in the event, which did not arise, of the estate becoming the subject of sale—not merely the subject of sale under the trust, but the actual subject of sale. It was insisted that the rights of the parties in these annuities rested wholly upon the notices which were served on the receivers and trustee. Now, although these annuitants could not, as it is admitted, come in under the trusts of the receivership and trust deed for securing the charges to be created for raising the 20,000*l.*, the deeds by which these annuities were granted undoubtedly charged them upon the life interest of Sir G. Bowyer, and therefore upon his interest under the receivership and trust deed, subject to the six annuities; and, whatever might have been the proper view to be taken in this case, if the deed of direction had not been executed (that deed by which Sir G. Bowyer directed the receivers and trustee to apply the rents and profits, and to pay nothing to him until the annuities were satisfied), whatever might have been the view to be taken of the case if that deed had not been executed, I think that that deed operated in equity to transfer to the grantees of the three annuities the interest of Sir G. Bowyer under the then existing trusts, subject, of course, to the six annuities, and operated also to constitute the receivers and trustee express trustees for those grantees, as assignees of Sir G. Bowyer. It was not, as I conceive, by the notice that the trust for

the grantees was created; however that notice might operate to secure the priority of these annuitants as against any subsequent claimants. It was said, on the part of the appellants, that the receivers and trustee repudiated the trust for the payment of the three annuities; but it is clear that there was no such repudiation before the execution of the deed of direction; and I do not see how there could be any such repudiation, even with the concurrence of Sir G. Bowyer, after the execution of that deed. The receivers had clearly accepted the trust for him and his assigns, subject to the prior trusts for the six annuitants. They continued to receive under the prior trusts, and I do not see how they could hold under one part of the trust and repudiate the other. Assuming, however, that it was competent to them to have done so, I think the evidence shews that they did not attempt to take that course. They paid the six annuitants and Donovan, whose charges were to the extent of the 20,000*l.*; and they paid no more because they had not sufficient funds for the purpose; but the evidence satisfies me that, if the funds had been sufficient, they would have paid these annuities also. A good deal of evidence has been gone into upon the question, whether Bridger ever was in possession as trustee, and whether he did not receive the rents merely as the agent of Ballachey, the receiver. I may say that Ralfe entirely throws himself out of the case, and does not seem to have acted as receiver at all. I think it unnecessary to enter into the examination of the evidence, or into the question as to the operation of the trust deed. Assuming that there was no possession by Bridger as trustee, there was the receipt of the rents by Ballachey as receiver, clothed with a trust; and the estate vested in Bridger as trustee, could not, as I conceive, be barred or extinguished whilst some of his *cestuis que trust* were in receipt of the whole produce of the estate, and were in such receipt under a deed forming part of the same security. So that, assuming the construction of the trust deed to be such as was contended for by the appellants, and assuming, also, Bridger never to have been in possession as trustee, the rights of the parties would remain the same. There being, then, an

express trust for the payment of the three annuities, can the Statute of Limitations operate to extinguish them? I am of opinion that it cannot. The 24th section of the statute is as follows:—"And be it further enacted, that after the 31st of December 1833 no person claiming any land or rent in equity shall bring any suit to recover the same, but within the period during which, by virtue of the provisions hereinbefore contained, he might have made an entry or distress, or brought an action to recover the same respectively, if he had been entitled at law to such estate, interest or right in or to the same, as he shall claim therein in equity." This section, if there had been no proviso, would have extended to cases of express trust, but the 25th section provides as follows: "Provided always, and be it further enacted, that when any land or rent shall be vested in a trustee upon any express trust, the right of the *cestui que trust*, or any person claiming through him, to bring a suit against the trustee, or any person claiming through him, to recover such land or rent, shall be deemed to have first accrued according to the meaning of this act, at and not before the time at which such land or rent shall have been conveyed to a purchaser for a valuable consideration, and shall then be deemed to have accrued only as against such purchaser and any person claiming through him." It is argued for the appellants, that this proviso applies only as between the *cestui que trust* and the trustee, and not as between *cestui que trust*, although under an express trust, where some have received to the exclusion of others; but the contrast between the 24th and 25th sections points, I think, to the opposite conclusion. The case between the *cestui que trust* would have fallen within the 24th section if uncontroled by the proviso. That 24th section furnishes the general rule as to equitable estates, and the proviso being general, it is reasonable, I think, so to construe it as to exempt, where there is an express trust, all the cases which would otherwise have fallen within the general rule. The reasonableness of this construction appears, I think, more strongly when we consider what would have been the remedies in the case of an express trust. If the right against the trustee was preserved, as it undoubtedly

is, there would be the consequent right to a receiver, and how could the right to a receiver be maintained if the section be construed to create a bar as between the *cestui que trust*? I do not see how in that case the land or rent could be recovered at all, because according to the argument the possession of one of the *cestui que trust*, though under the express trust, would have excluded the other *cestui que trust*, and would have been a bar to him, and, therefore, would have been a bar to the appointment of a receiver—one of the means by which the remedy against the express trustee is to be carried into effect. Besides, it is not very reasonable to suppose that the remedy was intended to be preserved against the trustee, but destroyed against the persons who had received the benefit of the breach of trust. I think, therefore, that the construction of the statute contended for by the appellants cannot be maintained, and that the appellants' case fails upon the point of the Statute of Limitations. The authorities seem to me to be very strongly in favour of that conclusion. I may refer to *Ward v. Arch* (2), *Young v. Lord Waterpark* (3), *Cox v. Dolman* (4) and *Garrard v. Tuck* (5). The case of *Burroughs v. M'Creight* (6), cited by Mr. Druce, does not, I think, apply; in that case the trustees had not acted. Failing this point upon the Statute of Limitations, the defendants relied upon the general course and habit of the Court to refuse relief in the case of stale demands, but the rules upon this subject which apply to ordinary cases, if they apply at all, certainly do not apply with equal force to cases of express trust. They are counter-vailed by the express duty incumbent upon the trustee to apply the trust funds according to the trusts. The Court, no doubt, in many cases, modifies the account against trustees where there has been delay or acquiescence on the part of the *cestui que trust*, and there may be cases, though I have not met with them, where the Court may have presumed a release or abandon-

(2) 12 Sim. 472.

(3) 13 Ibid. 199.

(4) 2 De Gex, M. & G. 592; a.c. 22 Law J. Rep. (N.S.) Chanc. 427.

(5) 8 Com. B. Rep. 231; a.c. 18 Law J. Rep. (N.S.) C.P. 338.

(6) 1 Jo. & Lat. 290.

ment of the right of the *cestuis que trust*. But in this case, whatever might have been said of the claim of the plaintiffs to rank *pari passu* with the six annuitants,—a claim which arose, and as to which the plaintiffs were certainly put at arms' length, very many years ago,—the claim to come in under the trust, subject to the six annuitants, does not appear to have arisen; nor could it arise, as it is admitted that the income has not been more than sufficient to answer the prior charges, and there has been no payment to Sir G. Bowyer. I see no ground, therefore, on which we can consider this claim to have been released or abandoned, and this ground of defence seems to me, therefore, to fail equally with the defence founded on the Statute of Limitations. A further objection was made, on the part of the appellants, to the title of some of the plaintiffs, upon the ground that their interests were acquired by means of a purchase, which was illegal and invalid, being affected by the laws relating to champerty and maintenance. It appears that in the month of July 1852, one of the three annuities, and a considerable share of another of them, were purchased in the name of the plaintiff Tomkinson, and that this purchase was made in his name in trust as to five-sixths for the solicitors of the persons who then claimed title to the whole or some part of the rest of these annuities, in a suit or suits in which the title to these annuities was then in litigation. This part of the case cannot be stated more favourably to the appellants than by stating that the deed by which the purchased annuities were transferred, contained a covenant to indemnify against past and future costs, and by referring to the declaration of trust which was executed by the defendant Tomkinson; for the parol evidence on the subject certainly does not tend to support the objection. The declaration of trust that Tomkinson executed was made on the 2nd of October 1852, and by it Tomkinson declares himself a trustee for five-sixths for Trinder & Eyre, the solicitors of the parties interested in other portions of these annuities, and for Sharp, Harrison & Sharp, who were concerned for the persons interested in some of the other annuities. I am of opinion that this objection on the part of the appellants is also unfounded.

Whether the purchase in question could be maintained as between Bernard and Ralfe, on the one hand, and the purchasers on the other, is a question with which in this case we have nothing whatever to do; so far as the interests of the parties are concerned, we are bound to consider it as valid until it is impeached. In order to maintain the objection as an answer to this suit, the appellants must shew that the purchase was illegal and void upon principles of public policy, upon grounds far higher than the mere interests of the parties: and the appellants have failed to satisfy me upon that point. The case of *Wood v. Downes* (7) was referred to in support of the appellants' argument upon this point, but all that was decided by Lord Eldon in *Wood v. Downes* was, that the transactions in question in that case could not stand as between the client and the attorney; not that they were void *per se*, or that property which is in litigation could not be made the subject of sale and purchase. The cases abundantly prove that it may, and it does not seem to me that the mere relation in which the contracting parties stand can affect the validity of the transaction, otherwise than as between those parties. I am aware of no rule of law which prevents an attorney from purchasing what anybody else is at liberty to purchase; subject, of course, if he purchases from a client, to the consequences of that relation. I have not failed to observe that there is in this case, in the purchase-deed, a covenant by the purchasers to indemnify the vendors against future costs, nor have I failed to remember that with reference to this covenant the case of *Harrington v. Long* (8), as reported, would seem to give countenance to the objection, on the part of the appellants, which we are now considering; but the report of *Harrington v. Long* does not shew what the contract in that case was, and I agree in the observations made upon that case by the Vice Chancellor Wigram, in *Hunter v. Daniel* (9). I am not prepared to hold that, if the purchase would be valid without the covenant of indemnity, the covenant of indemnity could render it invalid.

(7) 18 Ves. 120.

(8) 2 Myl. & K. 590.

(9) 4 Hare, 420; s.c. 14 Law J. Rep. (N.S.) Chanc. 194.

The case of *Simpson v. Lamb* (10), cited by Mr. Wickens, is distinguishable. There the purchase was by the attorney from the client, of the subject-matter of the suit in which he was attorney. It is not so in this case. It was further urged, on the part of the defendants, the appellants, that the six annuitants having priority over the three annuities in which the plaintiffs are interested, the plaintiffs could have no title to relief in this suit without re-purchasing the six annuities; and that, at all events, the plaintiffs were bound to re-purchase those annuities by the offer to that effect, which is contained in the prayer of the bill, and which offer is in these terms: "If it shall appear that the annuities granted to the said Alexander Donovan, deceased, or the said judgments obtained by him, or the said six annuities granted to the said six annuitants are entitled to priority of payment over the said three annuities granted to the said three annuitants, then that the plaintiffs may be at liberty to pay to the defendants George Bowyer, Wilson Lomer, Charles Bridger and Charles King, the price or consideration monies for the purchase of the said six annuities, and to pay to the defendant Alexander Donovan what (if anything) is due upon the said judgments, which the plaintiffs hereby offer to do; and that thereupon the defendants George Bowyer, Wilson Lomer, Charles Bridger, Charles King and Alexander Donovan, may be decreed to assign to the plaintiffs the said judgments and annuities respectively, and all securities affecting the same." Now these points, whether the plaintiffs are entitled to come into court for relief without purchasing the six annuities, and whether they can do so in the face of the offer which is contained in this bill, appear to me not to be free from difficulty. The rule, no doubt, is general, if not universal, that a mortgagee, whose title is not impeached, cannot be sued in this court except for the purposes of redemption. The question is, whether this rule, which thus applies to mortgagees, applies also to annuitants whose annuities are repurchaseable. I am not aware of any reported case upon this point, and the unreported case with which I have been

furnished does not, I think, apply, as it does not appear that in that case the annuity was repurchaseable, and of course, in the case of an annuity not repurchaseable, a subsequent incumbrancer can only be put under the obligation of paying the arrears of the annuity. I may add, that I am indebted to Mr. Leach, the registrar, for having made an extensive search into the registrar's books upon this subject, and that he has been unable to find any decision upon it. Looking, however, at the question on principle, I think that the rule which would apply in the case of an irredeemable annuity, is also the proper rule to be applied in the case of repurchaseable annuities. In the case of a mortgagee, the contract is, that he shall be repaid his principal, and if default be made by the mortgagor, this Court gives him relief only upon the fulfilment of the contract, upon the payment of the full amount which is due. If the mortgagee enters into possession, he takes the rents towards the discharge, not of the interest only, but of the principal also; but in the case of a repurchaseable annuity, there is no contract with the annuitant for the repayment of his purchase money. It is at the option of the grantor whether he will repay it or not, and if the annuitant enters into possession upon default in payment of the annuity, he is entitled to hold only until the arrears of the annuity are paid; as was decided by Lord Eldon in *Jenkins v. Milford* (11). To decide that upon default being made in payment of the annuity, the annuitant becomes entitled to be repaid his purchase money, or that the grantor could in no case have relief in equity, except upon the terms of such repayment, would be to introduce a new term into the contract between the grantor and the grantee. Independently, therefore, of the offer made by the bill, I think the plaintiffs could not be put upon the terms of repurchasing the six annuities. Then, does the offer vary the case? The question must depend, as I think, in the first place, upon the effect to be attributed to the offer; whether it is to be considered as vesting in the defendant an absolute and independent right to insist that no

(10) 7 El. & B. 84; s. c. 26 Law J. Rep. (N.S.) Q.B. 121.

(11) 1 J. & W. 629.

relief shall be given except upon the terms which are offered, or whether it is to be considered merely as giving power to the Court to enforce against the plaintiffs the terms which are offered, if the Court, in the exercise of its discretion, shall think fit to do so. Upon this point it is to be observed, that the question is not, as it was in *Knebell v. White* (12) and *Inman v. Wearing* (13) (two of the cases cited), whether the Court will give relief to a party who does not offer to submit to such terms as the Court may consider to be just and equitable; but the question is, whether the Court is under the necessity of imposing upon the plaintiffs the terms which are offered, whether in its judgment they are or are not equitable and just. It is to be observed also, that this is not a mere question of continuing an interlocutory order for a receiver, as in *Bazzelgetti v. Battine* (14)—a case in which the mere fact of the cross-bill having been filed may well have been considered as a sufficient ground for the continuance of the order, and in which, after a diligent search in the registrar's office, no entry of the decree can be found, although there is an entry in the minute-book of the dismissal of the bill, but whether in both suits, or in one only, does not appear. It is to be observed further that in some early cases parties were in some cases held to be bound, and in other instances were held not to be bound by offers of this description; and that in *Pelly v. Wathen* (15) the Vice Chancellor Wigram intimated at least a doubt whether it was obligatory on the Court to enforce the offer which had been made in that case. It was not necessary, however, in that case to decide the point. Being called upon now to decide it, my opinion is, that it is in the discretion of the Court whether the offer shall be enforced or not. I think that it would be unreasonable that the Court should be bound under all circumstances to give effect to a proposal which it deems to be unjust. In this case the offer, as it

stands upon the bill, is to pay for an annuity for the life of Sir George Bowyer the same price as would have been paid for it forty years ago. I think these are terms which it would be unjust to enforce against the plaintiffs. If, indeed, the defendants had in the first instance accepted the offer, it might well have been that the Court ought to have held the plaintiffs bound by it, for then it might justly have been said that the defendants had been misled by the offer. But the defendants have not taken this course; they have throughout resisted the right of the plaintiffs, and resisted it as fully as they would have done if there had been no such offer contained in the bill; and under these circumstances my impression is that they are not entitled now to insist on being paid the re-purchase price of their annuities. The next question is as to the 9,560*l.* mortgage. The decree of the Master of the Rolls as to this mortgage provides as follows:—"And it is further declared, that the mortgage-debt of 9,560*l.* in the pleadings mentioned, is the first incumbrance upon the Radley estate, or on that part thereof which is by the indentures dated respectively the 29th and 30th of September 1695, in the plaintiffs' bill mentioned, made the subject of the said charge. And it is further declared that the said mortgage-debt of 9,560*l.* is now vested in the defendant, George Bowyer, but that the same is not to be raised or paid during the lifetime of the defendant Sir George Bowyer, unless the said three annuities shall have been first duly discharged or satisfied." Then it directs an account of the rents and profits of the Radley estate, received by the defendant George Bowyer, or of the proceeds thereof, which without his wilful default might have been received by him; and in taking such account the defendant George Bowyer was to be disallowed all sums in respect of the payments made by him or to him on account of interest on the mortgage of 9,560*l.* since the 15th of November 1845, the day of the death of Henrietta Lady Bowyer. Those are the only material parts of the decree on the subject. These directions are objected to by the appellants upon the ground that Henrietta Lady Bowyer, under whom the appellant George Bowyer has become

(12) 2 You. & C. 15; s. c. 5 Law J. Rep. (N.S.) Exch. Eq. 98.

(13) 3 De Gex & Sm. 729.

(14) 2 Swanst. 156, n.

(15) 7 Hare, 351; s. c. 18 Law J. Rep. (N.S.) Chanc. 281.

entitled to the mortgage, was a purchaser for value of Sir George Bowyer's reversionary interest in the mortgage, without notice of any right or claim upon it, in respect of the annuities in which the plaintiffs are interested. The facts which are necessary to be stated as to this part of the case appear in the 23rd volume of *Mr. Beavan's Reports*, at page 619. It appears that "Henrietta Lady Bowyer was entitled to this charge," that is, the 9,560*l.*, "for her life, and the absolute reversion in it was vested in her son, Sir George Bowyer. On the 15th of May 1837, Sir George Bowyer, for valuable consideration, assigned his interest in this charge to his mother, Henrietta Lady Bowyer, absolutely. By deed, two days afterwards, Henrietta Lady Bowyer assigned the whole charge to two trustees, in trust to pay the interest to herself for life, with remainder, during the joint lives of Sir George and Ann Lady Bowyer," who is dead now, "and after the decease of the survivor of herself and Ann Lady Bowyer, to the defendant Mr. George Bowyer absolutely. Ann Lady Bowyer died in 1844, whereupon the annuity to her of 250*l.* charged upon the property, ceased, and Henrietta Lady Bowyer died on the 15th of November 1845, when the interest in the reversion of the mortgage of 9,560*l.* became absolute." It appears that the agent and solicitor of Henrietta Lady Bowyer duly attended the audits of the rents of the estate; he knew that Ballachey and Bridger had received them, and he received from Bridger (who must be considered as being in possession) the interest on the 9,560*l.* for Lady Henrietta. That Henrietta Lady Bowyer was a purchaser for value of Sir George Bowyer's reversionary interest in this mortgage, I entertain no doubt, and the question, therefore, is reduced to a question of notice. Now, that Henrietta Lady Bowyer knew that Bridger was in receipt of the rents of the estate, and in receipt of them on behalf of annuitants, seems to be clear upon the evidence. Her agent, Curtis, attended the audits, and received from Bridger the interest which was coming to her from the estate, giving receipts as for monies received from the grantees of annuities. Having this knowledge, I think she was bound to inquire into the right of Bridger, by whom

the rents were received. The cases fully establish that purchasers are bound to make inquiries of occupying tenants as to their rights, and are affected by notice of those rights if they fail to make such inquiries; and I do not see upon what principle it can be held that inquiry must be made of an outgoing tenant, but that if a stranger be found in the enjoyment of the estate no inquiry need be made of him. To hold that such inquiry must be made is not, as I think, any extension of the doctrine of constructive notice, which certainly I am by no means inclined to extend. The rule upon this subject is thus laid down by Sir James Wigram, who was particularly conversant with these questions of notice, having had to consider the question in that very troublesome and intricate case of *Jones v. Smith* (16). What he says upon that subject is this: "If a person knows that another has, or claims, an interest in property, he, in dealing for that property, is bound to inquire what that interest is." That is in the case of *Gibson v. Ingo* (17). The principle is there broadly, but not I think too broadly, laid down, and it seems to me to reach the present case. Taking Henrietta Lady Bowyer, then, to have been bound to make this inquiry, it is said on the part of the appellants that, had she made it, the answer would have been that Bridger was in receipt of the rents on account of the six annuitants, and not of the three annuitants. Had the inquiry been made and such an answer given, it is possible that Lady Bowyer might not have been affected by any further notice, but I do not mean to give any opinion upon that point. The fact is, that no inquiry seems to have been made, and I do not see my way to assume that, had the inquiry been made, the answer which is suggested would have been given. In the absence of inquiry, I think we are rather bound to assume that Bridger would have done what it would have been plainly his duty to do—have stated all the facts which would have shewn that he was receiver and trustee for all the annuitants, and not for the six only. I think, therefore, that Lady Bowyer must be considered to have had notice of the annuities in

(16) 1 Hare, 43; s. c. 11 Law J. Rep. (n.s.) Chanc. 83.

(17) 6 Ibid. 112, 124.

which the plaintiffs are interested, and, of course, of the deeds by which their annuities were granted, and the covenants of Sir George Bowyer contained in those deeds. Having taken with such notice, neither she nor the defendant George Bowyer, claiming under her as a volunteer, can set up this mortgage against the annuitants. It was contended on the part of the plaintiffs that the decree in this respect should have gone further, and should have fixed a trust upon the mortgage for the benefit of the plaintiffs. But I agree with Sir John Romilly that this would be going too far. It would be to treat the reversionary interest in the mortgage as having been a security for the annuity, which it was never intended to be. The case of *Barnhart v. Greenshields* (18) was referred to in the course of the argument upon this question of notice. It does not seem to me to affect the present case; but I take this opportunity of observing that I quite concur in the explanation there given of what fell from me in the case of *Bailey v. Richardson* (19). It was not my intention in that case at all to extend the doctrine of *Daniels v. Davison* (20) and *Allen v. Anthony* (21). The only further point on which it is necessary to remark arises on the appeal of the defendant Edward Kynaston Bridger, in whose behalf it was insisted that the account was improperly directed against him. On this point it is sufficient to say that he admits rents in his hands to the amount of £72l. 10s., and must, of course, account in respect of them. Upon the whole, therefore, I agree in the very careful and elaborate judgment of the Master of the Rolls, and am of opinion that these appeals must be dismissed; but, looking at the nature and difficulties, and my learned Brother not, as I believe, agreeing fully with me on all the points, I think they should be dismissed without costs.

LORD JUSTICE KNIGHT BRUCE.—The facts of this case render it, in my opinion, doubtful, whether the suit is not wholly for a demand barred by lapse of time, or

too stale to be acted on; and whether the bill, filed as it was, not before the year 1855, ought not to have been dismissed. Nor am I convinced that if there would have been an error in dismissing it, the plaintiffs ought not to have been held absolutely bound by the offer of redemption or re-purchase which it contains, and be dealt with accordingly. As to each of these points, however, the conclusion of my learned Brother being the same as that of the Master of the Rolls, their united judgment—very likely, I need not say, to be right—must, of course, prevent the decree of His Honour from being varied in either of the respects that I have mentioned. The view of my learned Brother also is, that of the interest which Henrietta Lady Bowyer acquired by purchase from Sir George Bowyer she was not a purchaser without notice, and that accordingly her estate or assignee is not entitled to the benefit of it on that footing. As to this view, likewise, which is in accordance also, I believe, with the opinion of the Master of the Rolls, I entertain some doubt—a doubt unimportant, however, and the petition of appeal must be dismissed.

M.R. } *In re OSBORNE.*
March 17, 18. } *re Parker 52 L.C. 159*
Solicitor — Election Agent — Bills of
Costs—Taxation.

Candidates at a general election for members of parliament employed a firm of solicitors as their election agents:—Held, that the employment was professional, and that their bill of costs was subject to taxation, within the provisions of the 6 & 7 Vict. c. 73.

Messrs. Edwards & Osborne were solicitors practising at Ross.

At the general election in 1857 Messrs. King, Blakemore and Hanbury were candidates for the county of Hereford. They coalesced, and employed Messrs. Edwards & Osborne as their election agents for the district of Ross. The letter retaining them was as follows:—"In order to secure an efficient distribution of professional services, we have to request you will act under the instructions of your district committee."

After the election Mr. Osborne, in

(18) 9 Moore, P.C.C. 18.
(19) 9 Hare, 734.
(20) 16 Ves. 249.
(21) 1 Mer. 282.

accordance with the 17 & 18 Vict. c. 102, sent to the authorized agent of the candidates the following bills, accompanied by a letter in the handwriting of Mr. Osborne, and signed by him:—

Messrs. King, Blakemore and Hanbury,
Dra. to Edwards & Osborne.
County Election.
Ross District.

1857.		£. s. d.
March	Retainer Fee	5 5 0
and		
April.	Selves canvassing for 18 days, at 3 <i>l</i> . 3 <i>s</i> . per day	56 14 0
	Expenses	10 10 0
April 2.	Engaged from an early hour, looking up voters. Attend- ing committee-room and act- ing as booth agent to Edde, Cross Street booth	5 5 0
	Managing clerk (Mr. W.) out canvassing for 21 days, at 3 <i>l</i> . 3 <i>s</i> . per day	66 3 0
	Expenses	9 0 0
	Mr. W. engaged bringing in the voters from Weston-under- Penyard, and acting as booth agent to the Gloucester Road booth	4 4 0
	Clerk (Mr. B.) out canvassing for 18 days, at 2 <i>l</i> . 2 <i>s</i> . per day	37 16 0
	Expenses	11 13 6
	Clerk engaged from an early hour, bringing in voters from Penwyd and Lanwarne, and afterwards conducting voters to booth	3 3 0
		<hr/>
		£209 13 6

Messrs. King, Blakemore and Hanbury,
To Edwards & Osborne.
County Election.
Ross District.

1857.	Engaged from the 12th to the 16th of March at offices, and from the 16th of March to the 2nd of April in the commit- tee-room, together with clerks, to very late hours each night; making out canvass lists for the various parishes, circulars to all the voters, canvass re- turns, correspondence, voting cards, and generally transact- ing the business of the dis- trict, by which our private business was wholly neglected and losses sustained thereby; and subsequently to the 2nd of April attending the sever- al committee meetings at the King's Head and our offices, getting in bills, forwarding the same to Hereford, and also engaged several days pay- ing messengers, slip clerks, and others	£150 0 0
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These charges were exclusive of all outlay for horse hire or such like expenses, which were charged by the postmaster of the town.

The committee of management considered that 160*l*. would be ample payment for the services of these gentlemen; they accordingly offered that sum to Mr. Osborne, who refused it. Mr. Edwards afterwards died.

On the 18th of January 1858 Mr. Osborne brought an action against the candidates in the Court of Queen's Bench for the amount of the bills for work and labour, care, diligence and attendance done, performed and bestowed by the plaintiff, *as agent* of the defendants, &c., and for certain fees due and of right payable to the plaintiff in respect thereof.

Separate appearances were entered by the candidates; and on the 1st of February 1858 a declaration was served. It was now sworn that Messrs. Edwards & Osborne would not have received a retainer had they not been attorneys and solicitors.

On the 15th of February 1858 Messrs. King, Blakemore and Hanbury obtained an order of course for the taxation of the bills.

Mr. Giffard now moved to discharge this order.—These bills are not taxable; they were the bills of an agent, and were sent unsigned, and purposely. It was not every pecuniary demand of a solicitor that was taxable. The present case was clearly one for the consideration of a jury; it was not within the 6 & 7 Vict. c. 73.—

Allen v. Aldridge, 5 Beav. 401; s. c. 18 Law J. Rep. (n.s.) Chanc. 155.

In re Smith, 4 Ibid. 309.

In re Andrew, 17 Ibid. 510; s. c. 23 Law J. Rep. (n.s.) Chanc. 129.

Mr. R. Palmer and *Mr. Stallard* supported the order.

THE MASTER OF THE ROLLS.—The parties obtaining the order are entitled to have the bill of costs taxed. The 6 & 7 Vict. c. 73. s. 37. enacts, that upon the application of the party chargeable by the bill of costs of an attorney or solicitor, it shall be lawful, in case no part of the business contained in such bill shall have been trans-

acted in any court of law or equity, for the Lord Chancellor or the Master of the Rolls, and they are thereby required to refer such bill, and the demand of such attorney or solicitor, to be taxed and settled by the proper officer. This section clearly determines and defines the right of the party who employs a solicitor in that character, and is liable to pay his charges in respect of such employment to an order for taxation, though the business is not done in any court. There are many cases in which it may be important that the *quantum meruit* should be determined by a jury; but the question as to the application of this section to the case is more properly determined here. If the section does not apply, the jury may then assess the damages payable to an attorney or solicitor for his employment in the matter contained in the bill. It remains to ascertain whether the employment was that of a solicitor in his professional character. *In re Smith* is strict law, which this Court will adopt. *Allen v. Aldridge* was not the case of a solicitor; but a distinction is drawn between the cases to which the statute applies, and those in which there is no relation of solicitor and client. A solicitor may have a claim against a party, but not necessarily in that character. To establish the relation of solicitor and client there must be the employer and the party employed; there must be the party charging, and the party whom he seeks to charge. Here there is no question as to the employment of Messrs. Edwards & Osborne, or as to the sending in of the bill of costs. The only question is as to the character of the employment. It was argued that Messrs. Edwards & Osborne were not employed in the character of solicitors, but that they must be considered as ordinary agents only; but that proposition is not tenable. No other person than a solicitor could have performed the duties they were employed to perform. They attended the sittings of the committee for several days. Was it not of importance that in the conduct of the election nothing should be done which was contrary to law? It was necessary that they should be conversant with the various statutes relating to elections, and to advise the committee on the course to be pur-

sued, and also to detect any illegal acts of the opposition. They were bound to exercise their legal acumen for their clients. This cannot be considered as an employment of an ordinary character. Though it does not appear on the face of the bill, and could not do so, yet the charges claimed by these gentlemen would be extravagant if they were made by a party having no legal knowledge; and if they were not employed in the character of solicitors, a much smaller sum would have been sufficient than for gentlemen of legal knowledge and experience, and able to advise the committee on their proceedings. I therefore think it clear that the employment was in the character of solicitors, and the fact that they might be employed also in another character does not affect their employment in the character of solicitors; and if the case were brought before a jury they would, no doubt, consider it as an employment in this character, and they would be directed by the Judge to give damages in respect of the legal knowledge placed at the service of their clients. The business contained in this bill is evidently not done in any court of law or equity; the Master of the Rolls, therefore, has jurisdiction to direct a taxation of this bill of costs. The bill must therefore be taxed; but as the question is peculiar, I shall make the costs of the motion part of the costs of taxation.

M.R.
Nov. 17, 18. }
L.C.
Jan. 16, 18. }

LEUTY v. HILLAS.

Vendor and Purchaser—Sale in Lots—Rectifying Mistake.

The plaintiff purchased at an auction a house and premises, which were the subject of one lease; there were stables, &c. attached, accessible only from the premises purchased, but which had been built upon a piece of land, comprised in the lease of the land upon which the adjoining house was built: these adjoining premises were also sold at the same auction to a different person, they being described as in the occupation of A. B, who, in fact, was tenant of this house only. An abstract was delivered

to the plaintiff, but he did not discover that the stables were not included in it, and he took a conveyance of the house and premises comprised in the one lease only. The stables, as being upon the land in the second lease, were assigned to the purchaser of the adjoining house. Upon a bill by the purchaser of the first house,—Held, by the Master of the Rolls, that the contract could not be rescinded, that the assignment could not be rectified, and that no ground existed to ask for compensation; but upon appeal, relief was decreed against the purchaser of the adjoining house, and the bill was dismissed as against the vendor.

James Wild, on the 8th of May 1856, put up some leasehold houses and land for sale by auction, in several lots.

Lot 5. was purchased by the plaintiff, John Austen Leuty. The printed particulars described it as "a convenient and well-arranged dwelling-house, No. 20, Inverness Road, with wing at side extending over gateway. It is brick-built, with stuccoed front and slated roof; has a forecourt, inclosed with iron palisade fence on stone curb." It then went on to enumerate the several rooms on each floor; and in the case of the first floor and principal story, to describe the rooms themselves minutely, and to specify particularly the larder on the lower story; and then proceeded as follows:—"At the side, with distinct entrance by carriage-gates, is a yard, with shed under the wing of the dwelling, and back coach-yard, at end of which is a brick building of coach-house, two-stall stable, with two rooms above, small yard beyond, with loose box or extra stable."

The residence is let to Mrs. W. by agreement for three years, from Lady-day, 1854, at per annum	£.	s.	d.
	65	0	0
The yard, coach-house, &c. are let to Mr. Hawkins, fruiterer, &c., as a yearly tenant, at per annum	23	0	0

£88 0 0

The foregoing is held by lease for a term of 95½ years, from Christmas, 1843, at a ground-rent of only	2	0	0
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£86 0 0

Lot 6. was purchased by Samuel Hillas. It was described as a leasehold private residence, No. 21, Inverness Road, ad-

joining lot 5, and of similar design and accommodation, with the deficiency of the wing.

It is now, and has been for years past, in the tenure of Mrs. T., a yearly tenant, at per annum	£.	s.	d.
	55	0	0
And held by lease for a term of 95½ years, from Christmas, 1843, at a ground-rent of	7	10	0
	47	10	0

The house, No. 21, stood upon the north of the two pieces of land; and a piece of the land comprised in the lease under which No. 21 was held had been separated from it, and a building intended to be used as a larder to No. 20, and solely accessible from that house, and a loose box or extra stable, had also been constructed upon a part. The remainder of the piece of land so separated was used as a small yard, but the stable and yard were accessible only through a carriage entrance under part of the wing to the house, No. 20.

The fourth condition stated that, as regards lots 5. and 6. respectively, such abstract shall commence with the leases under which the same lots are held, and that each purchaser was to be considered to have purchased each lot, with full notice of the contents of the lease or under-lease under which the same may be held.

By the last condition it was provided, that if any mistake be made in the description of the premises, or any error or misstatement appear in the particulars, the same shall not affect the sale; but a compensation or equivalent, based on the amount of the purchase-money, shall be given or taken, as the case may require; such equivalent to be settled, in case of difference, by the auctioneer at the sale.

The particulars also stated that the various leases, counterparts, and agreements would be produced at the sale, and might be inspected previously at the office of the solicitor, and that the purchaser would be deemed to have bought with full knowledge of the contents thereof.

On the 16th of May 1856 an abstract of the title was delivered to the plaintiff, but it comprised only the southern plot of land. It shewed no title to the larder, stable, and small yard, which had been constructed upon the piece of land taken

from the northern plot; and upon the supposition that the abstract delivered comprised the whole of the buildings and yard the plaintiff, on the 23rd of June 1856, took an assignment of the premises comprised in the lease, of which an abstract had been delivered, and of the premises demised thereby, with their rights, members, easements, and appurtenances, and at the execution of the indenture so theretofore used, occupied, or enjoyed therewith, together with the indenture of lease, and all other deeds, &c. relating to the premises.

On the 24th of June 1856 Samuel Hillas took an assignment of the lease of the northern plot of ground, on which the larder, the stable, and the small yard, added to the premises on the southern plot had been constructed.

The plaintiff took possession of the premises, and began to pull down the buildings which had been erected on the northern plot, to convert them into workshops, but he immediately desisted upon the threat of an action of trespass; and filed this bill against S. Hillas and J. Wild, praying that S. Hillas might assign to him the larder, stable, and yard, as being a part of the premises purchased by him; and he asked in the alternative that the contract with J. Wild might be rescinded, or otherwise that he might be declared entitled to compensation for such portion of the premises as stood on the northern plot, and formed a portion of the premises he had purchased.

Samuel Hillas, in his answer, stated that he had bought lot 6. under the impression that the buildings and yard in question were comprised in lot 6.

Mr. Selwyn and Mr. E. R. Turner, for the plaintiff.—The plaintiff asks to rectify a mistake made in the assignment of some leasehold premises, purchased by him under most specific descriptions. The premises purchased were held under two leases. The plaintiff saw them, and purchased lot 5, which comprised these premises, and he did so particularly with reference to the small yard, loose box, or extra stable, and the space over the larder, all of which he contemplated turning into workshops. These parts of lot 5. were comprised in the lease of the adjoining

lot 6, but they were not included in the description of that lot, or accessible from it; and the defendant, S. Hillas, upon reading the particulars, must have had full notice that they formed no part of the premises sold as lot 6. The abstract delivered to the plaintiff, however, related only to the premises comprised in one lease; and as no objection appeared on the title, the plaintiff took an assignment of what he supposed to be the whole premises described in the particulars as lot 5. It was not, however, until he began to pull down these back premises that he became aware that they had not been assigned to him; and he then discovered that they had been assigned to S. Hillas, as standing on the land in the northern plot, and he now claimed them as a part of his purchase. The plaintiff therefore insisted that Mr. Hillas ought to assign to him what the particulars did not include in his lot, or otherwise that the vendor might make compensation for the loss sustained by the plaintiff.—

Stapylton v. Scott, 13 Ves. 425.

Doe d. Freeland v. Burt, 1 Term Rep. 701.

Calverley v. Williams, 1 Ves. jun. 210.

Mason v. Franklin, 1 You. & C. C. C. 239.

Mr. Lloyd and Mr. Surrage, for S. Hillas.—*Chamberlain v. Lee* (1).

[The MASTER OF THE ROLLS.—It is impossible to collect from the particulars that the stable and yard did not form a part of lot 6, or that S. Hillas had notice, when he took his conveyance, that this portion of the premises had been purchased by the plaintiff as a part of lot 5. The bill, therefore, as against him, must be dismissed, with costs.]

Mr. Follett and Mr. Speed, for J. Wild.—There is no ground upon which compensation can be asked. The relief sought against each defendant was inconsistent: it was open to a demurrer. The premises had been conveyed; the plaintiff, therefore, could not be entitled to the relief asked.—

Seddon v. Connell, 10 Sim. 79; s. c. 9 Law J. Rep. (n.s.) Chanc. 341.

(1) 10 Sim. 444.

Sugd. Vend. and Pur. 440.

Newham v. May, 13 Price, 749; s. c. M'Cle. 511.

Newham v. May, 10 Ibid. 117.

Mr. Selwyn, in reply, in support of the pleadings referred to *Potter v. Sanders* (2).

THE MASTER OF THE ROLLS. — The plaintiff cannot obtain any relief under this bill. He asks at once to rescind the contract, to rectify the conveyance, and that compensation may be awarded to him. He contracted to buy A, and a part of B; he was aware that the vendor had agreed to sell B to another purchaser; he, however, without any person being guilty of fraud, took a conveyance of A only; he knew from the abstract that a title was made to A only. It was after this that the conveyance was made; he cannot therefore complain that the contract was not carried out. It has been carried into effect; and as the defendant, J. Wild, has assigned the other premises to Mr. Hillas, he has not the power to rectify the deed. It was the plaintiff who allowed those premises to be assigned to another person, and he has no claim upon him. The plaintiff also is not entitled to any compensation; that is incident to a decree for specific performance, but after the conveyance no claim for compensation can arise. If the plaintiff is entitled to anything, it is merely to damages. The bill, therefore, must be dismissed, with costs (3).

Jan. 16, 18.—From this decision the plaintiff appealed.

Mr. Selwyn, *Mr. Amphlett* and *Mr. E. R. Turner* appeared in support of the appeal.

Mr. Lloyd and *Mr. Surrage*, for the defendant Hillas.

Mr. Follett and *Mr. Speed*, for the defendant Wild.

Mr. Amphlett, in reply.

THE LORD CHANCELLOR said that he took a different view from that of the Master of the Rolls. The first question was, what were the properties which the

plaintiff and the defendant Hillas respectively contracted to purchase? The plaintiff entered into a contract to buy not only the house, No. 20, but also the yard and stable which, in fact, formed part of the property included in the lease under which No. 21 is held. Though the description of this yard given in the particulars of sale was not accurate, there was nothing else to answer that description. The plaintiff, therefore, supposed that he was so purchasing. What did the defendant Hillas contract for? He swore that he supposed he was purchasing the whole piece of ground, including that claimed by the plaintiff. But did the particulars justify him in this? The particulars stated that lot 6 was then and had been for years past occupied by Mrs. T. A question had been made, whether he knew what was so occupied? But that did not signify; the real question was, what was so occupied? What would have been done, if immediately after the contract each had filed a bill for specific performance? There could be no doubt that the plaintiff would have been held entitled to the property he now claimed; and the defendant Hillas could only have insisted on having what had been occupied by Mrs. T. The particulars stated that it was held by lease, but that was included together with other property. He did not contract for what was included in the lease; No. 21 was held as described in the particulars, but it was with other property. The reference to the lease was only material, as it was a contract for a particular sort of title. The result was, that the bill was quite wrong against Wild. The plaintiff's right to relief was against Hillas, and he ought not to have made Wild a party at all. Whether Hillas had not a remedy against Wild was a matter which could not be decided now. Hillas contracted to purchase what was in the occupation of Mrs. T. When he got more included in his assignment, he was a trustee of that. There would, therefore, be a decree against Hillas as asked by the bill; and, as to Wild, the bill had been properly dismissed, with costs.

(2) 6 Hare, 1.

(3) See *Paterson v. Long*, 5 Beav. 186.

NEW SERIES, XXVII.—CHANC.

M.R.
1857.
July 18, 31;
August 1. } SEAMAN v. WOODS.

Copyhold—Admittance for Life—Power of Sale—Remainders—Devisable Interest—Election.

A testator, seised in fee of a copyhold estate, devised it to his wife for life; and after her decease he (without giving any estate to his executors) directed them to sell the copyholds, and then divide the proceeds. The testator's widow was admitted for life; and after her decease the executors sold the estate, and executed a bargain and sale to the purchaser; and he, without having been admitted, made his will, and devised the estate to his wife; he was subsequently admitted to the copyhold estate and died. Upon a suit to administer the estate of the purchaser's wife,—Held, that the admission of the wife of the first testator enured for the benefit of the purchaser under the executors; that the customary heir of the purchaser took no estate in the copyholds, but that they passed to the wife as devisee.

The wife, under the will of her husband, had also entered upon some freehold lands, purchased after the date of the will:—Held, that they passed to the heir-at-law, and that he was not bound to elect between them and the benefits given by the will of the wife (1).

This case came on upon an adjournment from chambers.

At a court held for the manor of Lowestoff, in the county of Suffolk, in 1799, William Cleveland was admitted to two copyhold cottages and other premises, abutting upon Bell Lane, to hold the same, with their appurtenances, to the use of himself and his heirs, according to the custom of the manor; and at the same court he surrendered the same premises to the use of his will.

By a codicil to his will, dated the 25th of April 1805, W. Cleveland devised the copyhold premises to his wife, Elizabeth Cleveland, for her life; and he authorized, directed and empowered his executors,

William Cleveland, his son, and Thomas Tripp, or the survivor of them, or the executors or administrators of such survivor, immediately after the decease of his wife Elizabeth, to sell, for the best price that could reasonably be gotten for the same, all those his two new-built tenements or dwelling-houses (formerly Harden's), situate in Lowestoff aforesaid, and to bargain, sell and assure the same to the purchaser or purchasers thereof, and his or their heirs, or to such person or persons, and to such uses as such purchaser should direct or appoint; and the receipts of the trustees of the will for the money were made good discharges to the purchaser.

After the death of W. Cleveland, at a court held for the manor, on the 21st of March 1806, Elizabeth Cleveland was admitted tenant of the copyhold premises for her life.

By an indenture of appointment and bargain and sale, dated the 29th of March 1837, made between W. Cleveland, the son, of the one part, and Edward Seaman, of the other part; after reciting, among other things, the death of T. Tripp and the death of Elizabeth Cleveland, and that E. Seaman had contracted with W. Cleveland, party thereto, for the absolute purchase of the copyhold tenements and premises therein described, it was witnessed that, in consideration of \$251., W. Cleveland, the son, pursuant to the power to him reserved by the codicil, and in execution thereof, did bargain, sell, limit and appoint unto E. Seaman all those two cottages abutting upon Bell Lane, with the appurtenances, to hold the same unto and to the use of E. Seaman, his heirs and assigns for ever, according to the custom of the manor. The same deed contained a covenant by W. Cleveland, the son, to procure the admission of E. Seaman to the premises.

E. Seaman, by his will, dated the 29th of November 1837, after directing payment of his just debts, gave, devised and bequeathed all his estate, both real and personal, and of what nature or kind soever the same might be at the time of his decease, unto his wife, Elizabeth Seaman, to and for her own use and benefit; but in the event of his wife marrying any future husband, then the testator gave and be-

(1) See *Smith v. Glascock*, 27 Law J. Rep. (N.S.) C.P. 192.

queathed 1,000*l.* out of his said estate unto his son, the plaintiff Edward Cleveland Seaman, for his absolute use. The testator appointed his wife the sole executrix of his will.

On the 8th of March 1838, at a court held for the manor of Lowestoff, E. Seaman was admitted to the copyhold premises in Bell Lane, to hold the same to him and his heirs; but he never made any surrender to the use of his will.

After the date of his will E. Seaman purchased two freehold parcels of land; and these, by an indenture dated the 10th of October 1838, were conveyed to him and his heirs, to such uses as he should appoint; with remainder to him for his life; with remainder to James Redding and his heirs during the life of E. Seaman; but upon trust for him and his assigns, to the intent that no widow of his should be entitled to dower, with remainder to E. Seaman and his heirs.

Edward Seaman died in 1846, leaving the plaintiff his eldest son and heir-at-law, and also his heir according to the custom of the manor of Lowestoff.

On the 7th of July 1847, Elizabeth Seaman, the widow of the testator, proved his will and took possession of his real and personal estates, which she retained until her death.

Elizabeth Seaman, by her will, dated the 28th of June 1850, appointed her nephews, the defendants William Woods, William Frederick Cleveland and George Cleveland, trustees and executors of her will; she then gave, devised and appointed all the freehold and copyhold messuages, lands and hereditaments, and all the personal estate, goods, chattels and effects whatsoever and wheresoever, in or over which respectively she had or at the time of her decease might have any interest or disposing power, unto and to the use of the defendants, their heirs, executors, administrators and assigns, according to the nature thereof respectively, upon trust for her son E. C. Seaman for life, and after his death, upon trust to pay or transfer such residue "unto, between or amongst such child or children of my said son as, being a son or sons, shall attain the age of twenty-one, or being a daughter or daughters shall attain that age or be married, whichever

shall first happen, and also such child or children of any son of E. C. Seaman who shall die under the age of twenty-one years as, being a male or males, shall attain that age, or, being a female or females, shall attain that age or be married, whichever shall first happen, and if more than one, to be divided between or among them in equal shares or proportions as between brothers and sisters, but so that the child or children collectively of any deceased son of my said son, shall take only the share which such son would have taken if living, and if more than one, in equal shares and proportions." This was followed by a gift over in case there should be no child or other issue of her son who should take a valid interest under the trusts aforesaid.

It was then provided, that in case her son should become a bankrupt, an event which did not happen, the trustees should thenceforth during his life apply the income for the benefit of his children, and in case and while there should be no such child, then the trustees were to accumulate the income until the death of the son. This was followed by a power of maintenance and education (after the determination of the life interest of the son) of any children being presumptively entitled to any share in the residuary estate.

The testatrix died in 1850, shortly after making her will, leaving the plaintiff her heir-at-law and sole next-of-kin at the time of her death.

The will was proved by W. Woods and G. Cleveland alone.

This suit was instituted on the 3rd of March 1855, by the plaintiff E. C. Seaman, praying for the administration of the real and personal estate of the testatrix, and under a decree made in the cause the Master found that the testatrix was seised of two freehold meadows, called East and West Meadows, on the south side of Mill Lane, in Lowestoff, containing eleven acres and twenty-three perches, and two copyhold messuages, with the appurtenances thereto, situate on the south side of Bell Lane in Lowestoff.

By a decree made on the 25th of July 1856 the Court declared that the will of the testatrix was void for remoteness, as the class of persons consisted of children

and grandchildren of the plaintiff, and that the testatrix's residuary real and personal estate was undisposed of by the will and belonged to the plaintiff as the heir-at-law and sole next-of-kin of the testatrix; but this declaration was to be without prejudice to the trust declared by the will for the benefit of the plaintiff's children during his life on the determination of his estate on the events mentioned in the will (1).

The plaintiff now submitted that E. Seaman took the copyhold estate as if he had been named as a devisee in the will of W. Cleveland the elder, and accordingly, as he had not been admitted to the premises when he made his will, that they did not pass by it. He also submitted that as the freehold estates were not purchased by E. Seaman until after his will, which was never republished, the same did not pass to Elizabeth Seaman, and did not pass by her will.

Mr. R. Palmer and Mr. Cole, for the plaintiff.—The heir-at-law insists that the appointment made of the copyholds under the power of sale in W. Cleveland's will put E. Seaman in the position of a devisee, and that he obtained an inchoate title, which was not devisable. The question then is, whether these copyhold estates passed by the will of E. Seaman under a general devise of his estate.—

Doe d. Winder v. Lawes, 7 Ad. & E. 195; s. c. 2 Nev. & P. 195; 7 Law J. Rep. (N.S.) Q.B. 97.

Phillips v. Phillips, 1 Myl. & K. 649; s. c. 1 Law J. Rep. (N.S.) Chanc. 214.

7 Will. 4. & 1 Vict. c. 26.

Mr. Follett and Mr. Amphlett, for the trustees of Elizabeth Seaman's will.—Upon the execution of the bargain and sale to E. Seaman he had a right to make a will as an admitted devisee under the will of W. Cleveland, the admission of whose widow as tenant for life enured for the benefit of all those in remainder. E. Seaman, therefore, was in the same position as if W. Cleveland had devised the estate to his wife for life, with remainder to E.

Seaman and his heirs. Although the admission was to the wife of W. Cleveland for life, still, whatever the form, it enured for the benefit of those in remainder, whether they took under the will or by virtue of a power named in that will. It was said, however, that E. Seaman's will did not operate to pass the copyholds, even if he did take as devisee, because it was made before his actual admission. He, however, took a legal right under the will of W. Cleveland; and though the will of E. Seaman was made before his admission, still upon his admission from the effect produced by the concurrence of co-operating causes, the estate passed by his will, and his admission had reference back to the power, and the appointment made by virtue of that power, which was the authority and foundation of the admission, the same as if it had been made upon a surrender, which at once defeats all the mesne acts of the surrenderor, and confirms all the mesne acts of the surrenderee. E. Seaman also purchased a freehold estate after making his will; it did not, therefore, pass by it, but it descended upon the plaintiff, his son. The widow, however, supposing that it had passed by her husband's will, entered into possession and received the rents until her death. By her will she had given benefits to him; he was, therefore, bound to elect whether he would take those benefits or give up the freehold estate to the disposition made of it by the will of the testatrix.—

The Earl of Bath v. Abney, 1 Burr. 206; s. c. Cowp. 713.

Doe d. Whitbread v. Jenney, 5 East, 522.

Doe d. Vernon v. Vernon, 7 Ibid. 8, 22.

Lord Kensington v. Mansell, 13 Ves. 246, 253.

Watkins on Copyholds, 128, 166, 213, 337.

2 *Chance on Powers*, 33.

1 *Jarman on Wills*, 46, 2nd edit.

Davy v. Beardsham, 1 Chanc. C. 39; s. c. 3 Chanc. Rep. 4; Nels. Chanc. Rep. 76; 2 Freem. 157; 9 Mod. 75.

Mr. R. Palmer, in reply, referred to—*Vawser v. Jeffrey*, 16 Ves. 519, 527; s. c. 2 Swanst. 268.

(1) *Seaman v. Woods*, 22 Beav. 591.

Torre v. Browne, 5 H.L. Cas. 555 ;
s. c. 24 Law J. Rep. (n.s.) Chanc.
757.

Doe d. Clarke v. Ludlam, 7 Bing.
275 ; s. c. 5 Mo. & P. 48 ; 9 Law
J. Rep. C.P. 74.

*The Duke of Marlborough v. Lord
Godolphin*, 1 Eden, 404, 415.

Carr d. Dagwell v. Singer, 2 Ves. sen.
603.

2 *Sugden on Powers*, 25, et seq.

On the question of election—

Blommart v. Player, 2 Sim. & S. 597 ;
s. c. 5 Law J. Rep. C.P. 74.

July 31.—THE MASTER OF THE ROLLS.

—The will of E. Seaman was made previous to the 7 Will. 4. & 1 Vict. c. 26 ; that act remedies any defect like the present, if any exists. The question, however, is, whether the customary heir or the devisee is entitled to the copyholds under this will. The customary heir relies upon the cases of *Doe d. Winder v. Laues* and *Phillips v. Phillips*, and he contends that E. Seaman took, under a power contained in the will of the original testator, and consequently that he had not, under the deed and the contract with the executors, a mere equitable interest, but an inchoate and imperfect legal interest, which was not devisable by his will, he not having been admitted ; and which accordingly did not pass by his will, and that, when his admittance took place, it did not enure back to the benefit of this testator's will. The devisees contend one of two things, either that there was a devisable interest at the time he took it, or that if he took under the original will, then the admittance of the widow enures to his benefit as the admittance of all persons in remainder. Now I consider that there was a devisable interest, and that it passed by the will. E. Seaman did not take under the original will of William Cleveland in the sense in which it is to be understood that a person takes in remainder or reversion and the like, in which case an admittance of the first person would, by a species of fiction, enure to the benefit of the others. He did take under it, in a certain sense, undoubtedly ; but the question is whether he had a good equitable

interest in the whole of the copyholds, or whether he had merely an inchoate legal right—an imperfect legal right. This point and what was devisable, were discussed in *Wainwright v. Elwell* (2), and the authorities were there cited, but it was not determined. It is, however, quite settled, as in *King v. Turner* (3), that an equitable interest in copyholds is devisable. He had a good equitable interest under the contract with the executors—a complete equitable interest under the contract, and the fact of the sale having taken place under that power, does not detract from or diminish the extent of his equitable interest under the contract ; it would be so if it were sold by an owner in fee. If it was sold under a power, whether a power contained in a will or a settlement, or any other deed, the effect would be the same. No authority exists before the 7 Will. 4. & 1 Vict. c. 26. (on the contrary, all the authorities and the principles seem to point the other way,) that the interest of a purchaser of a copyhold would be in the slightest degree varied, whether he takes under a power of sale in the person who sold, or whether he takes under a surrender made by the owner in fee simple. That being so, I am of opinion that at the time when the contract was entered into, he had a good equitable interest, which was devisable by his will—55 *Geo. 3. c. 192*. Then he made his will, and it was good at that time. What, then, is the effect of the subsequent admittance ? If he had merely an inchoate legal right, that would not be devisable, and the admittance afterwards would be alone the period from which he could devise the property. But the subsequent admittance created the principal difficulty ; it did not help the title at all,—that I wish to be clearly understood,—neither does it enure back to the title he took as purchaser.

Having come to the conclusion that he had an equitable and devisable interest, it remains to consider whether the effect of the admittance was to revoke his will : and I am of opinion it did not, and that it left him in the same position as before ; that it was a good devisable interest at that

(2) 1 Madd. 627.

(3) 1 Myl. & K. 466 ; s. c. 2 Law J. Rep. (n.s.) Chanc. 188.

time, and not altered by the admittance which afterwards took place, and consequently that the chief clerk, although the point was not brought to his attention, came to a correct conclusion. I had a desire to have given my judgment more fully. As, however, the long vacation was at hand, I thought it desirable, as soon as I had made up my mind, not to allow it to stand over. I have not rested on my own judgment solely; I have taken from other persons advice such as I thought desirable, and the conclusion which I am of opinion is the proper result to be come to is, that this was devisable at the time when he made his will, and that it was not revoked by the subsequent admittance, but that the devise took place. I shall therefore declare, that these copyholds passed by the will of Edward Seaman; that the heir-at-law is not put to his election under the will of Elizabeth Seaman, either to reject the benefit taken under her will, or allow the freeholds to go as if the same formed a portion of her estate and passed by her will. The chief clerk must also review his report, notwithstanding the certificate of the 27th of May 1856; and the order of the 25th of July 1856, so far as regards the tenth inquiry, and so far as relates to the freehold estate; and the heir-at-law must be at liberty to carry in a claim against the estate of the testatrix for the rents and profits of the freehold estate which she received in her lifetime.

KINDERSLEY, V. C. { ATTORNEY GENERAL v.
Feb. 25. { THE DRAPERS COMPANY.

*Metropolis Local Management Act—
Open Vestry—Right to elect Alms-people.*

Under a deed for the foundation of a charity, the right of electing alms-people was vested "in the minister, churchwardens, overseers of the poor and such of the parishioners as should pay taxations to the poor, and should not keep inmates or poor lodgers":—Held, that this was not "a duty, power, or privilege relating to the management and relief of the poor, or the administration of any money or other property applicable to

the relief of the poor," within the meaning of the 3rd section of the Metropolis Local Management Act, 19 & 20 Vict. c. 112, and that the right of electing alms-people was not transferred to the new vestry appointed under that act.

This suit was instituted, by the Attorney General, upon the information of the parish of St. Mary, Newington, against the Drapers Company, for a better administration of one of its charities, called "The Drapers' Almshouses Charity." During the suit an order was made that the churchwardens of St. George the Martyr, Southwark, who were jointly interested in the charity with St. Mary, Newington, should attend the proceedings for the purpose of agreeing to the scheme proposed.

Upon the matter being discussed in the Judge's chambers, a question arose as to who were the proper parties to elect the alms-people to receive the benefit of the charity when any vacancies should occur, and the case now came on upon adjournment from chambers to obtain the opinion of the Court upon that question.

The charity was founded by John Walter, and was established under an indenture, dated the 20th of February 1650; and by a clause in that deed it was agreed and declared between the parties thereto, that from time to time thereafter when fourteen days next after any place or room in any of the said almshouses (by death or removal of any party which before dwelt therein) should happen to fall void, and notice thereof should be given to either of the churchwardens of the said parish for the time being, a public meeting or vestry should be had in that parish church, of the minister, churchwardens, overseers of the poor, and such parishioners of the said parish (as should pay taxations to the poor and should not keep inmates or poor lodgers), or of the greater number of them, and that at the same meeting all the said parties appointed to be electors present at that meeting, should name such and so many of the honest, aged, godly and fit persons, inhabitants of that parish, as they should think fit (either men or women as the house or void place should require) who should be known to be of good name and fame, and of quiet life and of honest

conversation, and for the space of two years then next before should have received the alms and relief of the said parish, to be admitted to dwell in the said void place or room.

Mr. Glasse appeared on behalf of the vestry of the parish appointed under the Metropolis Local Management Act, 18 & 19 Vict. c. 120, and contended that under the terms of that act and the Amendment Act, 19 & 20 Vict. c. 112, the right of election to the above almshouses had been transferred to the existing vestry.

Mr. Speed appeared for the minister, churchwardens and overseers of the poor, and the parishioners of the parish of St. George the Martyr, Southwark, and submitted that the right of election of the alms-people remained in the persons for whom he appeared, and who were described in the foundation deed, and that the right was not transferred to the present elected vestry.

Mr. Bailey appeared for the Drapers Company, and

Mr. J. H. Palmer and *Mr. Welford*, for the relators.

The following authorities were cited :—

Carter v. Cropley, 26 Law J. Rep. (N.S.) Chanc. 246.

18 & 19 Vict. c. 120, and

19 & 20 Vict. c. 112. ss. 1, 3, and 13.

KINDERSLEY, V.C.—The first question to be decided is, whether the meeting designated in the deed of 1650 comes within the description of a meeting in the nature of an open vestry meeting, described in the 1st section of the act, 19 & 20 Vict. c. 112. An open vestry meeting is something contradistinguished from a select vestry meeting; it consists of the minister, churchwardens and overseers of the poor of the parish, who are necessarily *ex officio* members, and of the parishioners at large. There are certain acts of parliament containing provisions for preventing a member of any vestry who has not paid the rates of the parish therein specified from voting as a vestryman, but these statutes go no further, and the mere preventing a man from voting does not render him the less a member of the vestry. What, then, is the

meaning of a meeting in the nature of an open vestry meeting? The legislature must have intended something which in the main answers the description of a proper open vestry meeting, although in some respects it may not strictly be so: in other words, it is an open vestry meeting, with the exclusion of some limited portion of the parishioners. It is almost certain that the legislature in passing these acts, and the person who framed them, did not mean to confine themselves to an open vestry meeting strictly, but to a meeting of the sort adverted to in the charity deed, which, though not an open vestry meeting, is so much so as to be properly described as a meeting in the nature of an open vestry meeting. On that dry point, therefore, the meeting described in the deed is a meeting in the nature of an open vestry meeting within the terms of the 1st section of that act. The next question has reference to the construction of the 3rd section of the same act. This section enacts, "that all the duties, powers and privileges (including such as relate to the affairs of the church, or the management or relief of the poor, or the administration of any money or other property applicable to the relief of the poor) which might have been performed or exercised by any open or elected or other vestry, or any such meeting as aforesaid in any parish, under any local act or otherwise, at the time of the passing of the said act of the last session, shall be deemed to have become transferred to and vested in the vestry constituted by such last-mentioned act;" and it contains this provision also, "Provided that all duties and powers relating to the affairs of the church, or the management or relief of the poor, or the administration of any money or other property applicable to the relief of the poor, which at the time of the passing of the said act were vested in or might be exercised by any guardians, governors, trustees or Commissioners, or any body other than any open or elected or other vestry, or any such meeting as hereinbefore mentioned, shall continue vested in and be exercised by such guardians, governors, trustees or Commissioners or other body as aforesaid." It has been contended that under this proviso the duties and powers reserved in the charity deed in this case were expressly

continued in "the meeting in the nature of an open vestry." No doubt the framing of the section is anything but clear, and two readings may be put upon it. One reading of it by putting in the words to be understood would render it thus: "all duties, &c. which at the time of the passing of the act were vested in any guardians, &c., or were vested in any body other than any open or elected or other vestry," "or were vested in any such meeting (that is, a meeting in the nature of an open vestry meeting) shall continue vested," and so forth. The other reading would run thus: "All duties, &c. which at the time of the passing of the said act were vested in any guardians, &c., or were vested in any body other than any open, elected or other vestry, &c. or other than any such meeting, shall continue," and so forth. It is obvious that the latter of these two readings is in sense precisely the reverse of the former. The question therefore is, which reading is the correct one? It would appear that the latter reading expresses the true meaning of the legislature, and for this reason: if it were read otherwise, there would be a contradiction between the proviso and the former part of the section, for while the former part transfers duties which might have been exercised by any meeting in the nature of an open vestry, to the new vestry, the latter operation would seem to have provided for the retainer of such duties by the meeting. It appears, therefore, that if the right of electing these alms-people were a duty, power, or privilege within the 3rd section of the act of the 19 & 20 Vict. c. 112, it would pass to the new vestry, constituted by the prior act of the 18 & 19 Vict. c. 120. On the second point there is no doubt that the effect of the 3rd section is, that all duties, powers and privileges (whatever these words may import) are transferred. Then comes the only point which is within the principle laid down in *Carter v. Cropley*. That principle, as laid down by Lord Justice Turner, is this: there are two acts, the first of which relates to certain specified matters with respect to the internal government of the parishes, which for that purpose are transferred to the vestry constituted under the enactment itself. Then comes the amended act which incorporates

the former acts. The Lords Justices considered that by such incorporation, the general words of the second act were to be restricted by a reference to the scope of the prior act. In that case the question was as to the right to elect the clergyman of the parish, which was vested in a body not being the vestry of the parish, and their Lordships held, that though the election of a minister clearly came within the general meaning of the words "duties, powers and privileges," still those words did not transfer that right of election to the new vestry because it was not within the scope of the prior act. The question now is, whether the election of the alms-people comes within the words "duties, powers and privileges," in the 3rd section. My opinion is, that the right of electing alms-people is not a matter which, according to the fair interpretation of the former act was intended to be transferred to the new vestry. Then comes the question, whether the words in the amended act, "including such as relate to the affairs of the church, or the management or relief of the poor, or the administration of any money or other property applicable to the relief of the poor," would, by force of the terms themselves, though not otherwise within the act, bring such election within the scope of the act. And that gives rise to a further question as to what is the meaning of the words "relief of the poor." No doubt, in one sense, almshouses are for the benefit of poor people, and are a provision for the relief of the poor, although not of every poor person; but they are not for the relief of the poor in the sense in which these words are used in the latter act. The words "management and relief of the poor," mean the general management which, under the old law, was exercised by the overseer, but was not exercised by different functionaries, such as guardians, &c. Neither is the mere election of alms-people the administration of money or property applicable to the poor. Upon the whole, I think I am bound to conclude that the duty, or whatever it is called, is not a portion of that which was transferred to the new vestry, but that it remained in the old body.

M.R. }
Nov. 16. } EARLE v. BELLINGHAM.

Legacy—Interest—Reversion—Statute of Limitations.

A testatrix gave two legacies and directed them to be paid out of a reversionary interest in stock to which she was entitled:—Held, that the legacies were payable when the reversion fell into possession, and that interest was payable from that time.

Mary Cooper, by her will, dated the 22nd of June 1822, made the following bequests:—"I give and bequeath unto Elizabeth Nicholas the sum of 1,000*l.*; also I give and bequeath unto Elizabeth Wake and Ann Wake, and Sarah, wife of Samuel Oriel, the sum of 500*l.*, to be equally divided between them, share and share alike, which said two legacies or sums of 1,000*l.* and 500*l.* I direct to be paid out of the monies arising out of my reversionary interest in the sum of 7,000*l.* bequeathed to me by the will of my brother John Cooper, and which he directed to be payable to me at the death of his wife Caroline"; and the testatrix directed that the residue of the said 7,000*l.* should form part of her residuary estate.

The testatrix died on the 25th of August 1822. The reversionary interest of the testatrix in the said sum of 7,000*l.* fell into possession on the 20th of May 1855.

The legatees claimed interest upon their respective legacies from the end of the year after the decease of the testatrix.

*Mr. Follett and Mr. W. W. Cooper, for the legatees of 1,000*l.* and 500*l.*—These were demonstrative legacies, and they were payable in any event out of the general estate; they were only made a charge on the reversionary interest as a security. The legatees were entitled to interest on these sums; it was not limited to six years. If there were prior claims upon the fund, time did not run; the legacies were vested *in presenti*, though they were made payable *in futuro*.*

Mr. R. Palmer and Mr. Speed, for G. P. Bone, William Morgan, and William Bellingham.

Mr. Selwyn and Mr. Fischer, for John Bellingham and John G. Bone.
Mr. Karlake, for Sarah Pickworth.

The authorities cited were—

Ravenscroft v. Frisby, 1 Coll. 16; s. c. 13 Law J. Rep. (N.S.) Chanc. 153.
Wood v. Penoyre, 13 Ves. 325.
Lloyd v. Williams, 2 Atk. 108.
Wilcox v. Rhodes, 2 Russ. 452.
Pearson v. Pearson, 1 Sch. & Lef. 10.
Crickett v. Dolby, 3 Ves. 10.
Heath v. Perry, 3 Atk. 101.
Tyrrell v. Tyrrell, 4 Ves. 1.
Drinkwater v. Falconer, 2 Ves. sen. 623.
1 *Roper on Legacies*, 221, 4th edit.
Badrick v. Stevens, 3 Bro. C.C. 431.
Sleech v. Thorington, 2 Ves. sen. 561.
Mann v. Copland, 2 Madd. 223.
3 & 4 Will. 4. c. 27. s. 42.

THE MASTER OF THE ROLLS.—The Statute of Limitations, 3 & 4 Will. 4. c. 27. s. 42, places the plaintiffs in a difficulty from which there is no possibility of escaping. Interest runs on a legacy from the time when the right to receive it accrues. The right to a legacy accrues at one time, and the right to receive it at another. The right to the legacy accrues at the death of the testator; the right to receive it does not accrue in ordinary cases until twelve months afterwards, and in many cases the right to receive the legacy is postponed until the expiration of some particular time, or the happening of some event indicated by the testator: when the payment of a legacy is so postponed, no interest is payable in the mean time. The time when the right to receive the legacy accrues is the period from which the interest begins to run. The statute runs from the same period, the legacy being barred by the lapse of twenty years, not from the time when the right to it accrued, but from the time when the present right to receive it shall have accrued. The period from which the statute begins to run, and the period from which interest is payable, are identical. It would, therefore, be unfortunate for the legatees if they succeeded in their contention that their right to receive the legacy accrued twelve months

after the death of the testatrix, because in that case they would be barred by the statute. I think, however, that the payment of the legacy was to be postponed until the reversion fell in, and that no right to receive it existed until that time. The interest will, consequently, run from that period.

M.R. }
March 15, 16, 17. } GREAVES v. WILSON.

Vendor and Purchaser—Contract—Right to rescind—Conditions of Sale.

A vendor has duties inseparable from that character which he is bound to perform, and cannot avoid by restrictive conditions of sale.

A vendor is not justified in rescinding a contract under a restrictive condition of sale reserving that power, when he has not answered the purchaser's requisitions, or made an attempt to answer the objections to the title.

The John Bull public-house, East India Road, Poplar, was put up for sale by public auction on the 20th of July 1857. The particulars stated that the premises were leasehold, held for the unexpired term of forty-seven years. The conditions provided:—4. That the vendor shall deliver an abstract of his title to the purchaser, or to his or her solicitor, commencing with the under-lease by which the vendor holds, and the purchaser shall not require the production of, or inquire into, or take any objections to the title to the premises prior to such under-lease; and the production of the last receipt for rent paid shall be accepted by the purchaser as conclusive evidence of the satisfactory performance of the lessee's covenants in the under-lease up to the time of completing the purchase. 5. That within five days from the delivery of the abstract all objections, queries and requisitions on the title shall be delivered in writing at the office of the vendor's solicitors; and all objections, queries and requisitions, if any, not so delivered shall be considered as waived, and in this respect time shall be considered as of the essence

of the contract. And if the purchaser shall, within the time above limited, shew any objection, whether of title, conveyance or otherwise, and shall insist thereon, the vendor shall be at liberty to rescind the contract and annul the sale, if he shall think fit so to do, on returning the deposit, without interest or costs, in satisfaction of all claims of the purchaser, notwithstanding any negotiation which may have been carried on relative to such objections, queries and requisitions.

The stock in trade, furniture and fixtures were to be taken at a valuation, and the time unexpired in the licences, and the insurance was to be paid for on the 10th of August following, the day named for completion.

The plaintiff, Thomas Greaves, purchased the premises for 1,410*l.*, and he paid a deposit of 282*l.* Joshua Wilson, the defendant, delivered an abstract of his title on the 31st of July, and within the five days limited by the abstract the plaintiff delivered certain queries and requisitions. Messrs. Calvert & Co., the mortgagees, claimed for principal, interest, goods supplied and costs, 1,595*l.* 2*s.* 10*d.*, and one of the objections was that the mortgage being by demise, the mortgagees must at the expense of the vendor concur in the sale, and a surrender of their interest must be obtained previous to the execution of the assignment to the purchaser. The other objections related to the insurance, and to the performance of the covenants in the under-lease, and to the right of the vendor to sell. The defendant sent no answer to the requisitions, but on the 10th of August his solicitors wrote, "We have received your objections, queries and requisitions on the title, which are of such a kind that the vendor thinks fit to rescind the contract and annul the sale; and the contract is accordingly hereby rescinded, and the sale is hereby annulled. We inclose an order to the auctioneer to return the deposit."

The plaintiff objected to have the contract rescinded, and he declined to present the order for the deposit; in consequence of this it was first tendered by the auctioneer and refused, and afterwards sent

by a clerk of the defendant's solicitors, who persisted in leaving it.

The plaintiff's solicitors, however, stated the terms on which they should hold it, and insisted upon the performance of the contract; and, finally, he filed this bill, praying for a specific performance of the contract, and by it he offered to waive all objections raised by the requisitions, if there were any, which the defendant was unable to remove; and at the bar he waived all objections, except that of requiring the mortgagees to join in the assignment.

Mr. Kay, for the plaintiff.—No objection has been taken to the title which the defendant cannot remove. The defendant rescinded the contract without an attempt to answer the requisitions, merely because it was believed that the purchase had been made at an inadequate price.

Mr. Lloyd and *Mr. Smythe*, for the defendant.—Though the conditions of sale were prepared by the direction of the vendor, they were not to be construed strongly against him. The vendor was an administrator *durante minoritate*; the property was small, it would leave but a small surplus. The objections raised to the title were both improper and unreasonable; they would exhaust the small surplus which would be left of the intestate's estate. The vendor, therefore, was entitled to claim the benefit reserved to him by the conditions of sale.—

Painter v. Newby, 11 Hare, 26.

Hoy v. Smithies, 22 Beav. 510.

Page v. Adam, 4 Beav. 269; s. c. 10

Law J. Rep. (N.S.) Chanc. 407.

Hyde v. Dallaway, 4 Beav. 606.

Morley v. Cook, 2 Hare, 106; s. c. 12

Law J. Rep. (N.S.) Chanc. 136.

THE MASTER OF THE ROLLS.—Conditions of sale must be construed, like any other instrument, most strictly against the party who frames them; he alone can judge of the necessity or propriety of making such conditions before he offers the property for sale. In addition to that, it is to be borne in mind that a person who offers property for sale has certain duties which attach to him in that character, and he does not get rid of those duties by selling subject to a restrictive condition of

sale; for instance, he cannot compel a purchaser to take a title upon an insufficient abstract, if he is able to give him a complete one. He is bound to perform the duty of a vendor as fully as he is able to do, subject to this exception, that the duty shall be reasonable. This, as well as the probability of its occasioning a great amount of labour and expense, are always taken into consideration by the Court; for though it may be in his power, still it may involve so much labour, expense and trouble as to make it unreasonable that he should be called upon to do it: this condition is framed to meet such a case. *Page v. Adam* establishes the proposition that a vendor cannot make use of such a condition of sale as this to rescind a contract, upon a point not within the express terms of it, for the purpose of getting rid of a duty which attaches to him upon the rest of the contract, namely, the duty of making out a good title, and accordingly the notice to rescind the contract was held to be null. Assuming, then, according to my present impression, that some of the requisitions upon the title were not tenable, still they do not justify the vendor in saying that he would put an end to the contract at once without making any observations upon the requisitions. Does the liberty reserved of rescinding the contract mean that if a requisition is made to the vendor, which he either disapproves or dislikes, he is at once to be at liberty to put an end to the contract? In some cases clearly not. Suppose this had been a requisition that the mortgagees should join in the assignment to the purchaser, could it be argued that the vendor would be at liberty to put an end to the contract? It is necessarily incidental to the sale that the vendor should sell the property discharged from all incumbrances, and therefore that he should get the incumbrancers to join in the assignment. The words "shall shew any objection and shall insist thereon" made it the duty of the defendant to say, as to some of the requisitions, that they were not tenable; as to others, we cannot comply with them; and as to the last, that we will obtain the concurrence of the mortgagees. If after that the purchaser had said, I insist upon those conditions being

complied with, the vendor might well have said, I do not want a Chancery suit to determine the question—I shall therefore have recourse to the conditions of sale, and put an end to the contract. But there must be reasonableness even in that, because if the sole requisition had been that the mortgagees should join in the assignment, the vendor would not have been entitled to put an end to the contract. Some light is thrown upon the conduct of the defendant by the evidence, from which it appears that the property was sold for less than it was worth—much less than the reserved price, but the sale being unfavourable was no reason for putting an end to the contract. If there had been any intention of using the condition to avoid the sale, in case the property should not be sold for the full value they thought it ought to be sold at, then this condition of sale was fraudulent, and could not be allowed to be used for that purpose, as the purchaser would be deceived, and could never ascertain what was intended to be done. The plaintiff, therefore, is entitled to a decree for specific performance. I will, however, hear the reply upon the costs up to the hearing, as prior to the filing of the bill there was no waiver of the requisitions covered by the conditions of sale; the last clause in the bill was hardly sufficient for that purpose: it was an offer to withdraw any objection which the defendant "is really unable to remove." He might be able to remove some, but at great expense and trouble. At the bar all the objections were waived, except the concurrence of the mortgagees, but still the pleadings must be taken most strongly against the plaintiff.

Mr. Kay, in reply.

March 17.—THE MASTER OF THE ROLLS.
—After consideration, I cannot but say that the plaintiff is entitled to his costs. The decree, therefore, must be for a specific performance of the contract, the plaintiff waiving all objections other than that requiring the concurrence of the mortgagees in the assignment.

WOOD, V.C. }
March 6, 29, 31. } *Re BARR'S TRUSTS.*

Bankruptcy—Notice—Assignment for Value—Priority.

An assignment by the Commissioners in Bankruptcy, under the old law, of the choses in action of a bankrupt, is not equivalent to a reduction into possession, and such assignment made without notice given to the trustees is not entitled to priority over a subsequent assignment for value, of which notice is given.

The issuing of the commission is not sufficient notice.

Nor does the mere accidental knowledge of one of the trustees amount to notice—semble.

William Barr, by his will, dated the 4th of December 1800, gave to trustees 10,000*l.* consols, upon trust for his wife, Sarah Reyner Barr, for her life or until her future marriage, with remainder in trust for all and every the testator's child or children by his said wife, S. R. Barr, or born in due time after his decease, equally, and if but one child, then the whole to such only child; but if it should happen that the testator should not have any child or children by the said S. R. Barr, upon trust to assign and transfer the same to his four children, William Barr, Betsy Johnson Barr, Ann Barr, and Mary Barr.

The testator died on the 13th of March 1803. There never was any child by Sarah Rayner Barr, except one who died an infant in the testator's lifetime.

Ann Barr, one of the children, in 1805 married Thomas Slade, who, in 1810, carried on business in partnership with his father, and became bankrupt in February, and obtained his certificate in May in that year. Betsy J. Barr died in 1816, intestate and a spinster.

By an indenture dated the 15th of May 1818, Thomas Slade and Ann his wife, in consideration of 1,000*l.*, granted to John Dowell an annuity of 100*l.* a year for three lives, and for securing the same assigned to a trustee the share of Ann Slade in the 10,000*l.* consols. A memorial of this deed was enrolled in Chancery, and notice was, directly after the execution, given to the trustees of the 10,000*l.*, and an attested

copy served upon them. John Dowell never had any notice of the bankruptcy, nor did the assignees under the bankruptcy give notice thereof to the trustees, or make any claim in respect of the trust fund before 1835.

Ann Slade died in February 1856, and Sarah Reyner Barr in November in the same year.

No part of the annuity was ever paid, and there was now due in respect thereof 3,300*l.* and upwards. The fund having been transferred into court under the Trustees' Relief Act, the personal representative of John Dowell presented a petition for the transfer of Ann Slade's share, amounting to 3,022*l.* 11*s.* 8*d.*, standing in trust in this matter, to an account entitled "The separate account of the share of Thomas Slade, as administrator of his late wife, Ann Slade, and the incumbrancers, if any, on such share."

In opposition to the prayer of this petition an affidavit was filed by Thomas Slade, in which he stated that at the time of his marriage he became well acquainted with the trustees of the testator's will, and continued so until they respectively died; that Mary Barr married a nephew of one of the trustees; that the deponent was particularly well acquainted with Thomas Kemble, another of the trustees, and he certainly was, and, as the deponent believed, the other trustees of the will were aware of his being made bankrupt at the time when the commission was issued; that Kemble, whilst the proceedings were pending, and before the commencement of the year 1818, promised to lend him a sum of 600*l.* or thereabouts, to enable him to resume business, and did in fact lend him that sum, and that the said Thomas Kemble, until his death, took an active part in the trusts of the 10,000*l.* legacy.

Mr. Rolt and *Mr. Nalder*, for the petitioner.—The assignees in bankruptcy have lost their priority by not giving notice. It has been expressly decided in *Re Atkinson* (1) that the title of an assignee for value of an equitable interest is not

affected by a previous insolvency of the assignors, the assignee having no notice of the insolvency; and the same principle applies in the case of bankruptcy. Kemble's knowledge of the bankruptcy was, at the best, only constructive notice, and there is no case in which, as between an assignee for value and assignees in bankruptcy, or even as between two assignees for value, constructive notice has been held entitled to priority over actual notice—*Thompson v. Speirs* (2), *Ex parte Boulton*, *In re Sketchley* (3). The doctrine of constructive notice is not to be extended—*Ware v. Lord Egmont* (4), *Dearle v. Hall* (5). The assignees in bankruptcy have been guilty of laches, and what they ask the Court to do is to remedy their own laches.

Mr. Kenyon, for Slade, took no part in the argument.

Mr. Greene, for the assignees in bankruptcy.—No notice was necessary. The conveyance of the bankrupt's estate by the Commissioners was perfect without notice. It has never been held, that a statutory conveyance was incomplete for want of notice—*Cooper v. Chitty* (6), *Carlisle v. Garland* (7), *Balme v. Hutton* (8). But supposing notice to be necessary, then the commission is notice—*Collet v. De Gols* (9), *Bartlett v. Bartlett* (10), *Re Rawbone's Trust* (11), *Sowerby v. Brooks* (12). Here, however, there was actual notice, for it appears, by Slade's affidavit, that Kemble, one of the trustees, was well aware of his bankruptcy as early as the issuing of the commission.

(2) 13 Sim. 469; a. c. 14 Law J. Rep. (n.s.) Chanc. 453.

(3) 1 De Gex & J. 163; a. c. 26 Law J. Rep. (n.s.) Bankr. 45.

(4) 4 De Gex, M. & G. 460; a. c. 24 Law J. Rep. (n.s.) Chanc. 361.

(5) 3 Russ. 1.

(6) 1 Burr. 20.

(7) 7 Bing. 298; a. c. 5 Mo. & P. 102; 9 Law J. Rep. C.P. 96.

(8) 9 Bing. 471; a. c. 2 Law J. Rep. (n.s.) Exch. 116.

(9) Cas. temp. Talb. 65.

(10) 1 De Gex & J. 127; a. c. 26 Law J. Rep. (n.s.) Chanc. 577.

(11) 3 Kay & J. 478; a. c. 26 Law J. Rep. (n.s.) Chanc. 588.

(12) 4 B. & Ald. 523.

(1) 2 De Gex, M. & G. 140; a. c. 4 De Gex & Sm. 548.

The other authorities referred to were—

Cannan v. the South-Eastern Railway Company, 7 Exch. Rep. 843; s. c. 21 Law J. Rep. (N.S.) Exch. 257.

Re Birch's Legacy under Bissell's Will, 2 Kay & J. 328; s. c. 25 Law J. Rep. (N.S.) Chanc. 323.

Smith v. Smith, 2 Cr. & M. 231; s. c. 4 Tyrw. 52: nom. *Smith v. Masterman*, 3 Law J. Rep. (N.S.) Exch. 42.

Meux v. Bell, 1 Hare, 73; s. c. 11 Law J. Rep. (N.S.) Chanc. 77.

Timson v. Ramsbottom, 2 Keen, 35.

Tibbitts v. George, 5 Ad. & E. 107; s. c. 6 Nev. & M. 804; 6 Law J. Rep. (N.S.) K.B. 255.

Gale v. Lewis, 9 Q.B. Rep. 730; s. c. 16 Law J. Rep. (N.S.) Q.B. 119.

13 *Eliz.* c. 7.

21 *Jac.* 1. c. 19.

46 *Geo.* 3. c. 135.

Wood, V.C. said that the only point about which he felt any doubt was, whether the commission under the old law was notice or not.

Mr. Nalder, in reply, referred to *Sugd. Vend. & Pur.*, 11th ed., p. 1049, in which it is stated (note *k*) that in *Sowerby v. Brooks* the Court was not aware of the reversal in the House of Lords of *Hitchcox v. Sedgwick* (13).

March 31.—Wood, V.C.—The question here is, whether the assignees in bankruptcy under a commission which was issued in 1810, are entitled to preference over an assignee for value claiming under an assignment executed in 1818, of which notice was immediately given to the trustees, the assignees in bankruptcy having given no notice. It was argued, for the assignees in bankruptcy, that, although in *Re Atkinson* it was decided that an assignee in insolvency is in no better position than the insolvent himself, and that his title could not, unless notice of it were given to the trustees, override the title of a subsequent assignee for value who had given such

notice, yet the present case was different, inasmuch as the statutes in force at the time of the bankruptcy gave to the assignees in bankruptcy far higher rights than were given to the assignee in insolvency, by the act which came under the consideration of Lord St. Leonards. In *Mitford v. Mitford* (14) it was similarly contended that an assignment in bankruptcy had the effect of reducing into possession a legacy of stock in trust for the bankrupt's wife, so as to defeat her right by survivorship. But Sir William Grant there said, (p. 100), "I have always understood the assignment from the Commissioners, like any other assignment by operation of law, passed his (the bankrupt's) rights precisely in the same plight and condition as he possessed them. Even where a complete legal title vests in them, and there is no notice of any equity affecting it, they take subject to whatever equity the bankrupt was liable to. This shews they are not considered purchasers for valuable consideration in the proper sense of the words. Indeed, a distinction has been constantly taken between them and a particular assignee for a specific consideration; and the former are placed in the same class as voluntary assignees and personal representatives. Thus, in *Jewson v. Moulson* (15), Lord Hardwicke says, it is clear, if the husband makes a voluntary assignment of the wife's portion, the volunteer must stand in the place of the husband; and there is the same equity as to assignees of bankrupts, for it is the law that casts it upon them; and in *Worral v. Marlbar* (16) Lord Thurlow says, a Court of equity has much greater consideration for an assignment actually made by contract than for an assignment by mere operation of law; for as to the latter, when the equitable interest of the wife was transferred to the creditor of the husband by mere operation of law, he stood exactly in the place of the husband, and was subject precisely to the same equity with respect to the wife; and, accordingly, though it has been much agitated, and is not yet perhaps perfectly determined whether a particular assignee be liable to make a provision for the

(13) 2 Vern. 156; Journals of the House of Lords, vol. xiv. p. 601.

(14) 9 Ves. 87.

(15) 2 Atk. 417.

(16) 1 P. Wms. 459. Mr. Cox's note.

wife out of her fortune, it has been long settled that assignees under a commission of bankruptcy, coming into a court of equity to reduce the interest of the wife into possession, are bound to make such a settlement as the husband would in the same case have been compelled to make. But if the assignment has the effect of reducing the wife's interest into possession, how could this equity ever have prevailed? Out of that of which the husband has obtained possession, no settlement can be compelled. If the assignment, therefore, put the assignees in possession, it would completely extinguish all the claims of the wife, as the possession of the husband himself certainly does. They ought on that principle to be considered as coming here to claim what had by the assignment ceased to be a trust for the wife and become wholly a trust for the creditors. But the Court considers the assignment as doing nothing more than to place the assignees in the room of the husband. So far from treating the assignment as equivalent to possession, it is upon the very ground that the assignees want its assistance to reduce the property into possession, that this Court imposes on them the condition, on which alone it would have assisted the husband to obtain the possession." These remarks precisely agree with the observations of Lord St. Leonards in *Re Atkinson*, as to the assignee in insolvency standing in the place of the insolvent. He says, "It may be considered as decided that the assignee in insolvency represents the insolvent; he stands in his place and takes only such interest as he can give, and subject to all equities by which the insolvent is bound. It has, however, been contended that the effect of the act is so to vest the property that the insolvent cannot afterwards divest it; but this is not so, for there are no words in the act giving to the assignee any higher interest than the insolvent himself has; the assignee does not, therefore, take so as not to be subject to equities as administered in this court." The Insolvent Debtors Act, referred to by Lord St. Leonards (17), vests in the largest possible words all the estate and interest of the insolvent in the provisional assignee. The 11th section enacts,

that the prisoner shall at the time of subscribing the petition duly execute a conveyance and assignment to the provisional assignee of all the estate, right, title, interest and trust of such prisoner in and to all the real and personal estate and effects of such prisoner, both within this realm and abroad, except wearing apparel, &c., and of all future estate, right, title, interest and trust of such prisoner in or to any real and personal estate and effects within this realm or abroad, which such prisoner may purchase, or which may revert, descend, be devised or bequeathed, or come to him or her, before he or she shall become entitled to his or her final discharge, which conveyance and assignment shall vest all the real and personal estate and effects of such prisoner, and all such future real and personal estate and effects as aforesaid, of every nature and kind whatsoever, and all such debts as thereinbefore mentioned, in the said provisional assignee. Therefore, the whole property is vested in the largest form of words in the assignee, and it does not appear to me that any further effect can be given to the assignment in bankruptcy than to those words. Neither can I assent to the distinction taken by Mr. Greene as to the assignment in insolvency being a voluntary act, and the other involuntary, as giving any greater effect to the assignment in bankruptcy.

Then, the reasoning of Sir William Grant, in *Dearle v. Hall* applies in its fullest force to the case of an assignee in bankruptcy. It is this: he says, "If you are willing to trust the personal credit of the man, and are satisfied that he will make no improper use of the possession in which you allow him to remain, notice is not necessary; for against him the title is perfect without notice." This explains what Lord Justice Turner said in *Bartlett v. Bartlett*, in reference to the case of *Ex parte Newton* (18), viz. that the Court of Bankruptcy appeared to have proceeded on a mistaken supposition that the assignment passed nothing without notice. Of course the assignment vests the whole property. "But," continues Sir W. Grant, "if he, availing himself of the possession as a means of obtaining credit, induces third persons to purchase

(17) 7 Geo. 4. c. 57.

(18) 4 Deac. & C. 138.

from him as the actual owner, and they part with their money before your pocket-conveyance is notified to them, you must be postponed. In being postponed, your security is not invalidated: you had priority, but that priority has not been followed up; and you have permitted another to acquire a better title to the legal possession. What was done by Dearle and Sherring did not exhaust the thing (to borrow the principle of the Civil Law), but left it still open to traffic. These are the principles on which I think it to be very old law, that possession, or what is tantamount to possession, is the criterion of perfect title to personal chattels, and that he who does not obtain such possession must take his chance." It is settled that a mere assignment without notice is not tantamount to possession. Therefore, the assignees have not obtained what is tantamount to possession.

The second point made by Mr. Greene was, that the commission in bankruptcy was notice to all the world. So it is for certain purposes; but in this case the argument is conclusively disposed of by the decision in *Sowerby v. Brooks*, where payment was made of a debt to a bankrupt after the issuing of the commission, and after notice of the commission and bankruptcy had appeared in the *Gazette*, but before the party paying had any actual knowledge of the bankruptcy; and the Court held, that the issuing of the commission was not notice in point of law, and the payment was protected. And clearly, on that principle, if the trustees in this case, having no actual notice of the bankruptcy, had paid over the fund to the assignee for value, they would have been protected.

The only remaining question is, whether the trustees had, or had not, actual notice of the bankruptcy. And as to that, it appears that the bankruptcy took place in 1810. In 1818 the bankrupt received 1,000*l.* as the consideration for executing the deed of assignment, which was then executed; and notice of that deed was given to the four trustees, and an attested copy, which was afterwards found in the possession of the executor of the surviving trustee, was delivered to them. They, therefore, had undoubtedly notice of the deed of 1818,

but I do not find any fact which leads me to infer that they had notice of the bankruptcy; there is no trace of their having mentioned the bankruptcy when the notice was given; and the presumption certainly is, that they knew nothing of it. The only evidence there is, as to their having had notice of the bankruptcy, is the affidavit of Slade himself: it is wholly unsupported by a scrap of other testimony, and he is speaking simply from memory as to what took place forty-seven years ago. With respect to the character of that notice, there are some not unimportant observations of the Chief Judge of the Court of Review, in the case of *Ex parte Carbis*, which is reported in a note to *Ex parte Watkins* (19). He says:—"In notices, the purposes for which they are given must be considered. . . . Independently of the letter, here is a mere accidental conversation, in the course of which it slips out the policy was deposited"; and Sir John Cross says:—"If a man walks into a banker's, and says accidentally that a bill is dishonoured, that is not notice." And Sir George Rose said:—"The assignment . . . is an equitable assignment, and there is no title in equity till notice thereof has been given. It is not necessary such notice should be formal, nor is it necessary that it should be in writing; but it must be a distinct notice." In the case of *Ex parte Watkins* itself it was held that there was notice, because one of the directors of an assurance company, and also the actuary, had direct knowledge that the bankrupt held his shares as trustee; but that decision was reversed upon appeal (20), on the ground that such private knowledge could not operate as notice to the company. Now the conversation here is remarkable. It takes place not between the assignee in bankruptcy and the trustee, but between the bankrupt himself and the trustee. If I gave full weight to that affidavit, the question might require more consideration than I think it necessary at present to give it. I should be strongly inclined to think that such knowledge as the bankrupt has deposited to was not sufficient notice. But the fact rests entirely upon the unsupported

(19) 1 Mont. & Ayr. 689; a. c. 4 Deac. & C. 354.
(20) 2 Ibid. 348.

evidence of the bankrupt; and the right principle for the Court to go upon, where the matter rests upon the evidence of a single witness, is, to look to his acts rather than to his affidavit. In this case, if the bankrupt's affidavit is true, he must admit that when he put 1,000*l.* into his pocket, on the faith of the deed of 1818, he was guilty of a gross fraud on the assignee for value. His evidence is entirely unsupported, and I do not rely on it. I prefer believing that his affidavit now is untrue, to believing that he was guilty of that act of dishonesty in 1818; and I therefore hold that the title is with the petitioners who claim under the assignment for value of 1818.

to the property in her right, or as her executor or administrator.

This suit was instituted, by Elizabeth Jane Marchioness of Townshend, by her next friend, against the executors of the will of Lord Dudley Coutts Stuart, for the purpose of obtaining the opinion of the Court as to the construction to be put upon the said will, and upon a clause in the marriage settlement of the plaintiff.

The bill stated that the settlement, dated the 17th of August 1825, made previously to the marriage of John, Marquis of Townshend, and Elizabeth Jane, Marchioness of Townshend, then Elizabeth Jane Stuart, contained, amongst other things, the following covenant and proviso:—"It is hereby provided, declared and agreed by and between the said parties to these presents, and the said John Marquis Townshend for himself, his heirs, executors and administrators, doth hereby covenant, promise and grant to and with the said Lord Patrick James Herbert Crichton Stuart and Henry Villiers, Lord Stuart de Decies (the trustees), their executors, administrators and assigns, that in case the said marriage shall take effect, and the said Elizabeth Jane Marchioness Townshend, or the said John Marquis Townshend in her right, shall at any time during the life of him, the said John Marquis Townshend, become possessed of or interested in or entitled unto any personal estate, monies, effects or other property in possession, reversion, remainder or expectancy, by gift, bequest, or under the Statute of Distributions, or otherwise, from her father, or any of her other relations or friends, or in any other manner, or by any other means whatsoever, he, the said John Marquis Townshend, his executors or administrators, and the said Elizabeth Jane Marchioness Townshend, shall and will from time to time within six calendar months after he, the said John Marquis Townshend, in the right of the said Elizabeth Jane Marchioness Townshend, or she, the said Elizabeth Jane Marchioness Townshend, shall become so possessed of or entitled to any such personal estate, monies, effects and other property as aforesaid by such transfers, assignments and assurances in the law as they, the said trustees,

KINDERSLEY, V.C. } TOWNSHEND v. HAR-
March 18. } ROWBY.

Settlement — Covenant to settle after-acquired Property.

*By a marriage settlement it was declared and agreed between the parties, and the husband covenanted with the trustees, that in case the wife, or the husband in her right, should at any time during his life become possessed of, interested in, or entitled to, any personal estate, monies, effects or other property, in possession, reversion, remainder or expectancy, by gift, bequest, or under the Statute of Distributions, the husband and wife would, within six months, transfer, assure, assign and make over all such property to the trustees upon the trusts of the settlement. Subsequently to the marriage, the father of the wife, by his will, vested a sum of 5,000*l.* in trustees to hold the same upon such trusts as the wife should by deed or will appoint, and in default of such appointment to pay the dividends and interest of the said sum of 5,000*l.* to the wife for her separate use, and after her death upon trust for her executors or administrators:—Held, that the covenant in the settlement did not affect or controul the general power of appointment given to the wife over the 5,000*l.* by her father's will; and that it did not affect her life interest to her separate use, but that it did affect the reversionary interest so far as her husband, in the event of his surviving his wife, would be entitled*

or the survivor of them, his executors, administrators or assigns, or their, or any of their counsel, shall require or advise, well and effectually transfer, assure, assign and make over all and singular the personal estate, monies, effects and other property which she, the said Elizabeth Jane Marchioness Townshend, or he, the said John Marquis Townshend, in her right, shall so become possessed of, interested in, or entitled unto in possession, reversion, remainder or expectancy as aforesaid, so and in such manner as that the same may be vested in them, the said trustees, or the survivor of them, his executors, administrators or assigns, upon trust to pay the whole, or so much of the annual interest or proceeds thereof as, with the annual interest or proceeds of the sum of 2,000*l.* thereinbefore mentioned, would amount to the annual sum of 200*l.*, unto J. C. Stuart, Marquis of Bute and Earl of Dumfries, his executors or administrators, for his and their own use, so long as the said annuity or yearly sum of 200*l.* should continue payable; and as to the residue of the annual interest and proceeds thereof, in case the same should be more than sufficient for the purpose aforesaid, and from and after the said annuity or yearly sum of 200*l.* should cease to be payable as to the whole of the annual interest and proceeds thereof, upon trust to pay the same into the proper hands of the said Elizabeth Jane Marchioness Townshend, for her own sole and separate use and benefit, for and during her life, independently of the debts, controul or engagements of the said John Marquis Townshend, and for which the receipt and receipts of the said Elizabeth Jane Marchioness Townshend alone shall, from time to time, be good and effectual discharges, and so that the said Elizabeth Jane Marchioness Townshend shall not have power to charge or anticipate the same or any part thereof"; and after the decease of the said Marchioness Townshend, upon trust to pay and divide the principal monies between and amongst all and every the children or child of the said Marquis and Marchioness Townshend, as the said Marchioness Townshend should by any deed or will appoint, and in default of such appointment, in trust to pay and

divide the same unto and between all and every the child and children of the said Marquis and Marchioness Townshend equally, share and share alike.

Lord Dudley Coutts Stuart, the testator in this cause, by his will, dated the 26th of November 1853, gave and appointed all the personal estate of which he should die possessed, or which he had any power to dispose of, unto the trustees and executors therein named, upon trust to sell and convert the same into money; and among other provisions, the testator directed that his said trustees should lay out and invest the sum of 2,000*l.* in their names, upon the securities therein mentioned, and that the said trustees should stand possessed of the said sum of 2,000*l.* and the stocks, shares, funds and securities whereon the same should from time to time be invested, upon and for such trusts, intents and purposes, and with, under and subject to such powers, provisoes, declarations and agreements, as Anne Maria Townshend, by any deed or deeds, writing or writings, with or without power of revocation, to be by her sealed and delivered in the presence of two or more credible witnesses, or by her last will and testament in writing, or any writing in the nature of a last will or testament, or any codicil or codicils thereto, should from time to time, or at any time, notwithstanding any coverture, and whether covert or sole, direct or appoint; and in the mean time, and until, and also in default of such direction or appointment, or so far as the same, if incomplete, should not extend, upon trust that they, the said trustees, should, so long as and whilst the said Anne Maria Townshend should be discover, pay the yearly dividends, interest and annual produce of the same trust premises unto the said Anne Maria Townshend and her assigns, and should, during any coverture of the said Anne Maria Townshend, pay the said yearly dividends, interest and annual produce unto such person or persons, and for such intents and purposes as the said Anne Maria Townshend, by any writing or writings, to be signed with her own hand, should, notwithstanding any such coverture, from time to time direct or appoint; and in default of, and until such last-mentioned direction or appointment, or so far as the

same should not extend, into her proper hands, for her own use and benefit, independent of, and without being in anywise subject or liable to the debts, controul or interference of any husband with whom she might intermarry. And the testator directed, that from and immediately after the decease of the said Anne Maria Townshend, his said trustees or trustee for the time being should stand possessed of the said sum of 2,000*l.* and the stocks, funds or securities wherein the same should have been invested, or so much thereof as should not have been well and effectually disposed of under the powers thereinbefore contained, upon trust for the executors or administrators of the said Anne Maria Townshend. And the testator directed his said trustees, or the survivors or survivor of them, his executors or administrators, or other the trustees or trustee for the time being of his said will, to lay out and invest the further sum of 5,000*l.* and to stand possessed of the said sum of 5,000*l.*, and the stocks, funds, shares or securities on which the same should be invested, and the interest, dividends and annual produce thereof, upon trusts for the benefit of the said Elizabeth Jane Marchioness Townshend, similar in all respects to the trusts for the benefit of the said Anne Maria thereinbefore declared concerning the sum of 2,000*l.* thereinbefore directed to be laid out by them, the said trustees, for her benefit, and the stocks, funds, shares and securities on which the same should be invested, and the interest, dividends and annual produce thereof, but so that the trusts for the separate use of the said Elizabeth Jane Marchioness Townshend, intended to arise under the said testator's will, should extend to the then present as well as to any future coverture of the said Elizabeth Jane Marchioness Townshend; and the said testator declared that the said Elizabeth Jane Marchioness Townshend should have similar powers of disposing, by deed, writing or will, of the said sum of 5,000*l.* so directed to be laid out as aforesaid by the said trustees for her benefit, and the stocks, funds, shares and securities in which the same should be invested, to those thereinbefore conferred on the said Anne Maria with respect to the said sum of 2,000*l.* thereinbefore di-

rected to be laid out upon trust for her benefit, and the stocks, funds, shares and securities on which the same should be invested; and that his said trustees or trustee should, from and immediately after the death of the said Elizabeth Jane Marchioness Townshend, stand possessed of the said sum of 5,000*l.*, thereby directed to be laid out by them upon trust for her benefit, and the stocks, funds, shares and securities on which the same should have been invested, or so much thereof as should not have been well and effectually disposed of under the power thereby conferred upon her, upon trust for her executors or administrators.

The bill was filed, by the Marchioness of Townshend, by her next friend, against the executors of the testator's will, and against her husband and other parties, praying that it might be declared that the said sum of 5,000*l.* was not, according to the construction of the proviso and covenant in the said settlement, bound thereby or subject to the trusts thereof, and for consequential directions.

Mr. Baily and *Mr. Leach* appeared for the plaintiff.

Mr. G. M. Giffard, for the Marquis of Townshend.

Mr. Glasse and *Mr. F. Bacon*, for the children of Lord and Lady Townshend.

Mr. Stratton, for the executors of Lord Dudley Stuart's will.

The following authorities were cited:—

Vaughan v. Vanderstegen, 2 Drew. 165; s. c. 23 Law J. Rep. (n.s.) Chanc. 798.

Ramsden v. Smith, Ibid. 298; s. c. 23 Law J. Rep. (n.s.) Chanc. 757.

St. Aubyn v. Humphreys, 22 Beav. 175.

White v. Briggs, Ibid. 176.

Sumner v. Powell, 2 Mer. 30.

Ivens v. Elwes, 3 Drew. 25; s. c. 24 Law J. Rep. (n.s.) Chanc. 249.

Thornton v. Bright, 2 M. & Cr. 230.

Ewart v. Ewart, 11 Hare, 276.

Reid v. Kenrick, 24 Law J. Rep. (n.s.) Chanc. 503.

KINDERSLEY, V.C.—This case appears to be a new one, none of the cases in all respects governing it. I think, therefore,

the most convenient mode of considering it will be, first, to enter upon the consideration of what are the interests which the Marchioness of Townshend takes under the will of Lord Dudley Stuart; and in considering that, it appears to me extremely desirable to keep in view certain fixed and well-established general principles. By the will of Lord Dudley Stuart, 5,000*l.* is directed to be invested by the trustees thereof, who were to stand possessed of that sum, and the securities upon which it shall be invested, upon such trusts and in such manner as Lady Townshend shall by deed or writing, or will, appoint—a general power of appointment. In default of appointment, a life interest in the fund is given to Lady Townshend for her separate use, independent of her present or any future husband; and after her death, in default of appointment under the general power, the reversion expectant upon her death is to go to her executors and administrators. So that she has three distinct interests (using the term “interests” in its very widest sense) under that will in this sum of 5,000*l.*: first, the general power of appointing it; secondly, the life interest for her separate use; and, thirdly, the reversion. Now, although it is perfectly true that where property is limited to an individual in the way in which this 5,000*l.* is for the benefit of Lady Townshend, the party for whose benefit those limitations are created (supposing that party to be adult and *sui juris*) has a right to say to the executors or trustees thereof, “This is mine absolutely, and you shall give it to me,” and if they refused, the party would have a right to file a bill and compel them to give it to him; still they are, in fact, distinct interests. And where those interests are given, not to a person who is an adult and *sui juris*, but for the benefit of a married woman, the married woman has a right to say, as against her husband and everybody who may claim under the husband, “Those interests shall be kept distinct for my benefit; I will not have the property handed over to me or treated as if it were a mere general legacy; it is either for separate use or not for separate use—I insist upon that—and I will have the three interests kept distinct for my own benefit.” And she has a right to say, “I have got a

general power of appointment which you cannot deprive me of; I have got a life interest to my separate use, which you cannot deprive me of; and I have also got the reversion, which is beneficially at least vested in me.” That being, as I conceive, the position of Lady Townshend under the will of Lord Dudley Stuart, now let us consider how far and to what extent those interests are affected by the covenant or agreement contained in the settlement. In all the cases of clauses in marriage settlements, as to the settlement of future property, three distinct questions arise: and several of the cases which have been cited, and, indeed, all cases which might be cited, turn upon one or more of these different questions, namely, whose covenant is it? who is bound? who has entered into the covenants? The second is, having ascertained who has entered into the covenant, by whom is the act to be done? and the third, what is the property which is included in the covenant and is to be affected by the act to be done? The different cases have turned upon the consideration of those different questions. Now, I apprehend, that whenever the covenant or agreement is simply and in terms the covenant and agreement of the husband, the husband only is bound; and some of the cases decided turned upon that distinction. But where the covenant in terms is not a mere exclusive covenant of the husband, but is an agreement between all the parties, which agreement, being under seal, is in point of fact a covenant by all the parties, then it is not merely limited to a covenant by the husband, but all parties who have entered into that agreement are bound to perform it when you ascertain what the agreement is. In this case the covenant or agreement is expressed in these terms: “It was amongst other things provided, declared and agreed by and between the said parties to the said indenture.” Now, stopping there, the parties to the indenture are, first, the Marquis of Bute, then Lord Townshend, and Elizabeth Jane, now Marchioness Townshend, the then intended wife (who was adult, *sui juris*, and therefore bound by the agreement which she has entered into); and it is provided, declared, and agreed by and between all those parties; she, therefore, is a party to

the agreement which she has entered into under her seal, and is therefore bound as by a covenant. But then it goes on, "and the said John Marquis of Townshend, for himself, his heirs, executors and administrators, did thereby covenant." So there is a special covenant on the part of the husband, but, as it appears to me, not superseding the effect of that which is the general covenant comprised in the general agreement among all the parties. But, although that is a general agreement, and in that sense a covenant, because it is an agreement under seal of all the parties, of course it does not mean that every party to the deed has bound himself and made himself responsible for the act to be done, because, as may be very justly observed, and as has been observed in one of the cases cited, trustees are under no responsibility that they will do the act to be done, or if it is not done, that they will make good what ought to have been done. But the meaning of it is, that these words express what is the intention and agreement of all parties shall be done by somebody, but not at all meaning to express by whom the act is to be done which the parties have agreed and intended shall be done. What is hereby agreed and declared to be done? This brings us to the other two questions, by whom the act is to be done? and, what is very much connected with that and may be affected by it, what property is included in the covenant, and is to be affected by the act to be done? Of course the question what property is affected by the act to be done, may be very much affected by the consideration of the question by whom the act is to be done. Now, what is agreed and intended by the parties and expressly covenanted by Lord Townshend is this: "That in case the marriage takes effect, and Lady Townshend, or the Marquis of Townshend in her right, shall at any time during the life of him, the said Lord Townshend, become possessed of or interested in or entitled unto any personal estate, monies, effects or other property in possession, reversion, remainder or expectancy, by gift, bequest or under the Statute of Distributions, or otherwise, from her father or any of her other relations or friends, or in any other manner, or by any other means whatsoever." That expresses the

property. Then it goes on: the Marquis, his executors or administrators and Lady Townshend—not her executors or administrators—"shall and will from time to time within six calendar months after he, Lord Townshend, in right of Lady Townshend, or she, Lady Townshend, shall become so possessed of or entitled to any personal estate, monies, effects and other property as aforesaid," do what? "By such transfers, assignments and assurances in the law as they, the trustees of the settlement, or the survivor of them, his executors, administrators or assigns, or their or any of their counsel shall require or advise, well and effectually transfer, assure, assign and make over all and singular the personal estate, monies, effects and other property which she Lady Townshend, or Lord Townshend in her right, shall so become possessed of, interested in or entitled unto in possession, reversion, remainder or expectancy as aforesaid," repeating all the words, "so and in such manner as that the same may be vested in them the trustees of the settlement or the survivor of them, his executors, administrators or assigns, upon trust;" and then come the trusts upon which it is to be dealt with. The first question is, whether that agreement (which I treat as an agreement on the part of Lady Townshend as well as on the part of Lord Townshend) affects the general power, so that it can be contended that by virtue of this covenant (I will call it covenant on the part of Lady Townshend) she is bound to exercise that power so as to vest the property in the trustees? Now, there being, as I conceive, three distinct interests which Lady Townshend has under the will of Lord Dudley Stuart—first, the general power; secondly, the life interest to her separate use; and, thirdly, the reversion—and being of opinion that she has the right to say that those interests do not merge the one into the other, but continue perfectly distinct for her benefit, it appears to me that the matter must be tried exactly in the same way as if three distinct testators had each severally given her one of those interests. Supposing, then, testator A. had given Lady Townshend a general power of appointment over a certain sum of money, say 5,000*l.*, and nothing more,—

merely a general power of appointment,—and in default of appointment, not to her but to strangers; and that testator B. had given to her, simply and exclusively, a life interest for her separate use in another sum of 5,000*l.*, and no other interest; and that a third testator, C, had given her no power, no life interest, but merely a reversionary interest expectant upon the death of a person still living—I must try the matter in respect to these interests precisely as if each stood quite separate and independent of the other, and given by different wills or instruments. Now, then, in that view, try whether this covenant would affect the powers given by testator A. I cannot think that could be the intention. I consider it of great importance, and I have in more cases than one endeavoured to uphold the broad and wide and settled distinction between property and power. It is true that the exercise of a power, if it be a simple power, may vest property in the individual who chooses to exercise it in that way; but as long as the power remains a power unexercised, so long it is a totally distinct thing from property. In one sense, no doubt, it is an interest in property, because if a person has power to appoint property in any way he thinks fit, you cannot say that he has not some interest in that property; but in the technical sense of the word “interest,” in the sense in which the courts of law and equity use it, power and interest are contradistinguished from each other, because power is not interest in that sense, nor, of course, is interest power in that sense. Now, the covenant appears to me not to have been intended to apply to the mere power which Lady Townshend might have at some future time vested in her by a testator or any other person, simply to appoint property in any way she might think fit. I do not think it was the intention of the parties to this settlement, using the language they have done, to say that the effect of this settlement is that she has covenanted and agreed that if there should be at any future time a general power of appointment vested in her, she would exercise that power of appointment in favour of the trustees of the settlement upon the trusts of this settlement. I think that would be treating the terms of the settlement in a manner quite

beyond the scope of their intention. I think, therefore, that so far as the general power of appointment is given by Lord Dudley Stuart's will to Lady Townshend her power is unaffected by this covenant; and that, whatever may be the effect with regard to property subject to the power, if at any future time she thinks fit to exercise the power, she may do so quite uncontrouled by the covenant in the settlement. If that be so, it becomes of comparatively secondary importance to consider what is the effect with regard to the other two interests which she takes under the will of Lord Dudley Stuart. But still it may be that she may never exercise the power; therefore it is necessary to consider what is the effect of this covenant on the other interests which must at all times be subject to her right to exercise that power. Now, the second interest which she takes under the will of Lord Dudley Stuart is a life interest in the 5,000*l.* to her separate use. It appears to me, upon the whole scope of such a clause as this (assuming it in the strongest way against the lady, holding her to be covenantor, and holding her to be the person who is to do the act) that it is beyond the principle upon which the Court has interpreted such clauses, to hold that that applies to a mere life interest. It appears to me that if Lord Townshend had himself covenanted in the same terms as in this clause, the Court would not hold that that applied to a mere life interest—an interest limited to his life—so as to say that that life interest must be turned into *corpus*; that each annual or half-yearly payment on that life income was to be assigned over to the trustees to be capitalized, so that he, as tenant for life under the settlement, would only have the income arising from the investment of each successive sum as it accrued due from the property. I consider, therefore, that the life interest to the separate use of Lady Townshend is not affected by this covenant. If it had been an absolute interest to her use I should consider that it was affected; but, being a mere life interest, it does not signify whether it is to her separate use or not. It appears to me that it is not within the terms of this covenant. There remains, then, the third interest

which Lady Townshend takes under this will, that is, the reversion expectant upon her own death (subject to be defeated by the exercise of her general power of appointment). Now this reversion, supposing it were a mere reversion given her by the will of a testator—that is, supposing a testator had given her 5,000*l.* upon trust to pay the income to a stranger for the benefit of the stranger during the life of Lady Townshend, and after her death upon trust for Lady Townshend, her executors and administrators, or, in the words of this case, “for her executors and administrators”—does that come within the terms of the covenant? It appears to me that it does *sub modo*; that is to say, the covenant is expressed as including “any personal estate, monies, effects or other property in possession, reversion, remainder or expectancy, by gift, bequest, or under the Statute of Distributions or otherwise, from her father or any of her other relations or friends, or in any other manner or by any other means whatsoever.” Here is property: this reversion is property which Lady Townshend or Lord Townshend in her right has, during the life of Lord Townshend, become possessed of, or interested in, or entitled to in reversion, remainder or expectancy. It clearly comes not only within the accidental terms, but the intentional terms of the settlement: and I do not know how to decide that it is not within the terms of the settlement, unless we find that the party who is to do the act is a party who could not affect the property by his act. Then, indeed, the question of what is intended to be included in the settlement may be affected by that consideration. By whom then is the act to be done? The act is to be done by Lord Townshend, his executors or administrators, and Lady Townshend. It is remarkable that it is Lord Townshend, his executors or administrators, and Lady Townshend, but not her executors or administrators. Now supposing, independently of any decision of the Court, and without having come to the Court, Lord and Lady Townshend had executed a deed by which they had assigned this reversionary interest, which I am assuming to be quite independent of the life interest, and as if it had come under

another will—supposing they had made an assignment of this reversion to A. B, the trustees of this settlement, or to anybody, whether for value or not, what would be the effect of it? It being a reversion, the assignment would be perfectly inoperative so far as related to the right of Lady Townshend; that is, if she survived her husband, she would have a right to say the instrument did not bind her, and therefore she would take that reversion unaffected by the assignment which she had so joined with her husband in making. But what would be the effect on Lord Townshend, if he made such an assignment and survived his wife, and then the property fell into possession? Of course it would bind his interest—he would be bound, and he could not say it was not operative. The act is to be done by Lord Townshend, his executors or administrators, and Lady Townshend. It is not disputed—and I must say, if it had been disputed, I should have come to the same conclusion—that it is intended to apply to anything, not only which may be affected by the act of Lord and Lady Townshend jointly, but which may be affected by the act of either of them severally. I think it is quite clear it must be so by the use of the words “his executors or administrators”; because it could never be intended that it is to apply to property which required the junction of the executors and administrators of Lord Townshend and Lady Townshend. The executors and administrators of Lord Townshend were mentioned here for this reason: although the property is to come within the lifetime of Lord Townshend, it is not to be assigned until six months afterwards. And it might have come in his lifetime after Lady Townshend's death probably; but whether or not after her death (at all events, possibly after her death) it might not have been assigned in his lifetime; then of course his executors would be required to assign it. I think, therefore, I ought to make a declaration to the effect that the covenant does not affect or controul the general power of appointment which Lady Townshend has under the will of Lord Dudley Stuart; that it does not affect her life interest to her separate use under that will; but that it affects the

reversionary interest so far as Lord Townshend in the event of his surviving his wife would be entitled to that property in her right, or as her executor or administrator.

M.R. } *In re* ST. GILES'S AND ST.
March 25. } GEORGE'S, BLOOMSBURY.

Charitable Trusts—Institution of Suit—Commissioners' Certificate—Trustees' Relief Act.

A trustee of a fund applicable in emergencies arising from war to the maintenance of a volunteer corps, the income of which, after the cessation of such emergencies, was applicable to the benefit of the poorer members of the corps, their wives and children, may pay it into court under the 10 & 11 Vict. c. 96, and ask for a scheme for its future management, without obtaining the certificate of the Charity Commissioners, under the 16 & 17 Vict. c. 137. s. 17.

This petition was presented by the Rev. Anthony Thorold, Rector of St. Giles's, and the Rev. Emilius Bayley, Rector of St. George's, Bloomsbury. These parishes were managed under powers granted by 3 Geo. 2. c. xix., afterwards by the 14 Geo. 3. c. lxii., and ultimately by the 11 Geo. 4. c. x., and under these acts the petitioners are *ex officio* vestrymen of the joint and separate vestries of the parishes.

An association of residents in these parishes, during the war, which closed in 1815, formed a volunteer corps, known by the letters G. G. B. and voluntarily subscribed a large fund for its maintenance.

After the Peace the association ceased to meet. A fund was, however, left under the superintendence of a committee, formed of members of the association, and on the 8th of March 1824, it amounted in the aggregate to 2,471*l.* 8*s.* 5*d.*, 3*l.* per cent. reduced annuities, which it was resolved should remain as a trust fund, to assist in again fitting out a similar force, should government require its aid; that in the mean time the annual income should be applied for the immediate benefit of members of the corps at the end of the war, if

surviving, or, if dead, of their families severally standing in need of assistance. Provision was then made for the appointment of trustees, who were either to be members of the general committee, or of the select vestry of one of the united parishes, and also for the election of a committee of fourteen out of the continuing members of the corps, to recommend to the trustees such of the corps, or, if dead, a widow or child of such of the members as from their circumstances might require an annual donation of 5*l.* The fund was managed under these resolutions until William Adams was left the sole surviving trustee, and he by his will, dated the 5th of April 1839, appointed his widow, the Hon. Mary Anne Adams, and his son, Borlase Hill Adams, his executors. The testator died on the 11th of June 1851, and from that time the dividends remained unreceived.

It was now found that the committee of management had ceased to exist, and also, from a want of members of the association, that the power to appoint new trustees could not be exercised; that the fund amounted to 2,333*l.* 6*s.* 8*d.*, and that the arrears of dividends amounted to 434*l.* 8*s.* 9*d.* There probably existed some few persons in needy circumstances who had a claim upon the income of the fund, one of whom was Jane, the widow of Sergeant Bugden, of the G. G. B. Volunteer Corps. W. Adams accordingly made an affidavit of these facts, and under the 10 & 11 Vict. c. 98. (the Trustees' Relief Act) he transferred the stock and paid the dividends into court, and gave such claimants as he knew of, and the vestry clerks of the parishes, notice of the fact.

An order, dated the 21st of December 1857, was then made upon the petition of Jane Bugden and others, widows of members of the corps, for payment to them of six years' donations; after which it was found that the fund amounted to 2,789*l.* 8*s.* 10*d.* stock.

The petitioners now asked that the parties entitled to the benefit of the trust might be ascertained, and for a scheme for the future management of the funds and the income.

A question was now raised, whether the

certificate of the Charity Commissioners ought not to have been obtained before the money was paid into court, or any proceedings taken in reference to the funds, inasmuch as this was not an application in any suit or matter actually pending.

Mr. G. L. Russell, in support of the petition, considered that the fund was properly paid into court, and that the certificate of the Charity Commissioners was altogether unnecessary where a party availed himself of the power of the 10 & 11 Vict. c. 96. Their jurisdiction was ousted.—

In re Lister's Hospital, 6 De Gex, M. & G. 184.

In re Markwell, 17 Beav. 618; s. c. 23 Law J. Rep. (N.S.) Chanc. 502.

Mr. Wickens, for the Crown.—The authority of the Court seems to be diminished by the Charitable Trusts Act. If the Court should direct the institution of proceedings the trustees, before the information could be filed, must obtain the certificate of the Charity Commissioners, and if they withheld it the proceedings would be stopped.

[The MASTER OF THE ROLLS.—If it is a mere form, and the certificate must be given, it is clearly a useless expense. If it is substance, the Commissioners must exercise their judgment; and if it is done *bona fide*, no doubt there will be cases in which they will differ from the Court.]

The Attorney General, without the sanction of the Commissioners, may proceed *ex officio*, and he, no doubt, would obey the orders of the Court.

[The MASTER OF THE ROLLS.—But the Court might think a relator desirable.]

Possibly; but the legislature intended that the trustees should not institute proceedings without the certificate of the Charity Commissioners, and without it either the trustees have no right to pay the money, that being the commencement of the litigation; or if payment is no proceeding within the act, then the certificate would be necessary for the further proceedings. "Now pending" has been held to mean during or at the time of the application. *In re Markwell's Le-*

gacy must govern this case. *In re Lister's Hospital* was a mere dealing with the fund to restore it to the position from which it had been taken. There has never yet been a decision that trustees could evade the operation of the 16 & 17 Vict. c. 137, by paying the money into court under the 10 & 11 Vict. c. 96, and they certainly cannot institute any other proceeding relating to the trust funds without the required certificate.

The MASTER OF THE ROLLS.—*In re Lister* overrules *In re Markwell*. It is impossible to say that the trustees were not at liberty to pay this money into court. If there had been an intention to fetter the Trustees' Relief Act, the words of the 16 & 17 Vict. c. 137. ought to have been very much extended. It is a principle recognized and well founded, that one act does not repeal another unless by express reference to the act which it is intended to repeal. There may occasionally be inconsistencies, but that does not amount to a repeal. If a company takes charity land for the purpose of its railway and pays the purchase-money into court, it is certain that the 16 & 17 Vict. c. 137. does not in any respect fetter the powers of the company, or prevent them from paying the money into court, but so far as the purchase-money of the charity land was concerned they were mere trustees of that money for the charity, and they transferred the trust to the Court of Chancery that it might be duly carried into effect. The same observation applies to any other company, or to individuals who become possessed of money held for charitable purposes. There is then the Lands Clauses Consolidation Act (1), but independent of that there is the 10 & 11 Vict. c. 96, which says, that trustees so situated may pay money into court; that act makes no difference between trustees for private individuals or for a charitable institution; they may do it in either case or in either event, and this Court has repeatedly dealt with cases in which sums of money have been paid into court by trustees, while it has been doubtful whether the purpose for which it

(1) 3 Vict. c. 18.

was given was void under the 9 Geo. 2. c. 36. or could be carried into effect, and the Court has adjudicated on the rights of the parties interested. The 16 & 17 Vict. c. 137. is therefore no fetter on the powers enabling trustees to pay money into court. *Lister's case* determined that money might be paid into court, that it might deal with it in accordance with the trusts. Were it otherwise this difficulty might arise (though possibly not a very likely one), that the Charity Commissioners might consider it better to do nothing; in such a case they would have the power of evading the authority and functions of the Court so far as related to the fund, but this could never be permitted. An impression certainly prevailed that the Court might deal with such a matter as it thought fit when the Charity Commissioners had refused their fiat, and upon the words of the act I considered that a pending proceeding extended to that. But the decision in *In re Lister* is opposed to this, and is apparently more convenient. I do not know what course is adopted before the Charity Commissioners; but after all, these prior proceedings to ascertain whether a suit shall be instituted or not, are matters of which the Court has great experience, and they are always to the injury of the parties themselves, so much so that when applications are made in chambers for my sanction to the institution of proceedings for the benefit of an estate, I very rarely give it, unless the person to be affected by the proceedings will come before me, and state why the proceedings ought not to be instituted; this may be considered as a hearing, but otherwise the application is entirely on one side, and it is impossible to know what will arise, and without it, when there is litigation on the other side, it adds materially to the costs. The decision in *In re Lister* must, therefore, govern the present. The cases cannot be distinguished so far as the payment of the money into court under the Trustees' Act is concerned, and when that is done I shall be able to deal with the money without the sanction of the Charity Commissioners.

KINDERSLEY, V.C. }
March 22. } EDGAR v. REYNOLDS.

*Intestate—Administration by the Crown
—Claim by Next-of-kin.*

A person died intestate, and no claim being made by the next-of-kin, the Solicitor to the Treasury administered to the intestate's estate and took possession of the property on behalf of the Crown. Thirty years afterwards the next-of-kin appeared and substantiated his claim:—Held, that the Crown must be treated as an ordinary administrator under similar circumstances, and that the property must be refunded, with interest at 4l. per cent.

In this case it appeared that Lieutenant Dewell died, at Gosport, in the year 1826, intestate, leaving the sum of 1,023l. 9s. 4d., and certain other monies in the long annuities. Upon his death no next-of-kin could be found, and administration was consequently taken out to his estate by the Solicitor to the Treasury, and the property was taken possession of on behalf of the Crown. Dividends were received upon the long annuities up to the year 1827, and the proceeds of the estate, after deducting the administration expenses, amounting to upwards of 2,000l., were handed over to the King's proctor for the benefit of the Crown.

After a lapse of about thirty years the present plaintiff came forward as a claimant to the estate, commenced a suit against the present Solicitor to the Treasury by summons in chambers, and substantiated his claim as next-of-kin to the intestate. The case was adjourned into court upon the question, whether the defendant, as representing the Crown, was liable to refund this sum with interest, and if so, at what rate of interest, and from what period.

*Mr. Glasse and Mr. Prendergast appeared for the plaintiff; and
The Solicitor General and Mr. Wickens, for the defendant.*

The following authorities were cited:—

Gallivan v. Evans, 1 Ball & B. 191.
Phillipo v. Munnings, 2 Myl. & Cr. 309.
Melland v. Gray, 2 Coll. 295.

Brucere v. Pemberton, 12 Ves. 386.

Lord Trimleston v. Hamill, 1 Ball & B. 377.

Raphael v. Boehm, 11 Ves. 92.

Chambers v. Bicknell, 2 Hare, 536.

Playfair v. Cooper, 17 Beav. 187; s. c. 23 Law J. Rep. (N.S.) Chanc. 341, 343.

Kane v. Reynolds, 2 Sm. & G. 331; s. c. 23 Law J. Rep. (N.S.) Chanc. 638; 24 Ibid. 321.

Anstruther v. Chalmer, 2 Sim. 1; s. c. 4 Law J. Rep. Chanc. 123.

Turner v. Maule, 2 De Gex & Sm. 209; s. c. 3 De Gex & Sm. 497; 18 Law J. Rep. (N.S.) Chanc. 454.

KINDERSLEY, V.C.—I cannot consider that the cases which have been cited govern the present case. They may be useful for guiding the Court as to the principle to be adopted; but certainly none of them seem to decide the question raised here. *Turner v. Maule* might have decided it, but it did not. In that case the question was raised on the footing of the principle of an administrator being liable for interest on balances improperly retained in his hands; but when the matter in the course of the proceedings came to be discussed, the Court, upon discovering that it was a question of an actual sale of a large sum of stock—I think some 39,000*l.* odd, and at a given period—said, this is a question, not of interest on balances, but whether there was not a sale of stock by an administrator, for which there was no reason, and which ought not to have been made; and therefore put it to the counsel, whether they would be satisfied to have interest at 4*l.* per cent. on the proceeds of that sum of stock which ought not to have been sold out; not expressing an opinion one way or the other on the abstract or the particular question then before it as to the liability to interest on balances retained. Now, it appears to me, that where, as in this case, a particular individual—always the Solicitor to the Treasury—is nominated by the Crown as the person to whom the Crown desires that administration should be granted, when administration is granted under that authority, the administration expresses it to be for the use and benefit of the Crown; but

the individual is to all intents and purposes the administrator. It is exactly the same thing as when a person entitled to administration is abroad and appoints an attorney or agent here, authorizing the grant of administration to that individual for his benefit. In *Chambers v. Bicknell* the party who was entitled to the administration was abroad, and the form of the letters of administration in that case is just the same as where administration is granted to the nominee of the Crown. After the usual words, it is as follows:—"And we do by these presents ordain, depute and constitute you administrator of all and singular the goods, chattels and credits of the said deceased, with the said will annexed, for the use and benefit of the said Ann Chambers, now residing at Surat, in the presidency of Bombay, in the East Indies, and until she shall duly apply for and obtain letters of administration (with the said will annexed) of the goods of the said deceased to be granted to her." That is exactly the form, *mutatis mutandis*, of the grant of letters of administration to the nominee of the Crown, where the Crown, by reason of there being no next-of-kin of the intestate, is entitled to the property of the intestate. Now, what has been determined with regard to an administrator who is the attorney of a party abroad entitled to the administration? In that case of *Chambers v. Bicknell* it has been determined that that individual, though the nominee of the party abroad, and though his letters of administration may be determined wherever the party for whose use they were granted chooses to come in and apply for letters of administration for himself, yet so long as those letters of administration remain unrevoked, is to all intents and purposes, as far as regards the claims and demands of any person beneficially entitled, the administrator, exactly in the same manner as if he had obtained the administration in his own right. Now, as I think that ruling lies at the root of the whole case, I will refer to the Vice Chancellor's judgment upon it. He says:—"It appears that administration of the estate of the testator has been granted to the defendant as the attorney of the widow, and for her use and benefit; and a doubt has been suggested whether the

grant in this form places Bicknell, the defendant, in such a position that the Court can act against him at the suit of the other parties beneficially interested in the estate, or at least can so act in the absence of the widow. It was said that he held the money as her agent, and was accountable to her and to her alone." That has been part of the argument here addressed to me by the Solicitor General. "The case of *De la Viesca v. Lubbock* (1) was referred to, upon which case I am not called on, nor do I presume, to make any observation. The Vice Chancellor seems to have held that where administration has been granted to the attorney of a person for the use and benefit of that person, the latter may sue the administrator in this country without making the parties beneficially interested parties to the suit, and without taking out letters of administration in this country. That case certainly affirms the proposition, that Bicknell is to be considered as the agent of the widow and accountable to her. I do not think that it bears further upon the point now before me. The question then arises, whether the plaintiff is entitled to sue Bicknell or not. The case of *Anstruther v. Chalmers* is a very important case on this subject. Catherine Anstruther having made her will, died, and Elizabeth Campbell, her sister and only next-of-kin, by her power of attorney authorized Chalmers and Fraser to obtain the administration of the testatrix's estate from the Ecclesiastical Court as her attorneys, and they accordingly obtained such administration as attorneys of Elizabeth Campbell, and, as in the present case, 'for the use and benefit' of that person. The question was thereupon raised, whether the letters of administration being expressed to be granted to Fraser and Chalmers for the use and benefit of Elizabeth Campbell, that circumstance did not exclude the parties beneficially interested in the estate from any claim against the attorneys; that is,—whether they were not merely agents. Sir Anthony Hart directed the case to stand over, that it might be ascertained whether the question had not been decided by the Ecclesiastical Court, in the form in which the letters of administration had been

granted. A certificate from the deputy registrar of the Prerogative Court was afterwards produced, which stated in substance that the words used in the grant of letters of administration were invariably used when it was made under a power of attorney from the parties entitled to representation, and that these words did not exclude the claim of others to share in the estate. It could not exclude those beneficially interested, and it was decided in that case that the plaintiff might sue. I am of opinion that the plaintiff may in this case also sustain a suit against the administrator, notwithstanding the character in which he has taken upon him that office. The suit, however, must be properly framed." That case clearly decides that where the administrator to whom the administration has been granted is merely the attorney of a third person, who is entitled to the administration, but is abroad, the person to whom the letters of administration are granted is to all intents and purposes full administrator, exactly as if he had taken out the administration in his own right, so far as relates to the liability to any other person who may have a claim or a beneficial interest in the estate; and unquestionably such a person would be liable to an action by creditors. And such a person would, if the administration was with the will annexed, be liable to the claim of legatees, and of course to the claim of residuary legatees, or to the claim of persons standing in the situation of next-of-kin. It appears to me that that foundation being laid, I cannot distinguish between that case and the case where the administration is granted to the nominee of the Crown. The form of administration is the same—the purposes of administration are the same. It is true that the administration is granted for the use and benefit—in the very terms of the grant—of the person in whose behalf the grant is made. But when the administrator is constituted, that administrator is liable to all the claims of persons who are entitled to claim against the estate or to claim an interest in the estate; and it cannot be questioned for a moment but that if a creditor of this intestate had brought an action against Mr. Maule to recover a debt due from

(1) 10 Sim. 629.

this intestate, Mr. Maule would have been liable to that action, exactly in the same manner as any other administrator would be. If it were otherwise, what monstrous injustice would be done to the subject by reason of the grant having been made to the nominee of the Crown. We now come to this case. At the time when administration was granted in this case, it was supposed that there were no next-of-kin of this intestate, and upon that assumption it was supposed the Crown was beneficially entitled to the whole residuary personal estate: being so entitled, or at least being supposed to be so, the Crown was entitled to nominate the administrator. In the eye of the law it is physically impossible for the Sovereign to take out administration *in propria persona*—it would be beneath his dignity so to do, and it is never done; but the Sovereign is the individual who is entitled to administration. It so happens, in this case (it being before the act which vested the private property of the Crown in the public), the Sovereign individually was beneficially entitled to the property—the public had no interest in it. Well, the Crown being entitled, it is suggested that Mr. Maule or Mr. Reynolds is merely the agent of the Crown. True, in one sense, the party is merely the agent of the Crown. The Crown being entitled to administer, and being beneficially interested in the property, nominates this person, and this person is undoubtedly accountable to the Crown if it turns out, as it is supposed, that there is no next-of-kin. The Crown may compel an account from the party as agent. I will assume, independently of the character of administrator, the Crown might even bring an action at law against him, still I apprehend there is no reason to doubt but that the Crown might, by the Attorney General, file a bill against this party as administrator and compel that administrator to account. It appears to me immaterial whether the Crown has the right to treat the administrator as agent or to treat him as administrator; the third person—that is, if there be such next-of-kin—must have a right, and can have no other right but to treat this individual as the administrator. Then, what is the duty of the Crown? It has been suggested that there is a duty in the Crown to admi-

nister. If there were any act of parliament or common law which imposed upon the Crown, when a person died intestate and the next-of-kin did not within some short time turn up, the duty, not for its own benefit, but for the benefit of persons who might ultimately turn out to be entitled to take out administration, in order to preserve the effects, then indeed there would be a duty on the part of the Crown to take out such administration. What is suggested as the duty of the Crown does not apply to this particular case, because it was before this property became the property of the public. How can you say that the Crown has a duty to enforce rights which are properly personal to itself? It has no duty any more than a duty in an individual to enforce his own personal rights. True there is a duty in the Crown to recover that which belongs to the public, but to whom is that duty owing? It is owing to the public, who may be the persons beneficially entitled to the property if there are no next-of-kin; but there is no duty in the Crown to protect the property for the next-of-kin; therefore there is no course unless the Crown thought fit to take out administration or to nominate a person to whom administration should be granted, but to let the property take its own chance. The next-of-kin never could say "The Crown has not done its duty to me," because there is no duty to the next-of-kin; therefore it does not appear to me they can stand at all upon the footing of any duty on the part of the Crown. Now, let me first of all regard this individual as the administrator, and as if he had taken out administration in his own name and not as the nominee of the Crown, or for the benefit of the Crown, or for the benefit of anybody, but simply as administrator, what is the rule of this Court with regard to such an administrator?—Of course I need not say where there is a will, and an executor is under the direction of the will to invest, he must invest. In this case there is no will, and, therefore, no direction to invest.—In the case of an executor where there is a will, or in the case of an administrator where there is no will, is there not a duty on the part of the executor or administrator, in the absence of any direction and a positive trust, to invest, and not

to retain the property in his hands, or in his own pocket—I may say mixed up with his own money—and when the sum becomes considerable to make an investment of it? It appears clearly there is; otherwise, what mischievous consequences would arise. One of the next-of-kin takes out administration; he receives, it may be, a very large personal estate; he may keep that in his own pocket, it may be, for years, before it is ascertained who are the other next-of-kin, and then say to the other next-of-kin, “I have had this in my pocket—there was no obligation in me to invest, and there is your money without interest.” He has no right, I apprehend, to have this money wrapt up in a napkin; still less has he a right to keep it in his pocket, where you must assume he is getting the benefit of it. If you can make out that he has employed it in his trade, if you can trace it in his trade, there can be no doubt the persons beneficially interested would have a right to say, if they could make out the case,—which would be an uphill and difficult one to make out—in the eye of the law he would have a right to say, “You shall account to me for the actual profits you have made by using it in your trade or in your business.” If you can shew that he has used it in his trade, although you cannot make out what is the profit which he has derived, you have the right to charge him with 4l. per cent. as a compensation for the profits he has made in the trade, if you cannot get at those profits. No doubt there must be a benefit, because every man who has a large sum in his hands derives a benefit from it, either in the shape of investment or getting him credit in some shape or other, and the persons beneficially entitled have a right to say that he shall be charged with interest upon it. If it is necessary to retain certain sums in his hands, because there are other sums which are expected to be paid shortly, due from creditors or other persons in respect of the estate, he may be well justified in not making the investment; but whenever it comes up to the point that he has a large sum in his hands which is not required for any particular purpose, then it appears to me that he is bound to invest in that investment which this Court considers to be the proper investment in all cases of trust pro-

perty, namely, the Three per Cents. That I conceive to be the position of an ordinary administrator. I cannot distinguish this case from the case of an ordinary administrator. Now, what has been done in this case is this: at a certain period Mr. Maule handed over the 2,000*l.*—we will say the balance—to the King’s proctor for the benefit of the Crown. Supposing now, to take an analogous case, an administrator or executor where there is an intestacy as to the residue, on the supposition that A. is next-of-kin, is asked by A. to hand over the property to him. What would such an administrator or executor be entitled to do, and what would be his duty? He would be entitled to say, “I cannot recognize your right—it is a doubtful one—it depends upon a pedigree, and I cannot take upon myself the risk of deciding that you are entitled. If I do, I make myself personally responsible;” and, therefore, he has a right to say, “As it is impossible for me to hand over this money to you with safety to myself, institute a suit and take proceedings, and then I am perfectly willing to deal with it in any way the Court thinks fit.” If the Court desires it to be done, and it is done, however wrong the Court may be as to that party being the next-of-kin, that administrator is perfectly safe in following the directions of the Court. If he takes on himself to hand over the property to A, the claimant, he takes on himself the risk of being personally responsible for it to the persons who may turn out to be the actual next-of-kin. He may take the risk: he may say, “I will hand it over to you, if you will give me an indemnity.” Then, “indemnity” implies a risk, and if the party to whom he has handed it over turns out not to be the person entitled, but somebody else turns out to be the next-of-kin, he, the administrator, remains liable, and he may have his remedy over. It appears to me that the position of Mr. Maule as the administrator in this case, is precisely analogous to that of an administrator who has handed over the property to the person supposed to be entitled, upon an indemnity, and although there is not the actual form of an indemnity passing from the Crown to the Crown’s nominee, to whom administration is granted, as a matter of

course, the administrator is indemnified by the Crown. The administrator is entirely under the direction of the Crown, and therefore indemnified by the Crown; and whether the Sovereign is entitled, whether it is the Privy Purse or the Crown, for the benefit of the public, and in such a case, whether you call it the Sovereign's for his own private purpose, or the public's under the act of parliament, in either case the party to whom it is handed over gets the benefit of it by the use of it. If it belongs to the public, and it is used as public money, for the purposes of the public, the public gets the benefit. The public do just the same as if an individual had employed it for his own private purposes. Surely in such a case the public, or, as in the present case, the Sovereign, is the person responsible — responsible, it may be, only indirectly, through the administrator; but still, if you once regard the administrator as for every possible purpose merely representing the Crown, then it is the Crown as administrator who has retained the balance in its own hands, and it appears to me to come within the principle I have alluded to. It does appear to me, subject to the question as to the time and the sums in respect of which interest is to be charged, that there is a liability to interest on the balance; and really, if it were not so, I do think that injustice would be done as between the public and individuals. When we talk of the Crown now, which means the public, it is very hard and unreasonable that the public should have the benefit of monies which did not belong to it, which belonged to A. from the death of the intestate. It is very unreasonable and unjust that the public should have the benefit of those monies, which is the same thing as if the public was getting interest upon these monies, or employing it at interest, and then twenty years afterwards, or at any time afterwards, saying to the party who turns out to be beneficially entitled, "true, we have had the use of these monies, but you ought to have come sooner; and although we have had the benefit, you shall have nothing but the dry principal." I do not see the equity or legal justice of it. It appears to me to be contrary to all analogy and principle. In this case there is a

double ingredient; there is a portion of the property which consists not of property invested, and another part which was property yielding an income. It is true the part which was yielding an income was a terminable property, that is to say, long annuities, or property of that description. No doubt, if this had been the case of property which was the subject of a will, where there was a tenancy for life and a remainder, there would be an obligation under ordinary circumstances upon the party who was the administrator or executor to convert it and invest it. But I see no such obligation in this case, where the administrator has nothing to do but to hold the property which is not unproductive and receive such profit as may arise. Now the sale of the stock took place about the latter end of the year 1827, and the money arising from that sale was not wanted for any purpose whatever. The total amount of debts, funeral and testamentary expenses, outgoing expenses of every kind, and administration expenses, amounted to 257*l.* 5*s.* 9*d.*; and the total amount of what was actually received in money, other than what arose from the proceeds of the sale of stock down to the end of the year 1826 is 1,023*l.* 9*s.* 4*d.*, leaving a balance of 766*l.* 3*s.* 7*d.* at the end of the year 1826. At that time every debt and every testamentary expense and outgoing had been satisfied, and therefore there was a clear balance at that time not wanted to be retained for any apparent or apprehended purpose. It appears to me, upon principle, that interest at 4*l.* per cent. ought to be charged on that balance from that time, and on the long annuities from the sale thereof in the following year.

WOOD, V. C. }
 April 22, 23. } CLARKE v. FRANKLIN.

Deed—Conversion—Resulting Trust.

Where a settlor conveys real estate upon trust for sale, and directs the proceeds to be applied to certain purposes, some of which fail, whether the sale is directed to be made in the lifetime of the settlor or after his decease, the property will, to the extent to

which the purposes fail, result to the settlor as personal estate.

Secus—if there is a failure of the whole purposes for which the sale is directed.

By an indenture, dated the 10th of March 1852, John Clarke conveyed a messuage, with the appurtenances, at Clarendon Square, in Leamington Priors, and also two sums of 1,000*l.* each, secured upon mortgage, and certain other sums of money invested on security, and household goods, to trustees, subject to an estate for life, with a power of appointment in the said J. Clarke, upon trust to sell the messuage and household goods, and after paying various small sums of money to certain persons therein named, to pay 1,000*l.* to the minister, churchwardens and overseers of the parish of Crick, and to certain other trustees, upon trust for maintaining an organist for the parish church of Crick, and to pay the residue of the money to the same persons, to be held upon certain charitable trusts, which were afterwards declared to be void so far as regarded the real estate and the personal estate savouring of the realty.

J. Clarke died in March 1855, without having exercised his power of appointment, and the question which now arose was, whether as respected such portion of the proceeds of the house and premises at Clarendon Square as might not be required for the purposes of the deed, the same was to be deemed to be real or personal estate.

Mr. Roll and *Mr. Lewin*, for the widow, who was the plaintiff, contended that there was a clear trust for the conversion of the house in Clarendon Square; and the property, therefore, so far as it was ineffectually given to the charity, was distributable as personal estate. In the case of a will where real estate is directed to be sold for the convenience of division and one of the objects fails, the heir takes the share as money and not as land, and in like manner where land is directed by deed to be sold for similar purposes, and one of the objects fails, it results to the grantor as personalty.—

Smith v. Claxton, 4 Madd. 484.

Lechmere v. Carlisle, 3 P. Wms. 211.
Hewitt v. Wright, 1 Bro. C.C. 86.
Wright v. Wright, 16 Ves. 188.
Jessop v. Watson, 1 Myl. & K. 665;
 s. c. 2 Law J. Rep. (n.s.) Chanc. 197.
Van v. Barnett, 19 Ves. 102.
Griffith v. Ricketts, 7 Hare, 299; s. c. 19 Law J. Rep. (n.s.) Chanc. 100.
Biggs v. Andrews, 5 Sim. 424.
Wright v. Rose, 2 Sim. & S. 323.
Ripley v. Waterworth, 7 Ves. 425.
Lawes v. Bennett, 1 Cox, 167.

Mr. Pemberton appeared for one of the next-of-kin.

Mr. W. D. Evans (with the *Solicitor General*), for the heir-at-law, referred to *Ripley v. Waterworth*.

Emblin v. Freeman, Pr. Ch. 541.

Maitson v. Swift, 8 Beav. 368; s. c. 13 Law J. Rep. (n.s.) Chanc. 354.

Alexander v. Brame, 19 Ibid. 436.

Mr. Willcock and *Mr. Erskine*, for the trustees.

Mr. Wickens, for the residuary legatee.

Wood, V.C., without calling for a reply, referred to *Griffith v. Ricketts*, *Hewitt v. Wright*, and *Wheldale v. Partridge* (1), and said it was perfectly clear from those cases that the conversion took effect from the execution of the deed; and where real estate was directed by deed to be sold for certain specified purposes, one of which failed, it would to that extent immediately result to the settlor as personalty, and it mattered not whether the sale was to take place in the lifetime of the settlor or not until after his decease. "If," said Lord Thurlow in *Hewitt v. Wright*, "it goes in the case of a will to the heir, in the case of a deed it must result to the grantor; and though in the case of a will it cannot go to the executor as money, not having been converted, but must descend to the heir, yet I should think that it was personal estate of the heir, and if he were dead would go to his executor: and if so, where it resulted to the grantor, it would be personalty in his hands, and would pass as such." If, indeed, the

(1) 8 Ves. 227.

whole purpose for which the conversion was directed had failed, as if the grantor had given all the proceeds of the sale for charitable purposes, the Court would then consider the whole intention as failing, and the property would continue to bear the character of real estate—*Ripley v. Waterworth*. But here that was not so; there were some small sums of money directed to be paid to certain persons named in the deed, and to that extent the purposes did not fail. It must, therefore, be declared that the proceeds of the Clarendon Square estate, so far as they were directed to be applied to charitable purposes, resulted to John Clarke as personal estate, and were applicable and distributable in like manner as the other personal estate undisposed of by his will.

were or should have been married at the time of his decease, to the trustees for the time being of their respective marriage settlements, to be held and applied by them upon and for such and the same trusts, intents and purposes as were or should be therein respectively expressed or declared of and concerning their respective original marriage portions of 2,000*l.*, or as near thereto as the deaths of parties or other circumstances would admit of; and he appointed his trustees executors of his will. Under this will 16,856*l.* were paid to the trustees of the settlement of the 15th of January 1800.

John Birley the husband died on the 25th of December 1833, leaving his widow Margaret Birley surviving.

There were ten children of the marriage, four of whom died before the date of the appointment next stated, two without issue, and two, Richard and Elizabeth, leaving issue. Two other children died afterwards, leaving no issue. The remaining four children, Hornby, William, Alice and Frances, were still living.

By a deed-poll, dated the 12th of May 1847, Mrs. Birley, after reciting that she had appointed the whole of the 2,000*l.* included in her settlement, and that she desired to make an appointment of her share in the residuary estate of her father, appointed and directed her trustees after her decease to pay thereout 100*l.* to her three sons, Hornby, John and George, or to the issue of any such sons, in case of the death of any such sons before the same should become payable; the further sum of 100*l.* unto and equally between all and every such children of her daughter Elizabeth living at the death of Margaret Birley; and a further sum of 100*l.* to her daughter Fanny, and to divide the residue equally between her son W. Birley and her daughter Alice, and their respective executors, administrators and assigns, as their own proper goods and chattels.

By a deed-poll, dated the 24th of April 1848, after reciting the appointment, and that at the time it was made it was understood that William and Alice should consider themselves possessed of the residue of the appointed funds as trustees, they declared that they were to divide the same into

M.R. }
March 12, 17. } BIRLEY v. BIRLEY.

Power — Undue Execution — Trust — Strangers.

A donee of a power made an appointment in favour of objects of the power, and they, in pursuance of an understanding between them, executed a declaration of trust for the benefit of themselves, and of other persons not objects of the power:—Held, that such appointments could not be supported.

By a settlement, dated the 15th of January 1800, made on the marriage of John Birley with Margaret Backhouse, her father, Daniel Backhouse, paid a sum of 2,000*l.* to the trustees, upon trust, in default of a joint appointment by Mr. and Mrs. Birley, for all and every, or such one or more of the children of the marriage, in such shares and proportions as the survivor of them should by deed or will appoint.

Daniel Backhouse, by his will, dated the 21st of March 1810, gave his real and personal estate to trustees, upon trust to convert the same, and after certain payments to stand possessed of seven-eighths of the residue for the benefit of all and every his daughters, in equal shares and proportions; but he directed his trustees to pay over the shares of such of his daughters as

eighths, and after deducting therefrom the several sums of 100*l.* appointed by the deed-poll, to hold six eighths in trust for themselves and the other children of Margaret Birley then surviving for life, with limitations over in favour of their issue respectively; and to hold the remaining two eighths in trust for the children of Richard and Elizabeth respectively.

By a deed-poll, dated the 16th of June 1849, in which the deeds of the 12th of May 1847 and the 24th of April 1848 were not noticed, Mrs. Birley appointed 100*l.* to each of the surviving children, except William, and appointed the residue to William as he should by deed or will appoint, and in default of appointment to William absolutely. William executed a deed-poll, dated the 30th of July 1849, and an indenture dated the 29th of June 1850, which it is not necessary to notice. He afterwards executed a deed-poll, dated the 14th of November 1853, and in pursuance of the power contained in the settlement of the 15th of January 1800, he appointed the trust funds in sixths for the benefit of himself and the three other surviving children of Margaret Birley and the children of Richard and Elizabeth.

Margaret Birley died on the 3rd of August 1856.

In consequence of these several deeds, the trustees considered that they could not satisfactorily distribute the trust funds, or the income thereof; they therefore filed the bill in this suit for a declaration of the rights of all parties, and that as far as might be necessary the trusts of the settlement of the 15th of January 1800 might be carried into execution.

Mr. Kay, for the plaintiffs, the trustees, supported the appointments and declaration of trust made by the deeds of the 12th of May 1847 and the 24th of April 1848, in favour of the children of Richard and Elizabeth.

Tucker v. Sanger, M'Cle. 424, 439.

Tucker v. Tucker, 13 Price, 607.

Mr. R. Palmer and *Mr. C. Swanston*, for the appointees under the deed of the 14th of November 1853, insisted that no valid appointment could be made to William and

Alice for the benefit of other parties. The execution of the power could not be delegated; it was impossible to presume any connexion between the two sets of deeds.

Briggs v. Penny, 3 De Gex & Sm. 525; s. c. 3 Mac. & G. 546; 21 Law J.

Rep. (n.s.) Chanc. 265.

Daubeny v. Cockburn, 1 Mer. 626.

Lee v. Fernie, 1 Beav. 483.

Salmon v. Gibbes, 3 De Gex & Sm. 343; s. c. 18 Law J. Rep. (n.s.) Chanc. 177.

Agassiz v. Squire, 18 Beav. 431; s. c. 23 Law J. Rep. (n.s.) Chanc. 985.

2 *Sugden on Powers*, 260, 263, ed. 7.

March 17.—The MASTER OF THE ROLLS.—The appointment of the 12th of May 1847 is good in respect of the several sums of 100*l.* appointed to the four children of the marriage; but so far as regards the two sums of 100*l.* appointed to the children of Richard and Elizabeth it is bad, as they were not objects of the power. The question however which has been argued, arises upon the appointment of the residue of the trust funds to William and Alice. They were two of the children of the marriage, and if it was intended to be for their own benefit, it was good, and they could do as they pleased with the fund: they might declare themselves trustees for any persons who were not objects of the power. The validity of the deed of the 24th of April 1848 depends upon the validity of the appointment of the 12th of May 1847. The declaration of trust contained in this deed was good, provided William and Alice took the absolute beneficial interest in the fund under the appointment of 1847, but this was not the fact. The recital in the deed-poll of the 24th of April 1848 stated that the object of appointing the residue to them was to secure a distribution of the fund as to part amongst persons who were not objects of the power. There is no doubt, in the absence of authority, that this appointment was void as being a device to enable the donee of the power to appoint to two classes of persons, one not being objects of the power. It was a fraud upon the power, and, if not void, any donee of a power of appointment in favour of certain

specified objects might appoint in favour of strangers at his own will. The point arose in *Tucker v. Sanger*, and that case has been cited as an authority for the validity of this appointment. The marginal note is, that the appointor originally appointed the trust estate to the grandchild absolutely in fee, but by a subsequent deed, and pursuant to an agreement made prior to the execution of the power, a term of 200 years was created and vested in trustees to provide for the costs of the appointee in the original suit, and the costs of the parties to that instrument in another suit to be instituted by them in the name of the appointee and for his benefit, and to raise and pay annuities to other objects of the power, and, subject to the term and its trusts, the estate was re-settled to the use of the appointee for life, remainder in fee to his children, and if no son should attain twenty-one, or no daughter attain that age or marry, then to the use of the appointee in fee. The appointment was held to be good. It is referred to in 2 *Sugden on Powers*, 261. "An appointment first to a child, and then a settlement by the child, in consequence of an agreement with the father before the appointment, upon himself (the child) and his children (not objects of the power), with provisions by way of annuity for other objects of the power, have been held valid—*Tucker v. Tucker*. There was a provision also for costs. It was insisted that the settlement was a fraud upon the power, but Alexander, C.B. held otherwise. The former cases, he thought, were infinitely stronger than the case before him, being cases of appointment under a power made on contract before execution, to persons not objects of the power, treating them as operating through and by means of appointing to persons who were; in both which cases the powers were held to be well executed, because it was considered that those appointments might have been made in the manner in which this very appointment was made. He observed that it was ingeniously argued, that in this case the other objects of the power, having had annuities given to them by the appointor, to be paid by the appointee, had an interest in the estate appointed, which might be defeated by the

incumbrances with which the appointee might charge the estate in the short interval during which he was seised of the fee by the effect of the conveyances making the appointment; but the answer to that was, that the appointor might have given the whole fee absolutely to the appointee without taking the least notice of the other objects of the power; and he considered the annuities as part of the appointment. In a subsequent case, upon the validity of the settlement made after the appointment as against creditors, *Cutten v. Sanger* (1), the Judge said he had reconsidered the principles on which he proceeded in the former case, and he saw no reason to depart from them. It appeared to him that the line he took was the necessary result of what had been done in the former cases, in all of which interests were given in form by the donee of the power to grandchildren, who were not objects of the power, because the person who was the proper object of the power, and to whom the whole might have been appointed, was a party to the deed and concurred in the gift. It appeared to him that in those cases such persons as were not proper objects of the power must have been considered as taking by and from the person who was the proper object of the power. He could view the settlement, therefore, as a voluntary settlement only so far as it gave interests to his own children. It was not contended that the small provisions by the settlement for the other objects of the power were invalid. This decision proves that the settlement is the act of the object of the power, not made upon a contract with the donee of the power, but voluntarily proceeding from himself, and cannot be sustained as a settlement for valuable consideration, except so far as the persons claiming under it can establish a sufficient consideration for it to protect it against either creditors or purchasers. There was more difficulty in *Tucker v. Tucker* than in the early cases upon this point; for where the settlement is considered as made by the direction of the object of the power, it is virtually his sole act; but where, as in *Tucker v. Tucker*, it is made by the

(1) 2 You. & J. 459.

object of the power in pursuance of a contract with the donee of the power, the case presents some difficulty." This passage correctly states the result of the decision of the Chief Baron. It is clear that Lord St. Leonards does not approve of it. It is obvious that this case created some doubt in the mind of the Chief Baron, from the manner in which he refers to it, and endeavours to defend it in the case of *Cutten v. Sanger*. He also considered *Routledge v. Dorril* (2) stronger than the one before him. These cases lay down the proposition that an appointment and a settlement by the appointee may be made by one deed and be effective. But where the appointment is the result of a contract made beforehand with the appointee to enable the donee to do what he otherwise could not, I find no case to support it. The Chief Baron, in *Tucker v. Sanger*, considered that the evidence did not prove that the appointee took otherwise than for his own benefit, and that he might either have settled the property for the benefit of his children, or have kept it himself. If that is so, *Tucker v. Sanger* does not, in effect, alter the rule upon the subject. If, however, the Chief Baron meant to lay down as a proposition of law, that a bargain between the donee and the object of the power to make a provision for persons not objects of the power without any benefit to himself, would not vitiate the execution of the power, such a proposition cannot be maintained; but I do not understand it to be so laid down. In what character does the appointee take the property? If for his absolute benefit, the appointment is good; but if for the purpose of distribution amongst persons not objects of the power, the appointment cannot be supported. William and Alice, in this case, took the residue in the character of trustees, as to part in favour of persons not objects of the power. Suppose after this appointment they had sought to retain the fund for their own use, could I have allowed them, as fiduciaries, to do so? Clearly not. The appointment, therefore, of the residue to William and Alice is void; and the deed of the 24th of April 1848 is also void. There is no evidence to shew

that the deed-poll of the 16th of June 1849 was the result of any bargain between the donee and the appointee. In the absence, therefore, of such evidence, it must be presumed to be good, and in consequence William takes the whole fund, subject to the appointments made in favour of the persons objects of the power. I pass the deed of the 30th of July 1849 and the 29th of June 1850, and come to the deed of the 14th of November 1853. This is valid, and all the persons specified in it are entitled to take, whether objects of the power or not. This deed, therefore, must regulate the division of the fund.

M.R. }
March 29. } BRACE v. WEHNERT.

Specific Performance—House—Agreement to build.

An agreement to build a house of a given value and according to a plan to be agreed upon, cannot be carried into effect in this court when neither plan nor specifications have been under the consideration of the parties.

By an agreement, dated the 4th of April 1854, Thomas Brace, as the agent of his brother, Edward Brace, agreed that as soon as Frederick Wehnert, his executors, administrators or assigns, should have erected one substantial brick messuage, with the necessary outbuildings thereto, of the value of 1,400*l.* at the least, on the piece of ground coloured blue on the map drawn on the agreement, and according to a plan to be submitted to and approved by E. Brace, or by T. Brace on his behalf, he would, in consideration of the costs and expenses of erecting such buildings, procure, at the costs and charges of F. Wehnert, a lease to be granted by E. Brace to F. Wehnert, his executors, administrators and assigns, of the piece of ground coloured blue, with the messuage and premises built thereon as aforesaid, and also of the piece of ground coloured brown, for the term of eighty-three years and one quarter of another year, from the 25th of December 1853, at the rent of a peppercorn, during the said

term for the piece of ground coloured brown, and for the piece of ground coloured blue the rent of 6*l.* 5*s.* for the first half-year thereof, and for and during the remainder of the term the rent of 18*l.* 15*s.* per annum, payable quarterly as therein mentioned, the first payment of which was to be made on the 29th of September next ensuing. And F. Wehnert, for himself, his executors, administrators and assigns, agreed, on or before the 21st of June 1855, to erect or cause to be erected and completed on the said piece of ground a good and substantial brick messuage or dwelling house, with necessary outbuildings of the value of 1,400*l.* at the least according to the said plan thereof so to be submitted to and approved by T. Brace or by E. Brace. The defendant also covenanted to erect a brick wall as therein mentioned, and with all convenient speed to proceed with the erection of the messuage, doing as little damage as possible to the private road leading to the piece of ground agreed to be demised. The agreement also contained a proviso, in the nature of a condition of re-entry, to the effect that in case the defendant, his executors, &c. should fail in the performance of the agreement, or any clause thereof, on his and their part to be observed, it should be lawful for E. Brace, by writing under his hand to be given to the defendant, or left on the said pieces of ground, or either of them, to determine that agreement, which from thenceforth was to be null and void, and E. Brace was to be at liberty to re-enter upon the premises and the buildings thereon. The defendant also agreed to accept such lease, which was to contain all the usual covenants on the part both of the lessor and the lessee, and particularly to pay rent, with a proviso for re-entry on non-payment of rent and non-performance of covenants.

No steps having been taken by the defendant for the performance of the agreement, Thomas Brace, on the 21st of August 1855, wrote to the defendant's brother, who also acted as his solicitor, complaining of the non-performance of the agreement, and stating that "the building season is now passing rapidly by, and there does

not appear even a prospect of operations being commenced. I, however, fully pointed out to you my full resolution not to allow further delay; and as the time has now expired at which the building should have been completed (yet nothing done), I have determined that your brother shall be put under such terms as the Court will impose, and therefore I shall file a bill at once for the specific performance of the contract." No notice was taken of the letter, and on the 9th of October 1855 Edward Brace and Thomas Brace filed the bill in this suit, alleging that the defendant had entered on the land and was in possession under the agreement, and that he had exercised acts of ownership over the same, and expended some money in raising the walls in part belonging to the same, and by levelling the ground; and it prayed that the defendant might be compelled to perform the agreement specifically, and that all proper directions consequent thereon might be given, the plaintiffs offering to specifically perform the agreement on their parts. The bill also prayed in the alternative that a receiver might be appointed with proper directions in that behalf, and that, if necessary, the premises might be sold for the term to be granted under the agreement.

Mr. Rogers, for the plaintiff. — The defendant had agreed to take a lease of a piece of ground; he had also agreed to build a house upon it; as, however, nothing had been done, the plaintiff was compelled to file this bill to obtain a specific performance of the agreement, and as the intention of the parties was clearly defined there was not much difficulty in making the decree asked. —

The City of London v. Nash, 1 Ves. sen. 12; s. c. 3 Atk. 512.

Mosely v. Virgin, 3 Ves. 184.

Allen v. Harding, 2 Eq. Ca. Abr. 17.

Franklyn v. Tuton, 5 Madd. 469.

Sanderson v. the Cockermouth Railway Company, 11 Beav. 497; 2 Hall & Tw. 327; 19 Law J. Rep. (n.s.) Chanc. 503.

Lucas v. Comerford, 3 Bro. C.C. 166; s. c. 1 Ves. jun. 235; 1 Mer. 264.

Pembroke v. Thorpe, 3 Swanst. 437.

Price v. the Mayor of Penzance, 4 Hare, 506.

Mr. Lloyd and Mr. Torriano, for the defendant.—The agreement which the Court was asked to carry into effect was both imperfect and indefinite. There was no plan of the house, and no specification of the works. The site of the house was not stated; the price of 1,400*l.* was stated, but was this to be laid out upon the house and buildings connected with it, or upon the house alone? Nothing was defined with certainty; but everything remained to be ascertained by a future plan to be settled by some future agreement. If the land was in the possession of the defendant, the plaintiff had a power of re-entry; and if the agreement was unperformed, they had reserved to themselves power to forfeit the lease, and render it null by serving the defendant with notice; it was clear, therefore, they had sustained no damage, but if they had, their remedy was at law.—

Hodges v. Horsfall, 1 Russ. & M. 116.

Squire v. Campbell, 1 Myl. & Cr. 459; s. c. 6 Law J. Rep. (N.S.) Chanc. 41.

Storer v. the Great Western Railway Company, 2 You. & Coll. C.C. 248; s. c. 12 Law J. Rep. (N.S.) Chanc. 65.

Mr. Rogers, in reply.

THE MASTER OF THE ROLLS.—It would not be desirable to diminish the power vested in the Court of making a decree for specific performance; and when the thing contracted to be done is reasonably clear, the Court will, no doubt, make such a decree; but an agreement to build a house of a particular value is not such a contract as this Court can perform. The Court would have great difficulty in making a decree, directing the defendant to build a substantial brick messuage of the value of 1,400*l.* at the least, with the necessary outbuildings; it might lead to future litigation. But if this were all, I would look through the papers to ascertain whether there were any means of making a decree which could be carried into effect. But to this is added a provision that the house shall be built

according to a plan to be submitted to and approved by Mr. Brace. Something therefore remained to be done, which the Court had no means of ascertaining. It could not compel the parties to approve of a plan; and if it said that they should approve of a reasonable or a handsome plan, this would still be too vague, and more especially so, when the value was limited to the sum of 1,400*l.* It may be true that there are many contracts made in this form; but then, probably, it will be found that the houses are to be built with reference to plans and specifications already prepared. It would, therefore, be a violation of the rules of equity to say, that there is such an agreement as this Court can carry into effect. The whole seems to have been left to the honour of the parties. If, however, any remedy does exist, it can only be upon an action for damages. The bill, therefore, must be dismissed, with costs.

Wood, V.C. }
April 23, 24, 26. } FERRIS v. GOODBURN.

Legacy — Ademption — Subsequent Advancement — Admissibility of Parol Evidence.

*A testator, after settling 10,000*l.* upon his daughter R. bequeathed to her 1,000*l.* on the day of her marriage as a marriage portion. R. was married in the lifetime of the testator, who subsequently advanced to her husband 800*l.* in detached sums:—Held, that the advances were pro tanto in satisfaction of the legacy.*

William Goodburn, by his will, dated the 19th of August 1854, after giving to trustees a sum of 6,000*l.* for the benefit of his adopted daughter, Rachel Ferris, then Rachel Goodburn, and her children, and a further sum of 4,000*l.* out of his residuary personal estate to be held upon the same trusts, and reciting that he was desirous of making a further provision for her in the event of her marriage, beyond the various provisions thereinbefore made for her benefit, gave and bequeathed to her, on the day of her marriage, the further sum

of 1,000*l.* sterling, to be deducted and taken out of the residue of his estate before the residuary legatee under his will should become entitled thereto, and he gave such further sum as aforesaid to her absolutely, for her own use and benefit, as a marriage portion, and which he directed to be paid to her on her marriage, whether before or after attaining the age of twenty-one years, subject, however, as to the precise day of payment, whether on the marriage day or soon afterwards, as his wife and his three other trustees, or his said wife and a majority of such three trustees, should in their discretion think proper, but such payment not to be delayed beyond, at furthest, the period of three calendar months from the day of such marriage.

The testator died on the 22nd of September 1855, and the question which now came before the Court was, whether the 1,000*l.* legacy had not been altogether or to some extent adeemed under the following circumstances.

Rachel Ferris, the plaintiff, was married to the defendant, R. A. Ferris, on the 18th of March 1855, in the lifetime therefore of the testator; and in the interval between that date and the death of the testator divers sums of money were from time to time given by the testator to her husband, amounting to 800*l.* The defendant, R. A. Ferris, in his affidavit stated that 500*l.* was given to him on the 4th of August 1855, and 300*l.* on the 11th of September 1855, and that it was given to him in consequence of his having asked the testator to give him 1,000*l.* to assist him in his business, and without any reference to what he had given to the plaintiff by his will. Other affidavits were also filed, in which the declarations of the testator about the time of making the advances were deposed to, and particularly an affidavit of the testator's widow and residuary legatee, in which she stated that her husband had informed her shortly after the marriage that Ferris wanted 1,000*l.* to put as his capital in the business in which he and his father were partners; and he added that it would not make any difference, as he had intended to give him 1,000*l.* as a marriage portion of the plaintiff, but that, as he was not in a position

to let him have that sum at once, he would pay it to him by instalments.

Mr. Willcock and *Mr. W. P. Murray*, for the plaintiff, argued that the legacy was not adeemed. If detached sums of money, advanced at different times, were added up and taken in satisfaction of a legacy, the decision would be carried further than any case had yet proceeded. In *Kirk v. Eddowes* (1), which was the strongest case against the plaintiff, a sum of 500*l.*, advanced to the husband of the testator's daughter, was held to be in satisfaction *pro tanto* of a legacy of 3,000*l.*, but the advance there was made at the express request of the daughter, and declared by the testator to be in part satisfaction of the legacy. The presumption against double portions could not arise where the testamentary portion and the subsequent advancement were not *ejusdem generis*—*Holmes v. Holmes* (2), *Davys v. Boucher* (3); and parol evidence, therefore, was not admissible—*Hall v. Hill* (4). But assuming parol evidence of declaration, made at the time of the advance, to be admissible, the declarations of the testator were made subsequently; besides, upon the evidence itself, it was no satisfaction. They cited also—

Grave v. Lord Salisbury, 1 Bro. C.C. 425.

Debene v. Mann, 2 Ibid. 165, 519.

Suisse v. Lord Lowther, 2 Hare, 424; s.c. on appeal, 12 Law J. Rep. (n.s.) Chanc. 315.

Powys v. Mansfield, 3 Myl. & Cr. 359; s.c. 7 Law J. Rep. (n.s.) Chanc. 9.

Trimmer v. Bayne, 7 Ves. 508, 515.

Monck v. Monck, 1 Ball & B. 298.

Hartopp v. Hartopp, 17 Ves. 184.

Mr. Daniel and *Mr. H. Cox*, for the defendant Richard Ferris, the husband of the plaintiff, referred to—

Roome v. Roome, 3 Atk. 181.

Robinson v. Whitley, 9 Ves. 577.

(1) 3 Hare, 509; s.c. 13 Law J. Rep. (n.s.) Chanc. 402.

(2) 1 Bro. C.C. 555.

(3) 3 You. & C. 397.

(4) 1 Dru. & W. 94, 122; s.c. 1 C. & L. 147.

Wallace v. Pomfret (5) was also referred to.

Mr. Rolt and *Mr. C. T. Simpson*, for the residuary legatee, were not called upon.

WOOD, V.C.—The principles upon which the Court acts, as to the admission of parol evidence, are clearly laid down in the authorities. Where a presumption against double portions is raised by the circumstances attending a gift from a parent or person standing *in loco parentis*, the Court is at liberty to receive parol evidence as to the intention of the donor, not, as Wigram, V.C. remarked in *Kirk v. Ed-dowes*, for the purpose of varying the will, but of explaining it, and shewing that the testator had become, as it were, his own executor, by discharging in his lifetime the obligation which he had imposed upon his estate by his will; because it is settled that a child shall not be entitled to a double portion, and the law, therefore, raises a presumption of satisfaction in that case, which will let in parol evidence, though in the case of a stranger parol evidence would not be admissible, no such presumption being raised. With respect to that case of *Debeze v. Mann*, Lord Thurlow, upon the first hearing, evidently considered that the presumption was raised and that parol evidence was admissible; though on the second hearing he did not seem to think the presumption was raised. The decision of Lord Eldon in *Wallace v. Pomfret* has been much disapproved of. That was the case of a bequest to a servant of 10*l.* over and above the wages that should be due, and of 1,000*l.* to another servant, without that addition; and Lord Eldon said:—"The question whether the evidence is admissible or not, turns upon the point, whether the inference from the express direction that the other legacy shall be in addition to wages, is strong enough to require a decision, that as to this legacy the addition to wages is, upon the face of the will, necessarily excluded. If it is not, then upon the rule as to satisfaction of portions, &c., these

declarations may be admitted. If admitted, they are to be looked at with great attention, to see whether the necessary effect is to beat down the fair inference from the written context." Lord St. Leonards, in *Hall v. Hill*, says he does not see how it is possible to maintain that decision consistently with the authorities. I confess I do not quite understand the force of that observation. It appears to me that what Lord Eldon meant to say was, that *prima facie* a legacy was to be taken to be in satisfaction of a pre-existing debt, but that the case before him was not to be decided upon the general rule of presumption as to satisfaction of an anterior debt; but that the presumption arose from the fact of the testator having given a legacy to another servant, which he declared should be over and above the wages due, and not having given a similar direction in the present case, and upon that presumption the parol evidence was admitted. In this case the legacy was clearly not given to the separate use of the lady. It was to be given to her on her wedding-day; and though she might have had it settled before marriage, it seems to have been the intention of the testator to benefit the husband, as he had amply provided for her separate use by the other clauses of the will. The precise dates at which these different advances were made do not very clearly appear from the testator's books; but they were all made within six months after the marriage, and, according to the statement of the husband, upon his request, for the purposes of his business. There was no reason for giving money to Ferris, except that he had married the testator's daughter; and connecting these gifts with the marriage, and the request made by the husband, it is impossible to say that the presumption of satisfaction is not raised, or that parol evidence is not admissible; and there being no evidence to rebut the presumption, there must be a declaration that the legacy was adeemed to the extent of 800*l.*

KINDERSLEY, V.C. }
 March 23, 29. } GIBBS v. GIBBS.

Interpleader Suit—Lower Scale of Costs.

*In an interpleader suit where the matter in dispute is under 1,000*l.* the costs to be charged, under the Orders of the 30th of January 1857, must be upon the lower scale.*

The plaintiffs in this case were the holders of a bill of exchange for 400*l.*, the proceeds of the sale of a ship. There were two claimants, who brought actions against the plaintiffs. The plaintiffs thereupon filed their bill, praying that the defendants might be decreed to interplead together and adjust their claims, the plaintiffs submitting to pay the 400*l.*; and also praying an injunction to restrain the actions.

The Court made the usual order in an interpleader suit.

A question was then raised, under the Orders of the 30th of January 1857, as to whether the solicitors' charges in this case were to be made according to the higher or the lower scale of charges, the matter in dispute being under 1,000*l.* The 2nd rule specified the cases in which the lower scale was to be charged; but an interpleader suit was not therein referred to. The 7th class of cases, however, was thus specified:—"In all proceedings by special case, and in all proceedings relating to funds carried to separate accounts, and in all proceedings under any railway or private act of parliament, or under any other statutory or summary jurisdiction, and generally in all other cases where the estate or fund to be dealt with shall be under the amount or value of 1,000*l.*"

It was contended, for the plaintiffs, that as the particular case of an interpleader suit was not specified in the rules, the solicitors were entitled to charge the higher scale of costs, and the case of *Reade v. Bentley* (1) was referred to.

Mr. Amphlett and *Mr. Macnaghten* appeared for the plaintiffs; and—

(1) 3 Kay & J. 271.

NEW SERIES, XXVII.—CHANC.

Mr. Hetherington and *Mr. Eddis*, for the defendants.

KINDERSLEY, V.C., after conferring with Wood, V.C. as to the case cited, said—By the 2nd Order of the 30th of January 1857, it is provided that solicitors are to be entitled to charge and be allowed the fees set forth in the column headed Lower Scale in the first schedule thereto, in the several cases following. Those cases are set out in separate paragraphs, the first four of which relate to various suits, the last three to proceedings not in suits; but the last paragraph concludes with these words: "and, generally, in all other cases where the estate or fund to be dealt with shall be under the amount or value of 1,000*l.*" It has been said that the word "cases" applies only to matters falling within the word "proceedings," and not to suits, and the case of *Reade v. Bentley* was cited in support of that contention. I have communicated with Wood, V.C. and have ascertained the actual grounds of his Honour's decision in that case. The question there was one of injunction and partnership, where there was no estate or fund, and therefore the Vice Chancellor thought that the Order did not in any way apply. Now the next Rule of the Orders to that which has been quoted uses the words "in all other cases" in such a manner as to shew clearly that suits as well as proceedings are intended to come within the meaning of "cases." The present is a case of interpleader, where there is an actual fund to be dealt with amounting to only 400*l.*, and as, in my opinion, an interpleader suit does come within the word "cases," and as the fund is under 1,000*l.*, the lower scale of costs will apply.

KINDERSLEY, V.C. }
 March 29. } DAVIS v. CHANTER.

Trustee Extension Act, 1852—Appointment of Trustee by the Court.

Where the last surviving trustee of a term of years died in 1799, and it appeared that there would be great difficulty and expense

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in obtaining limited administration, the Court appointed a new trustee under the 15 & 16 Vict. c. 55. s. 9.

This was a petition for the appointment of a new trustee by the Court, under the stat. 15 & 16 Vict. c. 55. It appeared that by an indenture, dated in April 1610, a term of 1,000 years was created, which subsequently became vested in Edward Snell. E. Snell died in 1766, and by his will the term of 1,000 years was bequeathed to J. Snell, J. Dunning and Elizabeth Snell upon certain trusts therein mentioned; and the testator appointed his trustees executors of his will. Elizabeth Snell became the surviving trustee and executor, and died in 1799, having, by her will, appointed James May and William Snell executors thereof. W. Snell alone proved the will, and died in 1800. J. May died in 1831. An order had been made by the Court for the sale of the premises comprised in the term, and the purchaser required an assignment of the legal estate in the term. The petition alleged that a new trustee of the term ought to be appointed, but that it was found difficult or impracticable to do so without the assistance of the Court of Chancery. It prayed, therefore, that such new trustee might be appointed under the 9th section of the Extension Act, 1852.

Mr. Glasse and Mr. Terrell appeared in support of the petition.

Mr. Baily and Mr. Grenside, for the purchaser, contended that the proper course was to obtain administration to Elizabeth Snell, the last surviving executor of the will of E. Snell; and that the Court had no power in a case like this to appoint a new trustee.

They cited—

In re Frost's Trust, 20 Law J. Rep. (N.S.) Chanc. 112.

In re Hazeldine, 16 Jur. 853.

KINDERSLEY, V.C.—The question is, whether the Court can, in such a case as this, appoint a new trustee under the Extension Act, 1852. There is some difficulty on the subject; but after consideration and reference to the decision

of Sir G. J. Turner, L.J., when Vice Chancellor, in *Re Hazeldine*, I think the order may be made. The 32nd section of the Trustee Act, 1850, is in these words: "And be it enacted, that whenever it shall be expedient to appoint a new trustee or trustees, and it shall be found inexpedient, difficult or impracticable so to do without the assistance of the Court of Chancery, it shall be lawful for the said Court of Chancery to make an order appointing a new trustee or new trustees either in substitution for or in addition to any existing trustee or trustees." So that the latter words in that section shew that it is only applicable to a case where there is an existing trustee. In *Re Hazeldine* I find that Sir G. J. Turner, L.J. refused to make the order on the express ground that there was no existing trustee, and that, therefore, the section did not apply. Had that section been applicable to the case, he would have made the order. In order to rectify the defect of that section it is, by the 9th section of the Trustee Extension Act, enacted, "that in all cases where it shall be expedient to appoint a new trustee, and it shall be found inexpedient, difficult or impracticable so to do without the assistance of the Court of Chancery, it shall be lawful for the said Court to make an order appointing a new trustee or new trustees, whether there be any existing trustee or not at the time of making such order." That being so, there remains only the question, whether in this case it is inexpedient, difficult or impracticable to appoint a new trustee without the assistance of the Court of Chancery; and it appears to me that it is so. The last trustee died so far back as 1799. It might be possible to procure administration limited to the term, but I have no doubt that it would be attended with difficulty, and, therefore, I think this is a case in which it would be expedient to appoint a new trustee. In the case before Lord Justice Turner there was nothing approaching to a necessity for appointing a new trustee. It was simply this, that a trustee had died, and no one had taken out administration to his estate. This case appears to me to come within the meaning and within the express terms of the 9th section.

M.R. } *In re* THE DEPOSIT AND
 March 8, 9; } GENERAL LIFE ASSURANCE
 May 22. } COMPANY, *ex parte* AYRE.

Company — Misrepresentation — Contributory.

If a party is induced to subscribe to a company, upon misrepresentation made by it or on its behalf, the shareholders, on the company being wound up, cannot insist upon such party being placed on the list of contributories.

Misrepresentations made by a secretary or manager, in the absence of authority, do not bind the company. It cannot be assumed that he was an agent to commit a fraud.

A judgment in favour of a company at law, for the payment of the deposit on shares subscribed for, will not prevent this Court from giving relief when the subscription was procured by fraud, which was not in evidence when the judgment was obtained (1).

This application came from chambers, upon a motion to vary the chief clerk's certificate.

The facts on which the case was decided will be found stated in the judgment.

Mr. Selwyn and Mr. Dickinson, for the official manager.

Mr. R. Palmer and Mr. Roxburgh, for Mr. Ayre.

The cases cited were :—

In re the Royal British Bank, *ex parte* Brockwell, 26 Law J. Rep. (N.S.) Chanc. 855.

In re the North of England Joint-Stock Banking Company, *ex parte* Bernard, 5 De Gex & Sm. 288; s. c. 21 Law J. Rep. (N.S.) Chanc. 468.

Burnes v. Pennell, 2 H.L. Cas. 49.

The Oriental Bank v. Nicholson, 3 Jur. N.S. 857.

McEwan v. Campbell, 2 Macq. 499.

Hankey v. Vernon, 2 Cox, 12.

Wilnot v. Lennard, 3 Swanst. 682.

In re the Universal Provident Life Association, *ex parte* Bell, 22 Beav. 85; s. c. 26 Law J. Rep. (N.S.) Chanc. 137.

Holt's case, 22 Beav. 48.

Larabrie v. Brown, 1 De Gex & Jo. 204; s. c. 26 Law J. Rep. (N.S.) Chanc. 416, 605.

May 22.—THE MASTER OF THE ROLLS.
 —Mr. Ayre, on the 7th of April 1854, executed the deed of the company as a holder of 200 shares. He is therefore *prima facie* a contributory of the company, and the burthen lies on him to prove that his name ought to be removed from the list. He says that he was induced to become a shareholder, and to execute the deed by misrepresentation. The distinction made in these cases is, that if the misrepresentation is made by a private individual, it will not prevent the person, who has unfortunately become the victim of it, from being a shareholder and contributing; his only remedy is by proceeding against the persons who deceived him; and as between himself and the other shareholders he is a contributory. But if the misrepresentation be made by the company, the shareholders are in this respect bound by the acts of the company; and consequently, as between themselves and the deceived person, no equity exists to have him placed upon the list of contributories. What, therefore, Mr. Ayre has to prove on the present occasion is, first, that a representation was made to him on the faith of which he became a shareholder, and that such representation was untrue; and, secondly, that such representation was made by the company. In 1854 Mr. Beavan was the secretary and manager of the company. He continued in that office up to the 28th of July in the same year, and during the whole time that the transactions under consideration occurred. Mr. Beavan wrote some letters, in March 1854, and particularly one on the 20th of March, to Mr. Neison, the actuary of the company, which were communicated to Mr. Ayre, and influenced him, as he says, in becoming a shareholder. I pass over, without comment, the assertions made by Mr. Beavan as to the state and expectations of the

(1) See the Deposit and General Life Assurance Company v. Ayscough, 26 Law J. Rep. (N.S.) Q.B. 29.

company ; as, on the assumption that these statements were inaccurate, they cannot bind the company, for no one, as secretary or manager, can be the agent of the company to commit a fraud ; but if he was expressly directed by the board of directors to make a particular statement, it would be the statement of the company. The misrepresentation in the present case, if it exists at all, is contained in the report of the directors made to the special public meeting, a copy of which was sent to Mr. Ayre ; and on the faith of that he swears, and proves, that he applied for the shares, and executed the deed. If this report contains misrepresentations of the state, condition and expectations of the company, they were misrepresentations by the company itself ; and if the report contains important statements relative to the position and expectations of the company which were untrue, and which the directors, at the time, knew were untrue, or ought to have known to be untrue, from documents in their custody or power, then Mr. Ayre ought not to be placed on the list of contributories. The occasion of this report being made was this :— Under the 39th clause of the deed of settlement there was a power under certain circumstances to increase the capital of the company by the creation and sale of new shares. That clause provides " That if at any time it shall be thought advisable to raise more money for the purposes of the company, it shall be lawful for an extraordinary general meeting of the company specially called for the purpose, to come to a resolution to increase the temporary capital of the company to any amount not exceeding 500,000*l.*, to be specified in such resolution, by the creation and sale of new shares of 5*l.* each ; and at the extraordinary general meeting at which any such resolution shall be entered into, the number of new shares and the price of such new shares, either at 5*l.* for such new share, or for a greater or lesser sum than 5*l.* as shall be thought advisable with reference to the state and condition of the company, and its future prospects, shall be declared, and the payment of such price, either at one time or by instalments, and the time or respective

times of paying such price, shall be fixed and determined upon ; and such resolution, if confirmed by an extraordinary general meeting, to be convened for that purpose, at a distance of not less than two weeks or greater than four weeks from such preceding extraordinary general meeting, shall, in such case, but not till then, be binding upon the proprietors and members, and the temporary capital of the company shall be increased in the manner and to the amount specified in such resolution. Provided always, that if the price or sum at which such new or additional shares of 5*l.* each shall be issued to the public, shall exceed the sum which shall have been paid upon the original or existing shares in the capital of the company, then so much and such part only of such price or sum as shall be equal to the sum paid upon the original or existing shares, shall be accounted as part payment in respect thereof, and the excess shall be considered as in the nature of a premium, and shall be carried to the profit or loss of ' the proprietors' fund ' hereinafter mentioned, and shall be applied in the same manner as any other profit which may have accrued to such fund." A meeting was accordingly convened for the 3rd of April 1854. The misrepresentations alleged by Mr. Ayre to have been made by the directors, are the following : first, that the shares were fully paid up ; secondly, that premiums to the amount of 10,000*l.* per annum were received ; thirdly, that the concern was in a flourishing state ; and, fourthly, that the new shares were issued in order to extend the loan business, whereas, in fact, they were issued to support the falling concern. These misrepresentations Mr. Ayre alleges to have been made in the report made by the directors to the proprietors, at the annual general meeting, held on the 3rd of April 1854, and in the account by which it was accompanied, and which documents had been previously communicated to Mr. Ayre, and were the cause of his taking shares in the company. It becomes necessary to examine, first, what was the real condition and situation of the company ; secondly, how far that real condition and situation appeared by the books of the company ;

and, lastly, what was the accuracy of the representations contained in the report made to the proprietors and the public. As to the first two questions, the matter stands thus: the accounts and papers of the company have been examined by accountants on both sides, who have agreed on the correctness of what appears by the books and by the real accounts of the company, and they have put their conclusions in certain papers which have been prepared and handed to me for this purpose. They are numbered from A. to F. inclusive, and they are accompanied by a paper of explanatory remarks by the official manager. The paper marked B. contains the abstract and short result of the whole, and explains the difference between the two accounts. It is thus described by the official manager—I read these because counsel agreed that I should be furnished with this assistance; but they have not been before them, but I take them to be the result of what appears upon the books and accounts of the company:—"The statement B," (the official manager says), "is the balance-sheet of the company to the 31st of March 1854, as prepared by the official manager. The first column shews the state of the affairs of the company, as appears by the entries in the books; the other part shews the amounts corresponding with the statement A, the account rendered to Mr. Ayre of the position of the company's affairs on the 31st of March 1854: the difference between the two columns will be found, on the debtor side to be an increase in the amount due to creditors, 4,904*l.* 19*s.* 5*d.*, the particulars of which are contained in statement C; the claims on policies not paid, 1,350*l.*, particulars of which will be found in statement B; on the credit side the amount due to the company from country agents is reduced by the sum of 1,360*l.* 6*s.* 10*d.*, as shewn by the statement C." Upon examining this account B, it appears that the state of the company, even as it appeared in the books, was very disastrous, for by the books it appeared that the company owed 10,561*l.*, while the assets of the company, as they appeared by the books, after valuing the premises and the furniture, amounted only to 10,362*l.* 6*s.* 3*d.*, being a balance of liabilities over assets

of 198*l.* 15*s.* 8*d.* This was, however, far from being the real state of the account. The society owed debts to creditors to the amount of 4,904*l.* 19*s.* 5*d.* in addition, which did not appear in the books, and it was also liable in respect of claims for insurances unpaid, amounting to 1,350*l.* more; and this was not all, for in the account of assets the balances in the hands of the agents of the company and due to the company were set down as 1,990*l.* 16*s.* 11*d.*, whereas these balances were liable to set-off in the hands of the agents amounting to 1,360*l.* 6*s.* 10*d.*, thereby reducing this head of assets to the sum of 630*l.* 10*s.* 1*d.* The real fact therefore was, that if on the 31st of March 1854 the company had been suddenly wound up, and the premises and furniture had realized the amount at which they were valued in the books, the company would have owed and would have had to pay 7,817*l.* 1*s.* 11*d.* more than they had assets for that purpose. Exhibit F. is the statement put forward at the meeting, and published by the directors, of the receipts and expenditure during the year 1853. By this statement it would appear that there was an available balance in the hands of the company, consisting of cash and investments, amounting to 13,208*l.* 12*s.* 8*d.* Certainly a more deceptive statement could scarcely exist, if this were represented to be a correct account of the actual position of the affairs of the company; however, this it certainly does not purport to be, although it might induce persons to form a very inaccurate opinion of the state of prosperity of the society. On this statement F. the official manager makes the following remarks:—"Statement F. is a statement of the receipts and expenditure from the 1st of January 1853 to the 31st of December 1853, issued by the company. This statement does not represent, nor does it purport to do so, the actual position of the affairs of the company, inasmuch as the outstanding liabilities of the company are not stated. The statement represents the receipts and payments of the company during the above period, with this exception, that the item capital account 4,683*l.* 10*s.* includes the amount of 1,795*l.* 6*s.* 1*d.* due on shares treated as an asset on the other side of the account, and the sum of

6,788*l.* 6*s.* includes the amount of 1,883*l.* 13*s.* 10*d.* in the agents' hands, and the amount of 74*l.* 5*s.* 11*d.*, due from time premiums, also treated as assets on the other side of the account, and with the exception of an item of re-assurance, 640*l.* 17*s.* 4*d.*, which is treated as an asset, but which in fact is a payment." Admitting, however, the correctness of the version of what the document purported to be, still the errors pointed out by the official manager constitute very serious errors in the account, making a difference of 4,394*l.* 3*s.* 2*d.* in the balance there stated; and which balance after all was but a nominal one, for at this moment their assets were not sufficient to pay their debts, as will be shewn by the accounts of the company, and as might be inferred from the fact that, three months later, namely, on the 31st of March 1854, the balance of liabilities over assets exceeded 7,800*l.* This statement, Exhibit F, was accompanied by the report. The following, so far as relates to the prospects and condition of the company, and the reasons for issuing new shares, is what appears by the report:—"Your directors have much pleasure in again meeting the proprietors, and in presenting for their information and that of the policy holders, the highly gratifying report of the business transacted during the last year. The directors in their last report anticipated, from the large amount of business that had been transacted during the short period of six months, greater success than had attended most societies of a similar kind, and they consider that their expectations are fully borne out by the following comparative statement of the business of the company up to the present date." Then it states, "Proposals received from the 20th of September 1852 to the 25th of March 1853, a period of six months, 342, amounting to 151,867*l.*; from the 25th of March 1853 to the 25th of March 1854, a period of twelve months, 2,127, amounting to 301,013*l.*, total number of proposals received in eighteen months, 2,469, assuring 452,880*l.*" Then it states, "Policies, from the 20th of September 1852 to the 25th of March 1853, six months, there were issued, averaging 383*l.* each, 203 policies, assuring 77,861*l.*, and producing an annual income of 3,828*l.*

16*s.* 5*d.*" They state also certain other policies, and then at the bottom there is this, "Making the annual income of the company 10,542*l.* 9*s.* 10*d.*" Then they say, "It will thus be seen that there has been a very marked progress in the business of this company, and your directors confidently appeal to the early history of other insurance companies to shew that there have been few instances of so favourable a result. Next to the amount of business done, the nature of the business itself is of chief importance, and it is therefore matter of congratulation that there have only been three deaths during the past year, assured for the sum of 826*l.* 16*s.*, which is very much below the anticipated average of mortality, and must clearly prove to the proprietors that great care and attention have been bestowed by the medical officers in the examination of lives. Your directors would now advert to two important sources for increasing the company's business, viz., the loan department and the agency department. In reference to the former the directors have much pleasure in stating that not a single loss has been sustained therein from the commencement of the company, and that its results have been highly satisfactory and amply repay the labour and care bestowed upon it. The directors, however, in calling the attention of the proprietors to this most important and profitable branch of the company's operations, have to state that in the first establishment of the company, no such business was contemplated, and that the paid-up capital of 10,000*l.*, which was only intended for a life guarantee fund in the earlier stage of the society's existence, and would have been ample for that purpose, has been found inadequate for the full development of this branch of the company's business. And as they consider it highly desirable to continue and extend so profitable a part of the business they recommend the shareholders to create an additional capital of 100,000*l.* by the issue of new shares, under the provisions of the company's deed of settlement." Then they proceed to comment upon the agency department. They notice the increased attention that is paid to the subject of life assurance; and then they proceed towards the end in this

form: "This company may now be considered fully established, and its expenses in future will bear a much smaller ratio to the amount of business transacted. A dividend at the rate of 5*l.* per cent. has been paid upon the capital stock of the company for the past year, in conformity with the deed of settlement, and under the authority of Mr. Neison, the consulting actuary of the company." Then they propose certain persons for re-election, and urge upon the shareholders the necessity of making the company known, and of shewing their own confidence in it by themselves assuring, if not already assured. Then there are statements made in speeches addressed to the shareholders, but to them it is unnecessary to refer: their character may be more ambiguous. This was a report calculated to produce a completely erroneous opinion of the real state of the concern. It is represented as in a highly flourishing condition, as if the annual income of the company were upwards of 10,000*l.*, and coupled with the statement of receipts and expenditure, as if there were actually 13,000*l.* available, at the disposal of the company while, at this very moment the company was insolvent; its liabilities, actual and ascertained, exceeded its assets, and that by a sum exceeding 7,000*l.* It is immaterial that, according to the entries in the books of account kept by the company, the deficiency of the assets to pay the liabilities appeared to be only 128*l.*, while the real deficiency was 7,800*l.* The directors were bound to know the real state of the company, and it was their duty also to take care that this real and actual position of the company might be ascertained by the books of the company; and it would not, therefore, have availed the directors if the books had shewn a large balance of assets over liabilities if the real fact were otherwise. But that question does not arise here, for in this case, by the books as they stood, it appeared that even after applying the furniture and selling the premises, they would not be able to discharge all the liabilities of the company; and in this state of things they publish their report and declare and pay a dividend of 5*l.* per cent., congratulate the shareholders upon the success of the undertaking and recommend an issue of new

shares, not for the purpose of paying off debts, but because the loan and agency department, which had turned out so highly profitable, had not been originally contemplated, and had not been provided for in the paid-up capital, a further amount of which would be required for the full development of this branch of the company's business, which was so profitable, and which it was so highly desirable to continue and extend. I have no hesitation in saying that the statement was incorrect and misleading, and that it must have deluded any person who believed it into a wholly erroneous opinion of the state of the concern and its future prospects. Whether the directors personally knew that their statements were delusive and untrue is wholly immaterial. They were bound to know it. They must be held to know it. They were the vouchers to the public of the accuracy of their statements. They were the company itself by its proper organs announcing to the public the state of the concern, and the company can gain no benefit and derive no advantage from the fact of having, by such delusive statements, induced strangers to become shareholders of the concern. If this had been an ordinary partnership, if, for instance, three partners had held this language to two strangers, and thereby induced those two strangers to enter into obligations and embark with them in the concern, whatever might have been the rights of creditors as against such strangers so induced to join with the three original partners, as between those partners and the deluded strangers, the latter would be relieved by this Court from all obligations into which they had thus been induced to enter. The case is the same here. The statements made by the directors in their official character to a public meeting are the statements of the company. The company, and all the shareholders constituting that company at the time when the statements are made, are bound by those statements as between them and strangers, and no strangers thus induced to take shares can be held bound to contribute towards the payment of the liabilities contracted by the company, who, by false statements or by fraudulent concealment, have induced those persons to join them. The first province

of a Court of equity is to enforce truth in the dealings of all men, a literal adherence to which is the foundation of the doctrines of equity. If a man makes a promise for the purpose of inducing, and thereby does induce, another to do a particular act and incur liabilities, equity will compel that man to keep that promise. If a man enter into an obligation, equity is not satisfied with a pecuniary payment to discharge it, but compels him to perform the actual obligation he undertook. It is equally the province of equity to prevent any man or body of men, from gaining any advantage by the assertion of that which is false, or by the suppression of that which is true. This, no doubt, puts directors of a company frequently in a position of considerable difficulty, as the company may be one which they really believe, and probably truly, will eventually thrive, and which may be wholly destroyed by a complete disclosure of its affairs; but unless directors do make such full disclosures, not merely may they incur serious consequences to themselves personally, but neither they nor their shareholders can derive any advantage in a court of equity from having by such means deluded strangers to join them. In this case Mr. Ayre was so deluded, and he ought not to be on the list of contributories. The case is not affected by the circumstance, that in 1855 the company brought an action against Mr. Ayre for the payment of his deposits on the 200 shares taken by him. This action he defended; it came on to be tried, before Lord Campbell, C.J., in November 1855, when a verdict was given against Mr. Ayre, and in favour of the company; but I am not bound by this verdict, the more so, as, when the notes of the Judge's summing up to the jury are read, I find that he laid down the law exactly on the same principles as those on which I now proceed. In fact, in that case there was no evidence of misrepresentation. The books were not laid before the jury, nor were the results of the accounts stated to them. It is clear that Mr. Ayre is entitled to the benefit of that evidence on the present occasion, and that I am bound to act on the case as it is now proved; the results I have stated as they appear from the papers and accounts of the company, and

the evidence before the chief clerk. I also find that, on the 11th of July 1856 following this action, the company came to a resolution—one which, I think, they could not have avoided—to wind up the company. If these facts had been before the jury in November 1855—if they had known that the company was insolvent in April 1854, when the shares were taken, that they had been getting only deeper into liabilities since that time, and that the then state of the company was such that they would be compelled to wind up the company in the course of nine or ten months, I think the Lord Chief Justice would have made a very different charge to the jury, and that the jury would probably have given a very different verdict. However, that matter is over, and it is not now capable of being re-opened. Mr. Ayre might have brought before the jury the facts now before me as to the state of the company in April 1854, and he must abide the consequence of not having done so. Accordingly he has had to pay the deposit on the shares he took, and also the costs of the action, and I assume that he will never be able to get these returned. But the fact that Mr. Ayre was compelled to make these payments takes away any question of acquiescence on which the official manager might have relied if the payment had been voluntary. Being in favour of Mr. Ayre on this point, I think it unnecessary to discuss in detail the other question raised, namely, that Mr. Ayre repudiated these shares before they were allotted to him, and before they had any legal existence. If this case had rested there, Mr. Ayre would have had but a slender ground of defence; for, after he had been allowed to execute the deed, it would have been difficult for the company, if the shares had been profitable, to have excluded him from a share of dividends, and the rights and obligations, so far as this question is concerned, must be reciprocal. But on the former ground, I must direct Mr. Ayre's name to be omitted from the list of contributories; he must also have his costs out of the estate.

M.R. } THE UNITY BANKING AS-
Jan. 22, 23, 30. } SOCIATION v. KING.

Mortgage—Set-off—Outlay on another's Land—Lien.

*A father purchased a piece of land, and took an agreement that the vendors would convey it to him. He afterwards built a granary, and allowed his sons to occupy the premises for their business. They supplied goods to their father to the amount expended by him in building the granary, and they erected other buildings on the land of greater value. The father, pending these transactions, became surety for his sons to certain bankers for 10,000*l.* The sons afterwards surreptitiously obtained possession of the agreement; and one of them representing that his father had given the land to them, signed his father's name on the blank leaf of the agreement, and deposited it with the plaintiffs, who were bankers, to secure their cash credit. The sons afterwards became bankrupt; the son depositing the agreement was, upon several indictments, convicted of forgery; and the father was required to pay the 10,000*l.* for which he was surety. Upon a bill, by the plaintiffs, to obtain the benefit of the deposit made with them,—Held, that the sons had a lien on the land to the value of the goods supplied to the father, and the money expended by them in building; that the deposit of the agreement, though made under false representations, was good to the extent of that lien; that the plaintiffs had no notice of the father's interest; that the father, as against the plaintiffs, was not entitled to any set-off in respect of his subsequent liability as surety; and a decree was made to foreclose the security in favour of the plaintiffs as against the sons, with costs, and as against the father, without costs.*

This suit was instituted, on the 20th of November 1856, by the Unity Joint-Stock Mutual Banking Association, against James King, and William Bell, the official assignee, and John Alfred Osler and Joseph Berry Edwards, the creditors' assignees of Octavius and Alfred King, bankrupts, and against J. B. Edwards and Richard Tattersall, to whom the defendant, J. King, had conveyed and assigned all his estate and effects, as trustees, for the benefit of

his creditors. The object of the suit was to establish the plaintiffs' claim to a charge upon certain premises at Dullingham, in the county of Cambridge, for advances made to the bankrupts, who had taken the agreement for the purchase of the land, and deposited it with the plaintiffs as security for the repayment of the money.

The piece of land at Dullingham was purchased, by J. King, of the Newmarket Railway Company; and on the 31st of December 1853 the railway company executed an agreement, by which, on payment of 50*l.*, with interest in the meantime they undertook to convey the lands to the purchaser.

J. King subsequently expended 280*l.* in erecting a granary upon the land, and he afterwards allowed his sons, Octavius and Alfred King, who carried on the business of corn-merchants, to occupy the premises. They supplied their father with goods to the value of 249*l.* 13*s.* 7*d.*, and they erected other buildings upon the land at an expense of 1,200*l.*

In May 1856 Messrs. O. and A. King opened a cash account with the plaintiffs; and on the 19th of August 1856 O. King, in a letter to the bank, said:—"I shall feel obliged if you would inform us, per return of post, if we lodged with you writings of premises on which we have expended 2,500*l.*, you would discount bills to that amount on that security."

The manager, in his evidence, said that, in reply, he asked the sons to call upon him, but that they did not come as requested; and that he received a further letter from O. King, in which he said:—"I am unable to get to town this day, but hope to do so on Monday. The matter of my last I again refer you to, viz. if I deposit with you the deed of three granaries, one coal-shed, and a house, all freehold, situate at Dullingham, near the rail, on which there has been expended 3,500*l.*, you would discount bills for us to the extent of 2,500*l.*;" that on Monday, the 15th of September, O. King did call at the bank, and, on behalf of himself and his brother, handed to the manager the agreement of the 31st of December 1853, and stated, in answer to the inquiries of the manager respecting the agreement, that his father had paid the railway com-

pany 50*l.*, and that his father had given all his interest in the land to him and his brother towards advancing them in their business; and that they had erected buildings on the land for the purpose of their business, which, together with the land, he stated to be of the value of 3,000*l.* The manager then required O. King to procure his father to sign a memorandum on the agreement, in confirmation of his having given them all benefit of the agreement, and it was returned to him for the purpose of obtaining such signature; and the result was, that a few days afterwards O. King brought the agreement to the bank, with a forged signature of his father's name upon it, above which he said he was at liberty to write any agreement he thought fit to answer his purpose in obtaining an advance of money. The manager of the bank expressly said that, upon seeing the signature, he believed it to be the genuine signature of the father, J. King. He also said, upon the agreement being referred to, "that I had great confidence at the time in the representations made to me by O. King, who told me his father would execute it when required; and I thereupon accepted the deposit of the agreement as security for the payment of whatever balance was then or might at any time thereafter be due to the plaintiffs on the cash credit account opened by them with Messrs. O. and A. King;" and that O. King, on behalf of himself and his brother, accordingly deposited the agreement with the manager for that and no other purpose, and upon an understanding that the same was to be assigned to the plaintiffs for the purpose of such security.

When this deposit was made the firm was indebted to the bank in a sum of 98*l.*; but from that time the bank discounted the bills of the firm until the 22nd of October 1856, when they were made bankrupts. The balance at that time due from them to the plaintiffs amounted to 3,000*l.*

After the bankruptcy of Messrs. O. and A. King the solicitors of the bank sent to their father a deed, transferring to the plaintiffs the benefit of the agreement of the 31st of December 1853, to enable the plaintiffs to obtain a conveyance of the land from the railway company. The reply received was, that until the letter

accompanying the deed reached him he was entirely ignorant of the transaction. He denied also that his sons had any authority to deposit the agreement, and alleged that it had been taken out of his possession unknown to him; he then stated his refusal to execute the deed, and requested the return of the agreement.

J. King, in his answer to the bill, said:—"In May 1855 two of my sons, O. and A. King, entered into partnership together in a business, which chiefly consisted of buying and selling corn; that shortly afterwards I allowed them the use and occupation of my said granary, and the land and premises so purchased by me of the railway company for the purposes of their business; and although I contemplated and intended at some future time to make over the land and hereditaments to them, yet I never, in fact, did so, nor did I engage or promise to do so; and I allowed my sons the use or occupation of the premises, without binding or placing myself under any obligation to allow them to continue such use and occupation, and without any arrangement as to the terms on which they should hold the same; but the whole transaction was a matter of mutual confidence between us, and subject to future arrangement. However, I distinctly say, I never made over or relinquished, and never engaged to make over or relinquish, to my sons the property in the land; but reserved, and intended to reserve, the same in my own hands and power until I should think fit otherwise to deal therewith; and I deny that I allowed my sons, or either of them, to deal therewith as their or either of their own absolute property, or, save as aforesaid, that I allowed them to enter into or remain in possession thereof. I admit that my sons caused to be erected and built upon the said piece of land, in July and August 1855, two other granaries, and in or about the months of May and June 1856 a coal-shed and a dwelling-house, and that the cost thereof, which amounted to about 1,200*l.*, was paid by them; but I say that the charges for building the said three granaries, coal-shed and dwelling-house, were all made out and included in one or more bills and charged to me, and I was the person on whose

credit the whole were built; but such charges for building were paid by my sons, who also supplied me with goods to the extent of 249*l.* 13*s.* 7*d.* in respect of my outlay in building the granary so first erected; that in the month of January 1856 I became surety for my sons in the sum of 10,000*l.* to Messrs. Harvey & Hudson; and I say, that in consequence of the bankruptcy of my sons, Messrs. Harvey & Hudson required me to pay them the sum of 10,000*l.* for which I had become surety."

It further appeared that on the 30th of October 1856 O. King was tried and convicted, at the Central Criminal Court, upon several indictments for forgery; and that on the 2nd of December 1856 J. King, the father, conveyed and assigned all his real and personal estate to Messrs. Edwards and Tattersall for the benefit of his creditors; and the bill was accordingly amended.

Mr. R. Palmer and Mr. W. W. Cooper, for the plaintiffs.—The acts of the father shewed that he had given up the land to his sons for their advancement. The sons, no doubt, considered themselves as the owners of the land; and they had not only built on the land, but they had paid for the building erected by their father. In any view of the case, they were entitled to payment for the building; but the transactions proved that the sons were entitled to all the benefits to arise from the agreement of the 31st of December 1853; and that J. King, as surety for the 10,000*l.*, could claim no counter-security upon the land against the plaintiffs.—

Short v. Taylor, 2 Eq. Ca. Abr. 522.

Williams v. Lord Jersey, Cr. & Ph. 91; s. c. 10 Law J. Rep. (N.S.) Chanc. 149.

Surcome v. Pinniger, 3 De Gex, M. & G. 571; s. c. 22 Law J. Rep. (N.S.) Chanc. 417.

Stanton v. Percival, 5 H.L. Cas. 257; s. c. 24 Law J. Rep. (N.S.) Chanc. 369; s. c. *nom. Percival v. Caney*, 20 Law J. Rep. (N.S.) Chanc. 42.

Cavendish v. Geaves, 24 Beav. 163; s. c. *ante*, 314.

Mr. Selwyn and Mr. Hardy, for the

trustees of J. King.—The case made before the Court is not that raised by the pleadings. It is contended that the father transferred an equitable estate in fee simple to his sons. The sons, however, had no right to the agreement of the 31st of December 1853; neither was it deposited with the sanction of J. King. The case suggested from the bill and the documents was, that the sons had become debtors to the bank, and that the father was to deposit the agreement as security, and retain a continuing interest in the property. The father had already become surety for his sons to another bank to the extent of 10,000*l.* The plaintiffs had never made any inquiry of him when the agreement was laid before the manager by a party having no apparent interest in it. If any bad faith was alleged against the father, it must be clearly made out. To give the sons even a shadow of title, three things were requisite: first, expenditure; secondly, a belief by the party expending that he had a title to the property; and thirdly, a knowledge of that belief by the other party, and a sanction of the expenditure. No pretence for the two last existed against J. King; and the expenditure was an item to be settled when the heavy liabilities of the father were determined. There was relationship, it is true, in the case; but while there was no evidence of any promise made to the sons, there was apparent negligence in making inquiries of the ostensible owner of the agreement.—

Sutherland v. Briggs, 1 Hare, 26; s. c.

11 Law J. Rep. (N.S.) Chanc. 36.

The East India Company v. Vincent, 2 Atk. 83.

Lord Cawdor v. Lewes, 1 You. & C. Exch. 427; s. c. 4 Law J. Rep. (N.S.) Exch. Eq. 59.

29 Car. 2. c. 3. (*Statute of Frauds.*)

Mr. Baggallay, for the assignees of the bankrupts.—There was discrepancy between the case made by the bill and the case proved. It was not alleged that A. King ever gave any authority for the deposit of the agreement. No inquiries were made by the manager of the bank, though he had notice of rights existing in other parties.—

Dann v. Spurrier, 7 Ves. 231.

The Rochdale Canal Company v. King,
16 Beav. 630; s. c. 22 Law J. Rep.
(N.S.) Chanc. 604.

The Master of Clare Hall v. Harding,
6 Hare, 273; s. c. 17 Law J. Rep.
(N.S.) Chanc. 301.

Mr. R. Palmer, in reply.

Jan. 30.—**THE MASTER OF THE ROLLS.**
—Upon the statements made by the father it is material to consider what, under the circumstances, were the rights of the parties between themselves. The father could not have resumed the possession of the land without allowing his sons the money they had expended upon it. Without, therefore, coming to the conclusion that he intended to make over, or that he had made over the absolute interest in the land to the sons, I must hold that the money laid out by the sons was a lien—a charge—upon that land as against the father, and this is confirmed by the admission that he was not to pay for the goods with which his sons furnished him, but that their value was to be taken by him as a remuneration for the money he had expended in building the granary. The 249*l.* 13*s.* 7*d.* and the sums laid out by the sons upon the land and buildings are a charge upon the land, and if no other transactions had taken place between the father and sons, the father, or the persons claiming through him, would not be allowed to take the possession from the sons without repaying the money. It was not a debt due to them, because it was not a debt of the father's; and he expressly says that, although the bills were made out to him, the money was paid by the sons; they are therefore entitled to a charge for the amount.

In what mode, then, did the sons deal with this as regards the plaintiffs? I say the sons, because though O. King alone dealt with the bank, yet it was on behalf of himself and his brother, who was his partner; and it has not been alleged either that it was not within the scope of the partnership, or that the partnership had not the benefit of the advances made by the bank. The application made by O. King is detailed by the manager in his evidence. He alludes to the deeds relating to the

three buildings; he does not mention the deed relating to the land. It is, however, immaterial, as the only question which can arise is with reference to the amount of the charge, which would seem to exceed the whole value of the property. It is quite apparent that the transaction between O. King and the manager of the bank did not affect the father in the slightest degree. How, then, did it affect the sons? Had they been the owners of the land, it would clearly have been an equitable deposit for valuable consideration, to secure to the bank the amount of the advances made to them. They cannot say that it was not a security for payment to the extent of their interest in the land, whatever it might be; and though false representations might be made that the father had no ulterior interest in the land, or that he had an interest, and was a concurring party in the transaction, and would be ready to assign the agreement, still they could not in the slightest degree affect the interest of the sons, while they would be inoperative against the father. The interest, therefore, of the sons was duly charged by the deposit of the agreement with the bankers. Here the case would end, were it not for the statement of the father, that he had at the time become surety for his sons, on which he was liable to the extent of 10,000*l.* What, then, are the rights which arise between the parties upon this transaction? If the sons had not parted with their interest in or upon the land, the father would have been entitled to set off any sum which he had paid on that account against any sum due to them upon the security of this land—and this Court would enforce it, and cause them to deliver up the land free from any charge upon it; but the case is different as regards the bankers. At the time that deposit was made with them, there was nothing whatever due to the father; the bankers were purchasers for value of the interest of the sons in respect of their advances, without any notice whatever. The equitable interest of the sons, therefore, was transferred to the bank for value; and the right of set-off, if any existed against the sons subsequently to that period, cannot now be enforced against the bankers. If the only question was the mere right to the land,

there would be nothing to disentitle the father, subject to his sons' charge upon it; but in the present case I must declare that the sons had a charge or lien upon the property for the 249*l.* 13*s.* 7*d.*, and the money laid out by them in building on the land; that this charge existed in August and September 1856, and that the deposit of the agreement of the 31st of December 1853 with the bankers charged the interest of the bankrupts with the amount due to the plaintiffs in respect of their advances. The result will be, that there will be a double foreclosure: first, against the sons; and, secondly, against the persons claiming under the father. The suit was, no doubt, framed to make the father liable. The whole scope of the bill seeks to have him declared a participating party in the lien; but though the plaintiffs are entitled to a decree, still I cannot give them the costs of the suit against the father, or the persons claiming under him. As against the sons, however, they are entitled to their costs.

STUART, V.C. }
May 4, 5. } CARNE v. LONG.

Will—Devise to Trustees of Penzance Public Library—Construction—Mortmain.

The Penzance Public Library was established and kept on foot by the subscriptions of certain inhabitants of Penzance, for the purpose of purchasing and preserving books for the use of such subscribers. The subscribers were elected by ballot, and the management of the library conducted according to certain printed rules by officers chosen by the subscribers from amongst themselves. The 7th of these rules provided that strangers who had not resided in Penzance, or its neighbourhood, more than three months might (on the recommendation of a member entered in a book called the Visitors' Book) have access to the library and the privilege of reading the books there, for one month only. The 27th rule provided that the property in the books, and everything else belonging to the library, should be altogether vested in the officers for the time being, who should be trustees for the subscribers. Rule 29. provided

that the institution should not be broken up so long as ten members remained; but whenever the number should be reduced below ten, all donations should be returned to the donors, or their representatives who might claim the same, and the remaining property be forthwith sold, and the proceeds appropriated to the foundation or support of some scientific institution in the town of Penzance, to be determined by a majority of the remaining members:—Held, that a devise of freeholds to the trustees for the time being of the Penzance Public Library, to hold to them and their successors for ever for the use, benefit, maintenance and support of the said library, was a legal and valid devise.

The testator, by his will, dated in 1853, gave and devised, after the decease of his wife, "all his freehold mansion-house and premises called the Abbey, situate in Penzance, to the trustees for the time being of the Penzance Public Library, to hold to them and their successors for ever for the use, benefit, maintenance and support of the said library."

It appeared that the Penzance Public Library was established, in 1818, by the voluntary subscriptions of certain inhabitants of that town, who were its original members, for the purpose of purchasing and preserving books for the use of its subscribers. Its members were elected by ballot, and its management conducted according to certain printed rules by officers chosen from amongst themselves by the general body of subscribers. By those rules every ordinary member paid 1*l.* 1*s.* annually, which annual payment might at any time be commuted by a single payment of 10*l.* 10*s.*, which entitled the member making such payment to free admission to the library for life. Annual subscribers of 2*l.* 2*s.*, and life subscribers of 21*l.* were also members of the committee.

Amongst the printed rules also were the following:—

"Rule 7.—Strangers who have not resided in Penzance, or its neighbourhood, more than three months may (on the recommendation of a member entered in a book called the Visitors' Book) have access to the library and the privilege of

reading the books there, for one month only.

"Rule 27.—The property in the books, and everything else belonging to the library, shall be altogether vested in the officers for the time being, who shall be trustees for the subscribers; and no member shall have any individual right or property therein, or shall, on pretence of such a right, retain any book, refuse to pay any fine, or break any of the rules that are now or may hereafter be adopted.

"Rule 28.—None of these laws, or the laws which may hereafter be made, shall be altered but at the annual general meeting; a notice of any proposed alteration must be stuck up in the library at least one month before such meeting.

"Rule 29.—This institution shall not be broken up as long as ten members remain; but, whenever the number shall be reduced below ten, all donations shall be returned to the donors, or their representatives who may claim the same; and the remaining books and other articles shall be forthwith sold by public auction, and the proceeds appropriated to the foundation or support of some scientific institution in the town of Penzance, to be determined by a majority of the remaining members."

Upon the death of the testator's widow in 1857, the trustees of the library instituted the present suit to have it declared that the above-mentioned devise to the library was valid and effectual.

Mr. Malins and *Mr. Eddis*, for the plaintiffs.—The devise in this case cannot be construed as a dedication to any public or charitable use. In the case of *The Trustees of the British Museum v. White* (1) a devise to the trustees and for the benefit of the British Museum was held to be for a charitable use within the spirit and intendment of the statute 9 Geo. 2. c. 36, but it was because the Museum was an institution established by the legislature, and supplied partly at the public expense and for the public improvement. So in *Townley v. Bedwell* (2), a devise of a botanical garden near Chelsea, to be kept up

for ever, was decided to be for a charitable use, because the testator had said in his will he thought it would be for the public benefit. The present case is free from all such indications of an intention to benefit the public. The institution for the benefit of which the devise was made is for the private benefit, solace and instruction of the subscribers, and such other persons as, under rule 7, may obtain the privilege of access to the library on the recommendation of the subscribers. Although by means of this rule any one of the public might chance to obtain for a short time the licence to participate in the benefit of the devise, yet this cannot be regarded as constituting a general public or charitable use within the meaning of the statute. The appropriation in the 29th rule to the formation or support of some scientific institution in the town of Penzance, of the remaining property of the institution in the event of the number of subscribers falling below ten, would certainly appear to be stamped with the character of a charity; but it must be observed, that this appropriation is not meant to apply to the property of the institution which should have arisen from donations, but only to the part which should remain after the donations should have been returned to the donors. Viewing it in the most favourable light for the heir-at-law and in connexion with these rules, the devise can be considered only as a donation to this private association of subscribers for their own benefit, whereby a consequential charity may possibly arise. But such a gift has been held not to be a charitable use—*The Attorney General v. the Haberdashers' Company* (3). In *Liley v. Hey* (4) there was a devise to trustees and their heirs upon trust to distribute part of the rents amongst certain families, and the devise was held good. So here, the trust is not in the nature of a public dedication, but rather of a gift to a number of private persons. If the question were open to doubt, the Court ought to solve that doubt in favour of the institution and against the prohibition of the statute. The prohibition being restrictive of the natural

(3) 1 Myl. & K. 420; a. c. 5 Sim. 478; 2 Law J. Rep. (N.S.) Chanc. 33.

(4) 1 Hare, 580; a. c. 11 Law J. Rep. (N.S.) Chanc. 415.

(1) 2 Sim. & S. 594.

(2) 6 Ves. 194.

right of individuals to dispose of their property as they please, the Court, where a doubt arises as to the intention of the legislature, will incline to that construction of the statute which is against the restriction upon the rights of the subject. In conformity with this principle, the Court, in *Harrison v. the Mayor of Southampton* (5), put a liberal construction upon Mr. Ewart's Act, 8 & 9 Vict. c. 43, by which devises for certain laudable public purposes therein specified are exempted from the operation of the Statute of Mortmain.

Mr. Bacon and Mr. Bovill, for the heir-at-law of the testator.—The devise in question in this case is for the benefit of the Penzance Public Library, an institution which is to be kept up so long as ten of its members remain; but whenever the number of members is reduced below ten, then the property belonging to the library, or such part thereof as shall not have been reclaimed by the donors or their representatives, is to be forthwith sold and the proceeds appropriated to the foundation or support of some scientific institution in Penzance. It is submitted that this is an institution for the advancement of learning and science, and that a gift to it is for a public purpose, and therefore void under the statute—*Mitford v. Reynolds* (6), *Nightingale v. Goulburn* (7), and *The Attorney General v. the Mayor and Corporation of Carlisle* (8). This construction becomes strengthened on reference to the 7th of the printed rules, according to which the institution is to be managed, and under which any member of the public might be admitted to the enjoyment of its advantages. The devise is not the less for a charitable purpose within the meaning of the statute, because it is for the benefit of a limited class of persons, or because the objects to be benefited by it may not be of a permanent and enduring class—*The*

Attorney General v. Lawes (9). But the devise in this case being to the trustees of the institution and their successors for ever is a devise in perpetuity, and therefore clearly in the nature of a charitable trust, and void under the Statute of Mortmain—*Thornber v. Wilson* (10).

STUART, V.C. said, that before the devise to the trustees of the library of Penzance could be held void, it must be shewn that it was a devise for a charitable use or purpose within the meaning of the Statute of Mortmain. Upon consideration, however, of the nature and constitution of the library, he was of opinion that the institution, though called a public library, could not be regarded as a charity in any sense of the term. It was out of the question to hold it as in any degree within the scope of the acts of parliament by which the Charity Commissioners were appointed, or under the controul as to its management of the Charity Commissioners themselves. It was an institution founded by means of the subscriptions of private individuals. It was managed by officers chosen by the subscribers from amongst themselves, and was maintained for the benefit, not of the public, but of the subscribers. It was true that by the seventh of the printed rules for the management of the institution, strangers were to be admitted under certain conditions; but that was in effect merely a licence to each of the private individuals who subscribed to the library to admit a stranger to the use for a certain period of the library and the books; and although any member of the public might, by this means, chance to be admitted, yet such a licence could not be viewed as a dedication to the purposes of a charity, or be construed as the declaration of a charitable use within the scope of the statute. So the twenty-eighth rule, which vested the property belonging to the institution in trustees, not for the public but for the private body of subscribers, could not be read as pointing to a charitable or public use. In the latter words of

(5) 2 Sm. & G. 387; s. c. 23 Law J. Rep. (N.S.) Chanc. 919.

(6) 1 Phil. 185; s. c. 12 Law J. Rep. (N.S.) Chanc. 40.

(7) 5 Hare, 484; s. c. 16 Law J. Rep. (N.S.) Chanc. 27: affirmed 17 Law J. Rep. (N.S.) Chanc. 296.

(8) 2 Sim. 437.

(9) 8 Hare, 32; s. c. 19 Law J. Rep. (N.S.) Chanc. 300.

(10) 3 Drew. 245; s. c. 24 Law J. Rep. (N.S.) Chanc. 667.

the twenty-ninth rule there seemed to be an indication of a purpose more like a public purpose, but the property intended to be devoted to this purpose was not the gifts of donors, but that part of the property of the library which should be left after the property which it had obtained by gift or devise, should have been returned to the respective donors thereof, or their representatives who might claim the same. He was unable, therefore, to see anything in the nature of a charitable or public use in the purpose of this devise. The case of *The Trustees of the British Museum v. White* was directly in point, as an authority against the claim of the heir-at-law. Sir J. Leach professed to decide that case on the ground that the Museum was an institution established by the legislature for the collection and preservation of objects of science and of art, partly supplied at the public expense and intended for the public improvement. But there was nothing of the kind in the present case, the library having been formed for the private benefit, solace and instruction of the body of subscribers, voluntarily associated for the purpose, and such other persons as, according to the regulations, might receive a licence from any of the subscribers. Had the question upon this devise been of a character even much more doubtful than he considered it to be, he should still have felt it his duty to give the benefit of the doubt to the plaintiffs. The Statute of Mortmain put a restraint upon that liberty in the disposition of his property, which was the natural right of every owner of property; and, as in the case of every other statutory restraint, where the construction gave rise to a doubt, it was the duty of the Court to decide against the restraint. The Court, no doubt, in construing the act, was bound to have regard to the purposes of public policy which led to its enactment, and give effect to the spirit of the statute. But it did not appear that in this devise there was anything fairly open to the objections on the ground of public policy, against which the provisions of the act were directed. He was of opinion, moreover, that the wording of the devise, which was, "to the trustees and their successors

for ever," did not assist the case contended for on behalf of the heir-at-law.

Mr. Malins having consented to waive the claim on behalf of his clients, of a conveyance of the devised property from the heir-at-law, an order was made, declaring that the plaintiffs were entitled to the property devised to them, and to the rents and profits thereof from the death of the testator's widow, the amount to be verified by affidavit, and giving to the heir-at-law, or to those claiming under him, liberty to apply in case of the dissolution of the library.

STUART, V.C. }
June 2. } KNIGHT v. BULKELEY.

Pension for Wounds—Assignment of—Injunction.

A retired officer of the army, entitled to a pension granted by the Crown, in consideration of wounds received by him while in the service, assigned it for valuable consideration, and, pursuant to his covenant in the deed of assignment, executed to the assignee a power of attorney, in the form required by the War Office, to enable him to receive the same. The pension was expressed in the warrant granting it, to be payable "until further order," and at the foot of the form of declaration issued by the Paymaster General, to be filled up and signed by the grantee on applying for payment of the quarterly instalments of the pension, were these words:—"This allowance cannot be assigned as security for a loan of money." The assignor, after allowing the assignee of the pension, by means of the power of attorney executed to him, to receive two quarterly instalments of the annuity, revoked the power; and thenceforth received it himself. The Court, on motion by the assignee, granted an injunction to restrain the assignor from receiving the pension, and from executing any power of attorney authorizing any person other than the plaintiff to receive it.

The defendant in this case was a retired major of the army, who from the date of

his retirement had been entitled to, and in the enjoyment of a pension of 100*l.* granted to him by the Crown, in consideration of wounds received in the service. Such pension was expressed in the warrant granting it, to be payable until "further order"; and the recipient, on drawing each quarterly instalment of the pension, was required to make a declaration in the following form:—

"I, Thomas Bulkeley, do solemnly and sincerely declare, that I am entitled to a pension of 100*l.* per annum, granted to me in consideration of the injuries I received while serving in the — regiment of —, and that the sum due to me from the — day of — to the — day of —, both days inclusive, amounts to — *l.*

(Signature) "Thomas Bulkeley."

"N.B. This allowance cannot be assigned as security for a loan of money."

The defendant, by indenture, dated in April 1853, in consideration of 250*l.* advanced to him by the plaintiff, granted to the plaintiff an annuity of 42*l.* 19*s.* 1*d.* for the term of his, the defendant's, natural life, payable out of the above-mentioned pension; and, by way of security for the due payment of such annuity, he assigned the said pension to the plaintiff, upon trust to retain thereout the said annuity, and next to reimburse himself all costs, charges and expenses which he should sustain or be put to by reason of the non-payment of the annuity; and, lastly, to pay the residue of the pension to the defendant, his executors, administrators or assigns. The indenture contained a power of attorney to receive the pension, and a covenant by the defendant to do all necessary acts to enable the plaintiff to receive the same. By two other indentures, dated respectively in June 1853 and December 1853, the defendant, for valuable consideration, granted two other annuities for his own life to the plaintiff, payable out of the above-mentioned pension, and secured in the same manner as the annuity granted by the indenture of April 1853.

It being the practice of the War Office to refuse to recognize assignments of such pensions, and to pay them only to the grantee in person, or on his power of attor-

ney, in a form appointed by the office, and revocable by the maker of it, the defendant, in addition to the power in the above-mentioned deeds, executed and delivered to the plaintiff a power of attorney in the required form, and agreed not to revoke the same. The plaintiff, by means of this power, received two quarterly instalments of the pension, and after retaining thereout the payments of the said three annuities which were then due to him, paid over the surplus of the pension to the defendant. The defendant then revoked the separate power of attorney in the form required at the War Office, in consequence whereof the plaintiff became unable to obtain payment of any further instalments of the pension from the War Office; but such instalments had ever since been applied for and received by the defendant, or his attorney or attorneys. A large arrear in respect of the above-mentioned annuities granted to the plaintiff had become due, and remained unpaid at the institution of the suit.

The bill prayed a declaration that the said three indentures operated as valid grants of the three several annuities thereby respectively granted by the defendant to the plaintiff, and that the defendant might be restrained by injunction from applying for, obtaining or receiving the said pension, or empowering or enabling any person other than the plaintiff to apply for, obtain or receive the same. It also prayed that the defendant might be decreed to do and execute all acts and instruments necessary to give full effect to the said three indentures granting the said annuities, and for a receiver.

The case now came on upon motion for an injunction and receiver.

Mr. Stiffe, for the plaintiff, asked for an order for an injunction on the ground that where, as in the present case, an annuity or pension had been granted entirely as a compensation for past services, it was assignable, whether the pension was for the life of the grantee or during the pleasure of others.—

Fiestel v. King's College, Cambridge,
10 Beav. 49; s. c. 16 Law J. Rep.
(N.S.) Chanc. 339.

Berkeley v. King's College, Cambridge,
10 Beav. 602.

Wells v. Foster, 8 Mee. & W. 149;
s. c. 10 Law J. Rep. (N.S.) Exch.
216.

Node v. Backhouse, 2 You. & C. C.C.
529; s. c. 22 Law J. Rep. (N.S.)
Chanc. 446.

Spooner v. Payne, 2 De Gex & Sm.
439; s. c. 1 De Gex, M. & G. 383;
21 Law J. Rep. (N.S.) Chanc. 791.

Mr. Horsey, for the defendant, admitted that there was not any ground of public policy upon which the pension in question could be held not to be assignable; but he submitted that, inasmuch as it was only payable until further order, and, from the note at the foot of the form of declaration to be made by the recipient on applying for it, it appeared that it was forbidden to be assigned as a security for money, the receiver, if appointed by the Court, would not be recognized at the War Office, and an injunction, therefore, would not benefit the plaintiff.

STUART, V.C. said, the only doubt he had felt upon the question in this case arose from the note at the foot of the form of declaration. If the restriction therein stated had been mentioned in the grant of the pension itself, there would have been an end of the plaintiff's case, not on any ground of public policy, but by reason of the terms of the grant itself. But, coupling the notice contained in the note with the terms of the grant of the pension itself, it did not appear that any difficulty on this ground need be felt. The grant of the pension was to the defendant, not for the term of his whole life, but a grant merely at the rate of 100*l.* per annum until further order; and no question was made as to the power of the Crown to stop the payment of the pension. The Court had only to decide between the parties to the suit upon the effect of the deeds of grant which had been executed by the defendant to the plaintiff. By these deeds the right to the enjoyment of the pension had unquestionably been assigned to the plaintiff for valuable consideration, and the Court would not allow a breach of the

covenants contained in those deeds relating to the enjoyment of the right so assigned.

An injunction was then granted to restrain the defendant from receiving the pension, and from executing any power of attorney authorizing any person other than the plaintiff to receive it.

M.R. }
Feb. 25, 26; } KERR v. PAWSON.
March 30. }

Copyhold—Enfranchisement—Agreement to purchase a Freehold.

An agreement was made by a copyholder to sell his estate so soon as it should have become freehold, and to apply to the lord of the manor, and use his best endeavours to enfranchise the same, and procure all necessary parties to join in conveying the inheritance in fee simple to the purchaser, his heirs and assigns. The agreement was made after the passing of the 4 & 5 Vict. c. 35, but before the passing of the 15 & 16 Vict. c. 51. The conveyance in fee from the lord of the manor was obtained after the passing of the latter act, and it contained a reservation to the lord of his manorial rights:—Held, that the agreement to purchase must be considered as made with reference to the Enfranchisement Acts, and that the reservations made under the 15 & 16 Vict. c. 51. were within the terms of the agreement.

Held, also, upon an enfranchisement under the 15 & 16 Vict. c. 51, and under an agreement to purchase a freehold, that it was not incumbent upon the vendor to produce the title of the lord of the manor.

By an agreement, made the 18th of June 1853, between Thomas Mark Kerr, the plaintiff, and John Falshaw Pawson, the defendant, the plaintiff agreed to sell, and the defendant agreed to purchase, so soon as the same should have become freehold under the covenant thereafter contained, a copyhold messuage, situate at Mill Hill, in the county of Middlesex, known by the name of Little Berries, together with the lodges and buildings, garden and pleasure ground, with the meadow and pasture

land therewith held, "together with all timber and other trees, and all appurtenances to the same hereditaments belonging," at the price of 8,100*l*. And the said T. M. Kerr agreed with the said J. F. Pawson that he, the said T. M. Kerr, would forthwith apply to the lord of the manor of Hendon, of which manor the hereditaments hereby agreed to be sold were held, and use his best endeavours to enfranchise the same, and so soon as the enfranchisement should be perfected, deliver to the said J. F. Pawson an abstract of the title of him, the said T. M. Kerr, to the said messuage, lands and hereditaments, shewing a good marketable title thereto, and also should and would execute, and cause and procure all other necessary parties to join in executing proper conveyances and assurances to the said J. F. Pawson, his heirs and assigns, of the inheritance in fee simple of the said hereditaments when so enfranchised as aforesaid; such conveyances and assurances to be prepared and perfected by the said J. F. Pawson, his heirs, executors, administrators or assigns.

T. M. Kerr, accordingly, applied to the lord of the manor of Hendon for an enfranchisement of the lands; and he, under the provisions of the 15 & 16 Vict. c. 51, executed a deed, which had been previously approved of by the copyhold Commissioners, enfranchising and releasing all the copyhold estate, to hold the same unto T. M. Kerr, his heirs and assigns, as freehold, but so as not to affect any of his rights reserved by the Copyhold Act, 1852, s. 48.

No abstract of the lord's title to the manor was delivered to T. M. Kerr, and the abstract delivered by him to J. F. Pawson deduced no title to the freehold; he, therefore, objected, first, that the title of the lord of the manor was not produced; secondly, that the deed of enfranchisement reserved the lord's manorial rights and other incidents wholly at variance with an estate in fee simple, and that it was not enfranchised within the terms and meaning of the contract to purchase.

T. M. Kerr then instituted this suit for a specific performance of the agreement, and a decree was made directing the chief clerk to inquire into the title, and he, by his

certificate, found that on the 2nd of September 1856 a good title had been shewn to the enfranchised estate.

The defendant objected to this finding, and he now moved that the certificate of the chief clerk might be varied.

Mr. Hemming, for the defendant. — The defendant contracted for the purchase of the inheritance in fee simple, — for the entire and absolute interest in the land; his contract was, that none other should participate in or enjoy any right or interest in or over the land. The vendor, however, had obtained a conveyance of the estate, subject to innumerable reservations, which went so far that they created presumptions against the owner that such rights existed, and were existing in the lord of the manor previous to his conveyance. The consequence was, that no good title within the contract could be made to the defendant. The contract was made under the 4 & 5 Vict. c. 35; it contemplated a voluntary and complete enfranchisement. The conveyance taken was under the 15 & 16 Vict. c. 51, a compulsory act, which had no existence when the contract was entered into. The contract never contemplated a compulsory enfranchisement, burthened with restrictions upon the enjoyment; it was little better than an alteration of descent, with a change of free bench into dower. The vendor also had never delivered any sufficient abstract of the lord's title; the Commissioners had no power, under either of the acts, to see that a good title to the manor was made, and if the lord refused to produce his title, they had no power to terminate further proceedings. A purchaser, therefore, was liable to claims which he had no means of rebutting; he was also liable to eviction in the event of the lord's title being bad. It was true that under the 15 & 16 Vict. c. 51. s. 47. he could claim a repayment of the consideration-money, with 4*l*. per cent. interest, but this could afford no compensation if the lands had been improved by an extraordinary outlay. Section 33. provided against informalities only; it did not provide for a want of interest in the lord. The defendant, therefore, asked that the fee simple in the estate

might be conveyed to him, and that all reservations in or over the land might be removed. It was also asked that the plaintiff might deliver an abstract of the lord's title; without it there was no possibility of rebutting claims which might be set up under such large and undefined reservations.—

Stapleton v. Croft, 18 Q.B. Rep. 367;
s. c. 21 Law J. Rep. (N.S.) Q.B.
246.

Barbot v. Allen, 7 Exch. Rep. 609;
s. c. 21 Law J. Rep. (N.S.) Exch.
155.

14 & 15 Vict. c. 99. The Evidence
Act.

20 & 21 Vict. c. 30. s. 10. Inclosure
Act.

The Copyhold Enfranchisement Bill, as it passed the House of Commons, was also referred to.

Mr. Selwyn and Mr. Freeling, for the plaintiff.—The agreement was within the Enfranchisement Acts, and so was the deed of enfranchisement. If the lord was entitled for life or in tail, still his conveyance, under the provisions of the 15 & 16 Vict. c. 51. would convert the estate of the copyholder into an estate of freehold. The 53rd and the 34th sections made all the proceedings of the Commissioners regular, and declared that the customary modes of descent should cease, and that the lands should descend, and be subject to dower and curtesy, the same as freeholds. The powers were similar in effect to those given to the Commissioners under the 12 & 13 Vict. c. 77. (the Encumbered Estates Act).

An abstract of the lord's title, therefore, was unnecessary, and could not be required. The plaintiff's agreement contemplated enfranchisement under the 4 & 5 Vict. c. 35. By that act the mines and minerals, &c. were not to be affected, and if ultimately the plaintiff procured under the 15 & 16 Vict. c. 51, the only deed he could obtain, he complied fully with the provisions of the agreement. If the 15 & 16 Vict. c. 51. s. 48. provided that the act should not extend to certain of the lord's rights, or if it preserved to him all his rights, still the plaintiff had com-

plied with the terms of his agreement, and the defendant was bound to perform his contract.—

Monro v. Taylor, 8 Hare, 51; s. c.
3 Mac. & G. 713; 21 Law J. Rep.
(N.S.) Chanc. 525.

Walker v. Bentley, 9 Ibid. 629.

*Jortin v. the South-Eastern Railway
Company*, 2 Sm. & Gif. 48; s. c. 6
De Gex, M. & G. 270; 24 Law J.
Rep. (N.S.) Chanc. 343; reversed
(House of Lords) *ante*, 145.

March 30.—THE MASTER OF THE ROLLS.
—There are two questions: first, whether the title of the lord of the manor ought not to be proved, and if not, whether the enfranchisement under the 15 & 16 Vict. c. 51. will be an effectual bar to the rights of the lord when the person who has executed the deed of enfranchisement is not really the lord of the manor. Secondly, whether, under the contract, the enfranchisement is good, although the rights of the lord of the manor to the mines, minerals, &c. are not by the deed vested in the tenant purchasing the enfranchisement of his lands. The first question depends on the construction of the 15 & 16 Vict. c. 51. That act provides for the compulsory enfranchisement of copyholds. The 4 & 5 Vict. c. 35. provided for enfranchisement by voluntary agreement. By the 4 & 5 Vict. c. 35. s. 43. the Commissioners are enabled, and may be said to be required, to call for the title of the lord of the manor. The 15 & 16 Vict. c. 51. s. 5. (the corresponding section) says, "provided always, that no lord or tenant so summoned shall be bound to answer any questions as to his title;" so, also, the 4 & 5 Vict. c. 35. s. 102. (the interpretation clause) enacts, that the words "lord" and "steward" shall include the person or persons for the time being filling those respective characters, or acting in those respective capacities, whether those persons shall be rightfully or lawfully entitled to fill such characters or act in such capacities or not. Under the word "lord," therefore, is included a person who acts as lord, whether he is entitled to act as the lord or not; but the 15 & 16 Vict. c. 51. s. 52. (the corresponding section) says, "the

word 'lord' shall extend to and include the lord or lords of any manor, whether seised for life or in tail, or in fee simple, and all ecclesiastical lords, farmers, lords seised in right of the church or otherwise, and holding under them, and any body politic, corporate or collegiate, and all lords seised of any manor, whether they have or have not an absolute power of selling or disposing of the same; and the word 'steward' shall extend to and include a deputy steward or clerk acting as such for the time being." The word "steward" is more comprehensive, but the word "lord" only includes a person who has a freehold interest in the manor. The words of the 4 & 5 Vict. c. 35. s. 102, namely "whether the person is rightfully or lawfully entitled to fill that character and to act in that capacity or not," are carefully and expressly omitted. The 15 & 16 Vict. c. 51. s. 11: specifies how the enfranchisements are to be made and from what period they shall take effect; and provides that "any enfranchisement of lands under this act, or the said recited acts, shall be by deed according to the form in the first schedule to this act annexed, or as near thereto as the circumstances of the case will admit, or by deed in any other form which the parties with the consent of the Commissioners may think fit, and which deed the lord shall be bound to execute within twenty-eight days after the same shall be approved by the Commissioners on the same being tendered to him for that purpose; and all enfranchisements so made shall take effect from the time of the execution of such deed by the lord, but not before, and shall be effectual to vest the land thereby conveyed in the tenant or other person to whom the land shall be conveyed, free from any estates, rights, titles to dower and free bench, interests, incumbrances, claims or demands affecting the manor of which the same lands are holden: provided always, that in the meantime, and until such enfranchisement shall so take effect, all the rights, remedies, powers, privileges and conditions of and affecting the lord and tenant respectively in regard to such lands, with all the incidents of tenure, shall remain and continue unaffected." Enfranchisement, therefore, is to be effected by the lord executing the

deed, and the enfranchisement is to take effect from the time of the execution by the lord, but not before; and until the lord executes, all the rights and powers of the lord are to remain unaltered, that is, there must be a deed executed by the lord, as defined by the interpretation clause, namely, a person having a freehold interest in the manor: but if the person who acts as lord has no title, it would appear from these clauses that he is for this purpose a mere stranger, and that the enfranchisement would have no operation. I so understand the argument of the defendant. This argument is material when combined with the fact that the 4 & 5 Vict. c. 35. expressly applies to persons acting as lord without being such, and requires their title to be investigated, whereas the 15 & 16 Vict. c. 51. omits that provision, and prohibits the Commissioners from investigating the title of the lord; and, so far as his evidence is concerned, it is not necessary for him to prove his own title. But by the 15 & 16 Vict. c. 51. s. 22. he is to be at liberty to make a voluntary declaration as to his title, which is to be sufficient for the Commissioners to act upon. This clause is an enabling, and not a compulsory clause, and the power of investigating the title is introduced only to meet cases where the enfranchisement is sought against the copyholder. It says:—"Previous to any enfranchisement under this act, it shall be lawful for the lord and steward, if they shall see fit, and if there shall be no steward, then for the lord alone, to make a solemn declaration in such form as the said Commissioners shall direct, and to be taken and subscribed as solemn declarations are, by the 5 & 6 Will. 4. c. 62, directed to be taken and subscribed, stating therein the nature and extent of the estate and interest of the lord in the manor of which he is such lord, and the date and short particulars of the deed, will or other instrument under which he claims or derives title, and the name and style or other designation or description of the person in whose name the court of any such manor was then last holden, and the date or time of the holding of such court, and the incumbrances, if any, whether by mortgage, judgment or otherwise, which affect such manor; and it shall be lawful for

the said Commissioners, and they are hereby directed to approve of such title for the purposes of this act, which approval shall be testified under their hands and seal upon such evidence alone, unless they shall be of opinion that further information is necessary in the respects aforesaid; but if the said Commissioners shall consider that such evidence does not fully and truly disclose all such particulars as are necessary, or if no such declaration shall be made, or if the lord shall refuse or decline, or fail to give such information and evidence as they shall deem proper and necessary to shew a satisfactory *prima facie* title in the lord, or in persons claiming under or in trust for him, and if the said Commissioners shall consider either that the title of the lord is not satisfactory, or that the incumbrancers should be protected, then, if they think the justice of the case requires it, they may direct that the enfranchisement consideration shall be invested as hereinafter directed in the case of lords under disability." The 15 & 16 Vict. c. 51. s. 23. applies only to an application for enfranchisement by the lord, and provides that the tenant may require the Commissioners to inquire into the lord's title, which in no other case is there any power of doing. If the matter rested here it would be difficult to hold that the enfranchisement was to be good against all persons who might have a title to the manor, but who were at that time not in the slightest degree represented by the enfranchisement proceeding which had been approved of by the Commissioners.

The general scope of the act, on a little further examination, leads to a different conclusion. The style of the act seems to point in this direction. But the 15 & 16 Vict. c. 51. s. 33. is important. It enacts that "the confirmation under the hands and seal of the Commissioners of any award, or the execution by the Commissioners of any deed or instrument whereby any enfranchisement shall be effected under the said acts or this act, shall be conclusive evidence that all the directions in relation to the enfranchisement intended to be effected by means of such award, deed or instrument, which ought respectively to have been obeyed or performed previously to such confirmation or execu-

tion respectively, have been obeyed and performed; and no such award, deed or instrument shall be impeached by reason of any omission, mistake or informality therein, or in any proceeding relating thereto, or on account of any want of any notices or consents required by the said acts or this act, or on account of any defects or omissions in any previous proceedings whatever in the matter of such enfranchisement." It is impossible, notwithstanding what has gone before, to get over this section. The deed of enfranchisement ought to have been executed by the lord of the manor; therefore, the confirmation by the Commissioners is conclusive evidence that it has been so executed; and also by the same section no such award or deed is to be impeached by reason of any omission or defect in any previous proceedings whatever in the matter of such enfranchisement. This cannot be got over; because if it is not to be impeached by reason of any defect or omission, it is clearly a defect or omission that the lord has not executed it, and the confirmation of the Commissioners is to cure that defect and omission. The 15 & 16 Vict. c. 51. s. 33, therefore, directs that, notwithstanding any person shall not have executed, or even if no person at all has executed, still if the Commissioners think fit to approve of what has been done, it is binding on everybody. The 15 & 16 Vict. c. 51. s. 34. is confirmatory of that. It is, that after the confirmation of the apportionment the tenure is to alter, and it is to go according to the freehold tenure, and not according to the custom of the manor. The 15 & 16 Vict. c. 51. s. 47. also shews that the object of the act is to make a complete and perpetual enfranchisement of the copyholds; for unless it accomplished that end, it produced no advantage. That section refers to the cases of defective titles of lords and tenants, and provides, that "if any enfranchisement consideration-money shall be paid to any lord whose title shall thereafter prove to be bad or insufficient, the rightful owner of the manor, or his representatives, shall be entitled to recover against such lord or his representatives the amount or value of such consideration-money, as money had and received to the use of such rightful owner, and interest

thereon at the rate of 5*l.* per cent. per annum from the time of such title so proving to be bad or insufficient; and that if any tenant, or person claiming to be tenant, shall after payment by him of any enfranchisement consideration-money be evicted from the lands enfranchised, by an adverse claimant, such tenant or person shall be entitled to claim the repayment of such consideration-money against the lands enfranchised, and the amount thereof shall be charged upon the lands enfranchised, and shall carry interest at the rate of 4*l.* per cent. per annum from the time of such eviction." If, therefore, the tenant is evicted from the copyholds enfranchised through any defect in his title, the enfranchisement still continues; and all he is entitled to is a charge upon the land for the amount of money he paid for the enfranchisement. It is impossible to hold that the first part of the clause is not intended to have the same effect in the case of a defective title of a lord. It may happen that the lord may be insolvent or bankrupt, and that the remedy by action may be worth little or nothing unless the title to the manor is retained. Fraud would, no doubt, vitiate anything; but if the enfranchisement is effected *bonâ fide*, it is meant by this clause to be effectual against everybody, although neither the copyholder, nor the person acting as lord, had any right in or to the tenement enfranchised, and the title of the lord, like that of the copyholder, is not required by this act to be proved. The legislature thought that the risk of insolvency of the lord probably was not sufficient to counterbalance the advantage to be derived from the act, and, accordingly, they thought fit to make it compulsory; and although it is unnecessary to refer to other clauses, still the whole object of the 15 & 16 Vict. c. 51, as it clearly was of the 4 & 5 Vict. c. 35, is to make a perfect and binding enfranchisement, although the lord should have no title to the manor at the time he made it. There is nothing in the second question. It is, whether the agreement entered into between the parties with respect to the enfranchisement must be understood to include the minerals as well as the surface of the ground. The agreement is, that the vendor shall use his best endeavours to enfranchise the copyhold,

and as soon as the enfranchisement shall be perfected, to deliver to the purchaser an abstract shewing a good title. Then he is to execute and procure all proper parties to execute a conveyance "of the inheritance in fee simple of the said messuage, lands and hereditaments when so enfranchised." There certainly is nothing whatever in the agreement about minerals. But on this point I turn to both acts. By the 4 & 5 Vict. c. 35. s. 82. it is provided, "that no commutation under this act shall operate to affect any rights of lords of manors to (*inter alia*) any rights in any mines and minerals or quarries within or under the said lands and hereditaments, or any other manorial rights whatever, unless expressly commuted under this act." And the 15 & 16 Vict. c. 51. s. 48, the corresponding section, provides that "no enfranchisement under this act shall extend to or affect the estate or rights of any lord or tenant in or to any mines, minerals, limestone, lime, clay, stone, gravel-pits or quarries, within or under the lands enfranchised, or within or under any other lands" (and other manorial rights); the only difference between the two acts being, that under the 4 & 5 Vict. c. 35. the enfranchisement is not to affect these rights of the lord, unless expressly commuted; and under the 15 & 16 Vict. c. 51. they are not to be made the subject of any commutation at all, and they are not to affect it in the slightest degree. The parties to this agreement, therefore, at the time it was executed, must have had reference to these acts; and I assume that they had reference to the first act only, under which it may have been that the right to mines, &c. might have been made the subject of commutation; but then with reference to the 4 & 5 Vict. c. 35. they both knew it could be so if it were made the subject of express stipulation; and unless it were made the subject of express stipulation, this agreement must bear the same construction which an ordinary enfranchisement would under the 4 & 5 Vict. c. 35, namely, that unless specified it was not to affect those rights, and that the parties themselves understood that it was not to affect those rights unless stated. I am of opinion, therefore, that by this enfranchisement a good title is made to the en-

franchised copyhold, although the lord may have no title in him; and also that it was not intended that the enfranchisement should extend to the minerals and other matters specified in the act. The result is, that the chief clerk's certificate will be confirmed.

[See now the 21 & 22 Vict. c. 94.]

WOOD, V.C.	} COPE V. DOHERTY.
May 1, 3.	
LOKDS JUSTICES.	
May 22, 24; June 12.	

Merchant Shipping Act, 1854, Part IX.
—Limitation of Liability—Foreign Vessels
—Jurisdiction—Construction of Statutes—
Lex Fori—Demurrer.

A collision took place on the high seas between two foreign ships, by which one was sunk. The owner of the sunken ship recovered judgment in the Admiralty Court, whereupon the owners of the other ship filed a bill praying an injunction, and to have the value of their ship and her cargo ascertained. To this bill a demurrer was put in, and Vice Chancellor Wood, in allowing the demurrer, decided as follows:—That in construing an act of parliament the Court is bound by the verbal construction of the section in question, if plain and simple; but if there is any doubt upon that, it is entitled to look, first, at the circumstances attending the passing of the act, next, to the preamble, and, lastly, to the whole purport and scope of the act, beyond the section immediately under consideration; that, prima facie, the acts of each independent legislature must be supposed to deal with those matters only which are within its own jurisdiction; that Part IX. of the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104.), limiting the liability of shipowners, in case of loss or damage to any other ship, has no application where one of such ships is a foreign vessel, and, therefore, none where both are foreign; and that the lex fori applies only to the form of procedure, and not to the substance of the proceeding itself:—Held, on appeal, by the Lords Justices, affirming the decision of his Honour, that, excepting when foreign ships

are expressly mentioned, the Merchant Shipping Act, Part IX., applies only to British ships.

The bill stated that on the 28th of April 1857 a collision took place between the American ship *Tuscarora* and the American ship *Andrew Foster*, which resulted in the total loss of the *Andrew Foster* and cargo; that in respect of such loss, the plaintiffs, who were the owners of the *Tuscarora*, were answerable in damages to the extent and in manner mentioned in Part IX of the Merchant Shipping Act, 1854, that is to say, to the extent of the value of the *Tuscarora*, and the freight due or to grow due in respect of the voyage; but such value was insufficient to answer all the claims made or which might be made against the plaintiffs in respect of the loss of the *Andrew Foster*; that an action had been commenced in the Court of Admiralty against the *Tuscarora*, by some of the defendants, as owners or consignees of cargo on board the *Andrew Foster*, in which action judgment was obtained, whereby the present plaintiffs were condemned in the damages consequent on the collision, and costs, and the *Tuscarora* had been arrested, and was liable to be sold. The other defendants, owners of part of the cargo and part owners of the ship *Andrew Foster*, had commenced several similar actions, and the bill, therefore, prayed that the value of the *Tuscarora* and freight might be ascertained as the Court should direct, and distributed rateably among the several claimants; and that the defendants might be restrained from further proceeding in the Admiralty Court, and from selling the *Tuscarora*.

Some of the defendants demurred on the ground of want of jurisdiction, for that Part IX. of the above-named statute applied only to British vessels.

Mr. W. M. James and *Mr. G. M. Giffard*, in support of the demurrer, contended that the act had no application to the case of an American ship, and referred to—

The Dundee, 1 Hagg. 109.

The Carl Johan, cited Ibid. 113.

The Mitford, 31 Law Times, 42.

The Zollverein, 2 Jur. N.S. 429.

The Girolamo, 3 Hagg. 169.

All statutes were applicable *prima facie* to British subjects only, as appeared by analogy to the cases under the Legacy Duty Act, and copyright cases.—

Thompson v. the Advocate General, 12 Cl. & F. 1; s. c. 13 Sim. 153.

The Attorney General v. Forbes, 2 Ibid. 48; s. c. *Jackson v. Forbes*, 8 Bli. N.S. 15; 2 Cr. & J. 382; 2 Tyrw. 358; 3 Tyrw. 982; 1 Law J. Rep. (N.S.) Exch. 159.

Arnold v. Arnold, 2 Myl. & Cr. 256; s. c. 6 Law J. Rep. (N.S.) Chanc. 218.

Jefferys v. Boosey, 4 H.L. Cas. 815; s. c. 24 Law J. Rep. (N.S.) Exch. 81.

Mr. Amphlett and Mr. C. Hall, in support of the bill, referred to—

The Saracen, 4 Notes of Cases in the Eccles. and Mar. Courts, 498; s. c. 2 Rob. 451.

The Johan Friderich, 1 Rob. 35.

Mr. Rolt, Mr. Osborne, Mr. Pritchard, Mr. Clarkson, and Mr. Bardswell, for other defendants, who had not demurred.

Mr. James replied.

May 3.—WOOD, V.C.—The question in this case is one of considerable interest, and perhaps is not altogether, as was observed by Dr. Lushington in the case of the *Zollverein*, free from doubt or difficulty; but I think that in construing any act of the legislature the actual verbal construction of the clause itself, if plain and simple, must govern the Court. If there is any degree of doubt or difficulty upon the wording of the section itself, one is entitled to look first at the circumstances attending the passing of the act, next to the preamble, so far as it affords any indication as a key to the interpretation of it, and next, I may also say, to the whole purport and scope of the act, to be collected from its various clauses, and beyond the question which may arise upon the construction of the clause itself which is in dispute. Now, as regards the construction of the clause itself, no doubt, if we were simply dealing with legislation relating to shipping, the clear conclusion would be, that in the first instance it referred simply to the ships of the nation

whose legislature was passing the act in question. It seems to me to be the plain and obvious rule of construction that the acts of each independent country must be supposed to deal with those subject-matters which are within its own special controul and jurisdiction, as Dr. Lushington expresses it in that case of the *Zollverein*: "In looking to an act of parliament, and in considering whether it applies to foreigners or not, we are always to bear in mind the power of the British legislature; for it is never to be presumed unless the words are so clear that there can by no possibility be a mistake, that the British legislature exceeded that power, which according to the law of the whole world properly belongs to it. The power of this country is to legislate for its own subjects all over the world, and as to foreigners within its jurisdiction, but no further." Therefore, it would not be the *prima facie* construction of the clause presented for my consideration, that it is applicable to foreign ships on the high seas, and matters which in themselves would be entirely beyond the jurisdiction and scope of the legislature. However, there are other questions arising upon the construction of the remaining clauses of the act of parliament, wherein foreign vessels are from time to time affected, which may make it somewhat necessary to call in aid these additional guides for the construction which I have referred to, viz., the general circumstances under which the act of parliament was passed and the preamble of the act itself. Now, with regard to the circumstances under which the act was passed, and the preamble, they, in fact, resolve themselves into one question. Preamble there is none beyond the expression that "it is expedient to amend and consolidate the acts relating to merchant shipping," which opens a little wider the question as to the law with regard to foreign shipping. Upon that particular point one feels the difficulty at once which arises on the subject of the consolidation of the statutes in general in the minds of all who have had to deal with that subject, that it is a matter of very serious and grave difficulty to determine what would be the effect of consolidation, by introducing the identical words

which you find in a former statute, but denuded of the preamble which had formed in some degree a key to the existence of the particular statute in question, those words being found in combination with other clauses introduced by way of consolidation, and having perhaps the effect of affording a construction entirely different from that which has hitherto prevailed upon the very words of the previously existing statute. One sees the extreme difficulty in such a case of consolidating statutes of that description, which have been the subject of numerous decisions upon the words of the acts themselves, and therefore I find myself so far placed in a certain degree of difficulty upon Lord Stowell's decision in the case of the *Carl Johan*, as to whether or not that would properly be applicable to a statute which wants a preamble, and, as Mr. Amphlett has shewn me this morning, wants a particular clause, which singularly enough does not appear to have been adverted to in the judgment of Lord Stowell, and which would more specially have confined that act of parliament to the particular subject-matter of British shipping.

Now, at the time of the passing of this act, the existing law, which was consolidated under the present act, had thus been construed by Lord Stowell, in the case of the *Carl Johan*. The question arose upon the 53 Geo. 3. c. 159, as to whether or not that statute would be applicable with regard to foreign owners; and Lord Stowell there remarks, in some observations of importance, independently of the actual construction of the statute itself, that, "anciently the owners were, under the general law, civilly answerable for the total loss occasioned by the negligence or unskilfulness of the persons they employed; but the avowed purpose of the relaxation of this rule of law was to protect the interests of those engaged in the mercantile shipping of the State"—that refers clearly to the preamble of the act he was considering—"and to remove the terrors which would otherwise discourage persons from embarking in the maritime commerce of a country in consequence of the indefinite responsibility which the ancient rule attached upon them. It was a measure evidently of policy, and established by countries for the encourage-

ment of their own maritime interests." The question there was, whether the owners of a Swedish vessel could or could not claim the benefit of the act of parliament; but the general law there laid down seems to me to be very material in coming to a conclusion as to the object of the present statute, framed as it is by way of consolidation of the existing law. The present statute, I apprehend, is framed for the purpose, in the first place, of providing, so far as it gives remedy or relief, for the shipping of this country, but further than that, one is led to the conclusion necessarily upon this, that the general law, as Lord Stowell calls it, (by which, I apprehend, he was referring not only to the general law of this country, but of all nations, with regard to injuries of this description,) would have provided a more extensive remedy than that which is now provided by this act. This act restricts the remedy to the value of the vessel and freight, and so far materially affects the shipowner. Then the question which at once arises upon that is, whether or not the legislature of this country would have a right to restrict the privileges which foreign owners would enjoy under the general law of nations, and say, whenever you are run down by a British ship upon the high seas, if you seek your remedy under the general law of nations, which would entitle you to full damages in respect of all the injury occasioned, you are to be tied down by the municipal law to the limited relief we have thought proper to give. I apprehend such a construction would be one which, in the words of Dr. Lushington, would be the last one he ought to give. It would be an attempt, on the part of the British legislature, to legislate for foreigners, by taking away those rights and privileges which they enjoy by the general law which gives full compensation for damages, and to tie them down to the limited remedy which extends simply to the property of the owner of the particular ship which has inflicted the damage. Such course of proceeding would be, as regards many countries, extremely inequitable in every point of view. One can easily conceive that the legislature of this nation, a vast maritime nation with an immense commercial marine, may say, looking to

the large number of vessels of this country plying to every quarter of the globe, and along every portion of the coast, the chance is as fair to the one as it is to the other of doing serious damage, whereby great loss may accrue to shipowners with limited capital, in being made liable for the negligence of their servants to the total amount of their fortunes, which, no doubt, would be to discourage the employment of a limited amount of capital in the mercantile marine, and it is very desirable that we should curtail the principles of the general law in settling what the sufferer would be entitled to, because every one of you may in turn be liable to the chance of inflicting the injury which you are in turn suffering. But it would be a very singular restriction with regard to other nations not so circumstanced. Independently of the general consideration of the impropriety of restricting the mutual rights of foreigners, there are many nations in Europe with a much more limited marine than our own who sail along the narrow seas, and are far more liable to suffer than to commit injury, from the large description of vessels engaged in carrying on the great commerce of this country; and it would be unreasonable, I think, to hold that there was any intention on the part of the legislature to say that any foreign vessel, whether it belongs to Sweden, Portugal, Spain or any other country, is to be limited, in its natural right to recover full damages, to the amount prescribed by the act. It seems to me so contrary to all principle to adopt such an interpretation, that, unless there is something conclusive upon the general frame and scope of the act, it is impossible to arrive at such a construction. If one looks to the general frame and scope of the act, no doubt it somewhat favours the construction of the plaintiffs. I find Dr. Lushington did not proceed upon the definition of the word "ship"; he was simply determining, as regards the vessel, without reference to its nationality, that it meant such and such a thing; and there is nothing from which I can judge whether or not it was intended that "ship," which *primâ facie* would, I apprehend, have meant an English ship, was to have a larger and more general signification; but when you come to the divi-

sional parts of the act, there seem to be some portions which specifically point to British ships. It is divided into several Parts; and the Second Part is with reference to British ships, their ownership, measurement, register and so on. Some sort of inference may be raised upon that, that, when British ships are not named in the act, ships generally are to be intended, that is to say, all ships. The Fourth Part, which relates to the prevention of injury or accident, and which was the section that Dr. Lushington had to consider in the case of the *Zollverein*, says, "this act shall apply to all British ships, and all foreign steamships carrying passengers between places in the United Kingdom shall be subject to all the provisions contained in the Fourth Part of this act, and likewise to the same provisions with respect to the certificates of masters and mates thereof, to which British ships are subject." Really, if you consider the whole of the wording, although it points out the two clauses, it is rather favourable for the contention that foreign ships are not intended, except where specifically adverted to, and in the case where they are, you find it is a most reasonable act of legislation, and not contrary to any of those principles to which I have been referring. It alludes to steamships carrying passengers from one port of the United Kingdom to the other. Nothing can be more reasonable than for any country to say, when you are passing along our seas from port to port, you shall be subject to the rules and regulations which our country thinks fit to impose upon all who are either occasioning or suffering hazard or damage. Then the other clause, which is the very clause under which the plaintiffs in the Admiralty Court are proceeding, and which the plaintiffs in equity now seek to restrain, is a special clause, pointing to what is to be a remedy in case of foreign ships, and therefore again shewing by that specialty the intention of the legislature so far to deal only with foreign ships, to the extent that it is reasonable and right they should be dealt with in the manner provided for. Nothing can be more right and reasonable than that, if you find the ship of the wrongdoer within your jurisdiction, you should lay hold of the vessel, in order to enable you

to bring the wrongdoer to do you such justice as should be arrived at. In that case, if no bail were given, it would result in the sale of the ship; but if bail were given, he would subject himself to the general jurisdiction of the Courts of this country.

I ought to mention what was referred to in Mr. Amphlett's argument, that there are other passages in the act, such as those referring to salvage and pilotage, in which the words "foreign ships" are not introduced, the word "ship" alone being generally used. As to that, all I can say is, that it is not by any means thoroughly clear to my mind that this section would have a general and necessary application to all foreign ships, but if it had, it could only arise from the circumstance on which the argument is based, namely, that the necessary construction of the clause itself shews that every ship is indicated, and that there again the right would arise from there being a necessity for dealing with that which takes place on our own shores, and within the immediate purview and proper jurisdiction of our own legislature; for instance, in the case of salvage and wrecks upon the British shores, it would be very reasonable that the legislature should deal with that in any manner it might think proper; and, again, with regard to British pilots, they are men who have to be regulated of necessity by a certain amount of legislation; and also with reference to any dues and the like which may have to be paid for the user of that which is upon our own shores, and with reference to the piloting of ships within the narrow seas which are a part of the realm of Great Britain within our own jurisdiction. There the nature of the case would indicate of itself, that you are about to deal with that which may be a proper subject of legislation in this country.

I have considered only the question between a ship of this country and a ship of a foreign country; but the notion that the legislature could be contemplating a restriction of natural rights as between two mariners of a foreign country on the high seas is still more startling than that which would presume an intention to deal with those foreigners, when those who are affected by their act should be themselves British. It seems to me that it would be

a presumption of a most singular character to suppose that there was any intention to frame a contract contrary to the natural law, as Lord Stowell expresses it, between two foreigners, whom, of course, the legislature would have no right to affect in any manner, either, on the one hand, by regulating the natural law, or, on the other, by interfering with the peculiar municipal law, if I may so term it, that those two foreigners would have recourse to in their dealings with each other. Upon this part of the case, I ought to observe, it was contended, that the *lex fori* should prevail on the general ground on which the *lex fori* is held to operate. I apprehend that it is clearly laid down by Dr. Lushington in the case of the *Zollverein* that the *lex fori* has application (and he cites with approbation Mr. Justice Story's work upon that subject) to everything concerning the form of procedure, but none whatever to the substance of the proceeding itself; and an act which says that damage shall be limited to a given amount is evidently an act which deals with the substance and not with the form of the procedure in any way. It, in effect, forms a contract: whereas by the natural law you would be entitled to damages to the amount of the damage you have sustained, this act imposes upon all those persons upon whom it can impose such a contract, that is to say, upon all its own subjects, that you shall not recover that which the ordinary law, the common law, as we should call it here in England, would give you, but it imposes upon you a contract that you shall be entitled only to the amount of the value of the vessel which has done the damage, and the freight due or to grow due during the voyage.

I will now consider the wording of the section itself, so far as it throws any light upon the particular point which is now in issue. The Ninth Part commences by declaring what the liability shall be. It says, "the Ninth Part of this act shall apply to the whole of Her Majesty's dominions." That I apprehend, in itself, is rather unfavourable to the contention of the plaintiffs than otherwise, as indicating simply what one would expect *a priori*, that it is not intended to confine the operation of the act to Great Britain, but to extend this portion of it to the whole of Her Majesty's

dominions, and to all those who may be dwelling in the colonies, as well as in this country; but, certainly, it can have nothing favourable to the plaintiffs' contention in its construction, as applying to anything at all that takes place beyond that sphere, although it may not be inconsistent with the plaintiffs' contention that when the litigation is within Her Majesty's dominions it is to be applied to that litigation. Then, the first part of the 503rd section begins thus: "No owner of any sea-going ship or share therein shall be liable to make good any loss or damage that may happen without his actual fault or privity of or to any of the following things, that is to say, first, of or to any goods, merchandise or any things whatsoever taken in or put on board any such ship, by reason of any fire happening on board such ship; secondly, of or to any gold, silver, diamonds, watches, jewels or precious stones taken in or put on board any such ship, by reason of any robbery, embezzlement, making away with or secreting thereof, unless the owner or shipper thereof has, at the time of shipping the same, inserted in his bills of lading, or otherwise declared in writing to the master or owner of such ship the true nature and value of such articles, to any extent whatever." Now it would be a most singular limitation for us to impose upon a foreigner, if we were to say that no liability whatever should be incurred by the owner in case of those things happening without his fault or privity. It does not apply to running down so much as it does to embezzlement or fire, and there is nothing to lead one to the supposition that foreign vessels were under consideration. The 504th section is the one in question: "No owner of any sea-going ship or share therein shall in cases where all or any of the following events occur without his actual fault or privity, that is to say, first, where any loss of life or personal injury is caused to any person being carried in any such ship; secondly, where any loss or damage is caused to any goods, merchandise or other things whatsoever on board any such ship; thirdly, where any loss of life or personal injury is by reason of the improper navigation of such sea-going ship as aforesaid, caused to any person carried in any other ship or boat; fourthly, where

any loss or damage is by reason of such improper navigation of such sea-going ship as aforesaid, caused to any other ship or boat, or to any other goods, merchandise or other things whatsoever on board any other ship or boat,"—that is the clause in question,—“be answerable in damages to any extent beyond the value of his ship and the freight due, or to grow due, in respect of such ship during the voyage, which, at the time of the happening of any such events as aforesaid, is in prosecution or contracted for.” Now it would seem, as I said before, upon the principle I have endeavoured to enunciate, very singular, that it should be supposed that the legislature intended to cut down the right of any foreigner as between himself and a British owner, and still more between himself and another owner of another country, to this particular and limited remedy. Then comes at the end of this clause a passage which is of great importance, unquestionably, in construing the whole section. It says, “Where any such liability as aforesaid is incurred in respect of loss of life or personal injury to any passenger, the value of any such ship and the freight thereof shall not be taken at less than 15*l.* per registered ton.” There you have at once a limit which clearly refers and can refer only to British vessels. The registered ton is ascertained by British law, and by a very peculiar and minute series of directions. I am not aware whether it is the fact or not, in every other country, that the ships are registered by the ton. I believe they are not registered by such an artificial mode of calculation as that by which the tonnage of our navy is ascertained; it is of a character extremely artificial, not recognized by foreigners, and as to which it would be extremely difficult for anybody to arrive at a conclusion, in case of an accident, whether or not the tonnage was capable of being ascertained.

Therefore it is quite plain upon that section, that in legislating on these matters there is a contract made with those who are injured, that they shall not proceed against the owner for more than a certain amount of damage; but there is still given this further advantage, whilst restricting your common-law right, that if you are a person injured in limb, or the executors of

a person whose life is lost, then you shall have that injury rated at 15*l.* per ton. Now, how could any person who had been injured by a foreign vessel ever exercise a right of that description? In the first place, it is by no means clear,—on the contrary, I apprehend it would not be according to what is termed the natural law, that law which governs all civilized nations,—that any compensation for loss of life should be obtained at all. It is not the common law of this country, however reasonable it may be, that where a person's life is lost his executors should obtain a remedy for that loss. I apprehend the same rule would apply with reference to the general law of most European nations; and therefore the very circumstance of finding this provision as to life is a strong indication of what the intention of the legislature was in laying down rules for the restriction of damages, viz. that it should be applicable to British shipping, and British shipping only.

Now as to the mode of procedure, there is an elaborate series of provisions in case of loss of life, and so on, which would have no application whatever to any foreign jurisdiction. It seems, if you are capable of finding a defendant, you are to sue. It does not in the least contemplate the case of a foreigner being the party interested; in case of loss of life, foreigners, except for this act of parliament, would be under no liability whatever. Then there are rules afterwards laid down with reference to the distribution and arrangement of damages; and then you come to a clause, the only clause which creates any possible doubt, as it seems to me, upon the construction of the act; "that nothing in this act contained shall be construed to lessen or take away any liability to which any master or seaman, being also owner or part owner of the ship to which he belongs, is subject in his capacity of master or seaman, or to extend to any British ship, not being a recognized British ship within the meaning of this act." The argument of course upon that is, that, unless the whole section was intended to apply to foreign shipping, the mentioning of any British ship here would be entirely unnecessary; the legislature would have said it shall not extend to any ship not recognized as a British ship, that there is no necessity to name

British ships at all, because if you said "any ship which is not a recognized British ship within the meaning of the act" should not be included, nobody would ever dream of a foreign ship being intended, and the introduction of a British ship would be superfluous. But that seems far too small a point to lay hold of in the wording of this act to override those higher principles of construction which necessarily, as it appears to me, govern the case, as they are laid down in the judgment of Dr. Lushington in the case of the *Zollverein*. I may observe, that it is very singular, certainly, that in the short report we have of the *Carl Johan*, the section which Mr. Amphlett has this morning referred to, and which would seem in itself to be sufficiently conclusive of the matter, does not appear to have been noticed; and it is also somewhat remarkable that Dr. Lushington, in the case of the *Zollverein*, does not refer to that particular division of the act which he was then dealing with, being expressly applicable to foreign vessels of a certain qualified character, which was not the character of the vessel then under his consideration. He remarks upon a portion of the argument of Dr. Twiss upon that subject; but he does not remark that that particular part of the section was to be confined to a certain class of vessels, such as coasting vessels which ply from port to port; but at the same time I have the great advantage of having such minds as those of Lord Stowell and Dr. Lushington, so peculiarly competent to deal with questions of international law of this description, upon the general principles which ought to regulate me in deciding this case; and I decide entirely upon those general principles which to my mind render it proper that every Court of judicature should consider that the legislature of the country is simply, unless otherwise expressed, to regulate those rights which exist between its own subjects, and that it never can be a sound rule in construing our statutes, unless from absolute necessity, to suppose that there is any intention to restrict or enlarge the rights of foreigners. I think there was no intention on the part of the legislature to interfere with the rights of a foreigner in respect of matters occurring out of the jurisdiction of

the Courts of Great Britain, as between himself and one of our own subjects, and still less to regulate the rights as between two foreigners of another state with regard to any matter happening wholly out of the jurisdiction of the Courts of this country; and I hold further, that with regard to the regulation of the rights by the statute before me now, nothing whatever is done which can be considered as merely regulating the form of judicial proceeding; that that which is done is to regulate the liability of the owner of the vessel; to regulate the very substance of the matter in respect of which the judicial procedure is to take place; and therefore it is that the *lex fori* cannot prevail in such a case. It is founded upon a particular species of legal contract; that legal contract cannot be imposed as between a subject of this country and a foreigner, and still less can it be imposed upon two foreigners, whose rights must be governed by entirely different principles. I have not commented upon the fact alluded to by Mr. Amphlett, that the law of America is identical with the law of this country. As to that, it is a fact to be averred and proved, and, of course, if that law is so averred and proved, a case of a different description might be made as between the foreign owners. The proper course will be to allow the demurrer, without liberty to amend against all the English owners, and with liberty to amend against the Americans (1), as it is suggested that there is a proper case to be tried upon the law as between the Americans themselves.

May 22, 24. — From the above decision the plaintiffs appealed; and at the opening of the argument the following admission was agreed upon:—That the collision occurred in the Irish Channel, on the high seas between Tuskar and Barnstaple; that both ships then belonged, and the *Tuscarora* still belongs, wholly to citizens of the United States of North America, and that both ships are to be regarded, as respects Great Britain, as foreign ships. Upon this basis the case was argued on appeal.

(1) It appeared, however, that none of the American owners had demurred.

The Solicitor General, Mr. Amphlett and *Mr. Charles Hall* were for the appellants, citing, in addition to several of the authorities relied on by the plaintiffs in the court below, the following cases:—

The British Linen Company v. Drummond, 10 B. & C. 903.

Don v. Lippman, 5 Cl. & F. 1.

Lopez v. Burslem, 3 Moore P.C. 300.

De Vega v. Vianna, 1 B. & Ad. 284.

Leroux v. Brown, 12 Com. B. Rep. 801; s. c. 22 Law J. Rep. (N.S.) C.P. 1.

The Vernon, 1 Rob. Adm. Rep. 316.

Statutes 53 Geo. 3. c. 159. and 17 & 18 Vict. c. 104.

Mr. W. M. James and *Mr. G. M. Giffard* cited, besides the cases relied on in the court below—

The Grimsby, cited in Dr. Pratt's New Admiralty Regulations.

The Solicitor General was heard in reply.

June 12.—LORD JUSTICE KNIGHT BRUCE. —The first two paragraphs in the bill in this cause are thus worded:—"On the 28th of April 1857, a collision took place between the American ship *Tuscarora*, of which the plaintiffs are owners, and an American ship called the *Andrew Foster*, shortly after which collision the *Andrew Foster* foundered, and was, together with the cargo laden thereon, lost. In respect of the loss of the said ship the plaintiffs are answerable in damages to the extent and in manner mentioned in Part IX. of the Merchant Shipping Act, 1854; that is to say, to the extent of the value of the *Tuscarora*, and the freight due or to grow due in respect of her then voyage; such value, however, is insufficient to answer all the claims made or which may be made against the plaintiffs in respect of the loss of the said ship *Andrew Foster*." There is no statement in the bill of the place where, or any place near which, the alleged collision happened, but it was agreed between the counsel that it should be deemed to have happened at sea, in the Irish Channel, between Tuskar and Barnstaple, and they also agreed that the vessels should be taken as having belonged, and the *Tuscarora* as

still belonging, wholly to citizens of the United States of America, and that both ships with regard to Great Britain must in every sense be considered as foreign vessels. The question is, whether the 504th and 514th sections of the Merchant Shipping Act, 1854, (the 17 & 18 Vict. c. 104.), or either of them, ought to be construed as applying to such a case; at least the plaintiffs, the appellants, have not, nor could they reasonably have contended that their bill has any foundation, unless those two sections, or one of them, ought to be so interpreted; and I am of opinion, considering the state of the law of this country immediately before the passing of the act, and considering the context, that we ought not so to construe the 504th and 514th sections, or either of them. In other words, the language of the statute does not appear to me to shew that any provision was intended to be made by either of the two sections for the case of damage done at sea by a vessel in every sense foreign, to another vessel in every sense foreign, or to her cargo. I assume the plaintiffs would have been right if both the *Tuscarora* and the *Andrew Foster* had been British in ownership and character, all things else being the same; nor do I say whether the plaintiffs would have been right or wrong, if one only of the two ships had been of that description, or if the collision had happened in a British river or a British port. But as the facts are, the plaintiffs seem to me, I repeat, to have no case here. Stress was laid by the learned counsel on the word "British" in the 516th section, where it is first used—a circumstance which, however, in my opinion, does not assist them. I consider it to be clear that, independently of that word, the plaintiffs are not within the act, and we should, I think, be giving an undue and improper effect to it were we to hold that it changes the construction of the statute for the purpose in contention; nor, in saying this, do I forget the language of the 18th, 19th, 106th, 109th and 291st sections, the preamble, the interpretation clause, the expression of the 5th section, the 527th, 528th, and 529th sections; and the statute of the 17 & 18 Vict. c. 120. (the Merchant Shipping Acts Repeal Act, 1854). The Vice Chancellor

having allowed the demurrer, that decision ought not in my judgment to be disturbed.

LORD JUSTICE TURNER.—After having given this case very attentive consideration, I have come to the same conclusion as my learned Brother and the Vice Chancellor have arrived at, and am of opinion that this demurrer was properly allowed. This bill is filed by American owners of an American ship, against the owners of another American ship, also Americans, and the owners of the cargo on board the latter ship, stating a collision between the two ships, by which the latter of them was sunk, and praying to have the value of the plaintiffs' ship, and of the freight for her voyage, ascertained and apportioned between the parties interested in the ship and cargo lost by the collision, and to restrain proceedings against the plaintiffs in respect of the damages incurred by the defendants. The plaintiffs can only be entitled to this relief if they can bring the case within the provisions of the 514th section of the Merchant Shipping Act of 1854, and the question, therefore is, whether that act extends to a case of collision between foreign ships, of which the owners are foreigners. This act is divided into several Parts, each of which relates to a distinct and independent branch of the Merchant Shipping law. The act, indeed, may well be considered as embodying several distinct acts in one act, and one part of the act throws no further light upon the other parts of it than would be cast upon them by the existence of other separate and distinct enactments to the same effect. It is upon the Ninth Part of this act, with the light thrown upon it by the other parts of the act, and with the aid, of course, of the interpretation clause, which applies to the whole act, that the question now before us depends. This ninth part of the act relates to the "liability" of shipowners. It first provides that this part of the act shall apply to the whole of Her Majesty's dominions, which I take to mean no more than that it is to be in force throughout those dominions. It then lays down the rules which are to govern the liability of shipowners. It next points out the course of procedure, and then it winds up with a limiting pro-

vision, specifying some cases to which this part of the act is not to apply or extend. In construing this part of the act we ought, I think, in the first place to consider to what cases the rules which are laid down were meant to extend, and then what is the effect of the limiting provision; for no fair judgment can be formed as to the effect of that provision until it is known to what the limit was intended to be applied. To what cases, then, were those rules intended to extend? They are contained in the 503rd and 504th sections of the act, which are as follows:—"No owner of any seagoing ship or share therein shall be liable to make good any loss or damage that may happen without his actual fault or privity of or to any of the following things (that is to say): of or to any goods, merchandise or other things whatsoever taken in or put on board any such ship, by reason of any fire happening on board such ship; of or to any gold, silver, diamonds, watches, jewels or precious stones taken in or put on board any such ship, by reason of any robbery, embezzlement, making away with or secreting thereof, unless the owner or shipper thereof has at the time of shipping the same inserted in his bills of lading or otherwise declared in writing to the master or owner of such ship the true nature and value of such articles." Then the 504th section is in these terms: "No owner of any seagoing ship or share therein shall, in cases where all or any of the following events occur without his actual fault or privity—that is to say, where any loss of life or personal injury is caused to any person being carried in such ship; where any damage or loss is caused to any goods, merchandise or other things whatsoever on board any such ship; where any loss of life or personal injury is, by reason of the improper navigation of such seagoing ship as aforesaid, caused to any person carried in any other ship or boat; where any loss or damage is by reason of any such improper navigation of such seagoing ship as aforesaid caused to any other ship or boat, or to any goods, merchandise or other things whatsoever on board any other ship or boat—be answerable in damages to an extent beyond the value of his ship and the freight due, or to grow due, in respect of such ship during

the voyage which at the time of the happening of any such events as aforesaid is in prosecution or contracted for, subject to the following proviso (that is to say), that in no case where any such liability as aforesaid is incurred in respect of loss of life or personal injury to any passenger shall the value of any such ship and the freight thereof be taken to be less than 15*l.* per registered ton." And the 514th section provides that "in cases where any liability is alleged, and actions are brought, persons may come to a Court of equity to have the value ascertained." And the 515th section is, that "all sums of money paid for or on account of any loss or damage in respect whereof the liability of the owners of any ship is limited by the Ninth Part of this act, and all costs incurred in relation thereto, may be brought into account among part owners of the same ship, in the same manner as money disbursed for the use thereof." Now, the words of these sections, the 503rd and 504th, are no doubt wide and extensive. The words "any sea-going ship," construed with reference to the interpretation clause, would embrace every vessel navigating the sea which is not propelled by oars. But it does not follow, because general words are used in an act of parliament, that every case which falls within the words is to be governed by the act. It is the duty of Courts of justice so to construe the words as to carry into effect the meaning and intention of the legislature. We had occasion very much to consider this point in the case of *Hawkins v. Gathercole* (2), in which case we restrained the effect of general words in the act on which that case depended; and there are many other cases in the books to the same effect, some of which are referred to in that case, and others of which are not there referred to, but are to be found in *Vin. Abr.* under the title "Statutes." Was it, then, the intention of the legislature that the general words contained in the sections to which I have referred should extend to the case of a collision between foreign ships owned by foreigners? I think that it was not. This is a British act of parliament, and it is not, I think, to be presumed that

(2) 6 De Gex, M. & G. 1; s.c. 24 Law J. Rep. (N.S.) Chanc. 332.

the British parliament could intend to legislate as to the rights and liabilities of foreigners. In order to warrant such a conclusion, I think that either the words of the act ought to be express or the context of it to be very clear. The circumstance of foreign vessels being affected by some other parts of the act was relied on on the part of the appellants, in support of their argument that they were intended to be included in this part of the act also; but the parts of the act which affect foreign vessels apply to different subjects, and may well rest on different considerations, and this part of the appellants' argument is not therefore, I think, entitled to any weight. Another consideration which, as it seems to me, bears strongly upon the construction to be put upon the general words of these sections of the act is, I think, furnished by considering the source from which these sections are derived. They are plainly taken from the 53 Geo. 3. c. 149, and the prior acts on which that statute was founded, and those acts had before the passing of this act been decided not to apply to foreign vessels. The legislature cannot be supposed to have been ignorant of that decision at the time this act was passed; and it cannot, I think, be imputed to it, that, with that knowledge, it intended to alter the law on this important question without some more definite expression of that intention. But what seems to me to be still more decisive upon the subject is the context of the act. If the 504th section reaches the case of a collision between foreign vessels owned by foreigners, the 503rd section must also reach that case; for in each of those sections the words are "no owner of any seagoing ship or of any share therein;" and then we must suppose that the British parliament meant by this act to legislate upon the questions what should be inserted in the bills of lading of foreign shippers, and what should be declared by them to the masters of the vessels on board which their goods should be shipped. There is besides this the provision as to the registered tons, which of course must mean registered tons according to the measurement prescribed by the act, the act having no reference to the measurement of foreign ships. And there is also the provision as to the account

between the part owners, which cannot surely have been intended to have effect in foreign courts. I am satisfied, therefore, that, upon the true construction of the clauses to which I have referred, taking them apart from the limiting provision, they were not intended to apply to foreign ships owned by foreigners. Then, does the limiting provision which is contained in the 516th section of the act alter this construction? Now that limiting provision is this:—"Nothing in the Ninth Part of this act contained shall be construed to lessen or take away any liability to which any master or seaman, being also owner or part owner of the ship to which he belongs, is subject in his capacity of master or seaman, or to extend to any British ship not being a recognized British ship within the meaning of this act." I am of opinion that the construction which I have put upon the previous parts of the ninth division of this act is not altered by this section; for foreign ships owned by foreigners being excluded, and it being clear that there can be no foreign owner of a British ship, the words "no owner," in the 504th section, can only mean, and must be read "no British owner;" and as to the words "any seagoing ship," they must of course either mean, and must accordingly be read, "any British seagoing ship," or "any British and foreign seagoing ship," according as the act is limited in its operation to British ships, or extends to British and foreign ships—a point which I leave wholly untouched. But in either case, whether it be "no British owner of any British ship," or "no British owner of any British and foreign ship;" in either of these cases the proviso that the act shall not extend to any British ship, not being a registered British ship, fits perfectly well to the enactment, without involving any such consequences as the appellants have contended for. An attempt was made on the part of the appellants to bring this case within *Donn v. Lippman*, and cases of that class; but I think those cases have no bearing upon the point. This is a question of liability and not of procedure. Upon the whole, therefore, my opinion is, that this appeal must be dismissed, and dismissed with costs.

M.R. }
Feb. 24, 25. } ELLIS v. COLMAN.

*Company—Misrepresentations—Directors
—Contract Ultra Vires.*

*A managing director of a company induced contractors to receive payment for work done in preference shares of 5*l.* each, on which 3*l.* per share had been paid, upon an understanding, which was confirmed by a resolution at a board meeting, that no more than 3*l.* per share would be called, and that they would indemnify them against further calls, and also accept a part of such shares at par in payment of calls, should any be made. The company did afterwards make a further call, but they refused to abide by the contract or the resolution, alleging that it was invalid. Upon a bill by the surviving contractor against the managing director and another to obtain a performance of the agreement,—Held, upon demurrer, that the directors making the contract were not compellable to perform the agreement or to make good the representations made, that they could not comply with any decree or order that might be made for the specific performance of the agreement, and that the remedy was at law in an action for damages.*

Messrs. Ellis & Husler were contractors for works to complete the Waterford and Kilkenny Railway. Josiah Bates and Charles Robert Colman were directors of the company, but the former was considered the manager. The estimated amount of the contract was 14,000*l.*, exclusive of extra works. The company, when it entered into this contract, had not the money to complete the railway, but an arrangement was in progress with the Public Works Loan Commissioners for a loan of 40,000*l.* (1), and it was estimated that 26,000*l.* of this sum would be applicable towards paying what might become due to Messrs. Ellis & Husler under their contract. The excess beyond that sum it was proposed to pay in 5*l.* shares, bearing a preferential dividend of 6*l.* per cent. per annum. On each of these shares it was to be considered that 3*l.* was paid up. The preference shares had been issued to the public, with an intimation that no further call

beyond the 3*l.* per-share would be made. This was advertised in the following terms:—

“Waterford and Kilkenny preference Shares.—40,000*l.* of 5*l.* each *nominally*, but only 3*l.* in *reality*.

“These shares are issued at 5*l.* each, but no more than 3*l.* will be called up, the Government Loan Commissioners objecting to advance 40,000*l.* unless the shares were issued at 5*l.* each. To close the capital account 160,000*l.* are required, and no more, which consists of 120,000*l.* in the shape of 40,000 shares of 3*l.* each, and 40,000*l.* the amount of the loan.”

During the negotiations the liability of Messrs. Ellis & Husler to the payment of future calls on these preference shares was discussed; but the board and its officers positively asserted that no call would or could ever be made; and ultimately to set at rest all doubts, Mr. Bates undertook to obtain a positive engagement on the part of the directors, by a resolution that Messrs. Ellis & Husler should not be required to pay any future calls on the shares to be taken.

On the 30th of May 1851 a contract was accordingly prepared between Messrs. Ellis & Husler of the one part and the company of the other part. It embodied the terms of the contract, but at the request of the company's solicitors no provision was introduced to exempt Messrs. Ellis & Husler from the payment of any future calls upon the preference shares which they were to take for work to be done. Messrs. Ellis & Husler executed the deed, both parties at the time understanding that the arrangement should be carried into effect.

The directors subsequently proposed to Messrs. Ellis & Husler that they should subscribe for 16,670 shares, to be delivered according to the contract in payment for work done. This proposal they acceded to, but they declined to execute the share-deed, as it contained a covenant to pay all future calls in respect of the shares subscribed for, which they considered inconsistent with the arrangement they had made.

To remove this objection Mr. Bates, on the 25th of June 1851, wrote:—

“It appears there is another objection.

(1) 9 & 10 Vict. c. 80.

You do not like to sign for shares on which 3*l.* are paid, when there exists a possibility of 5*l.* being called up. Had this been stated before, the difficulty would have been instantly removed. It would be manifestly unfair on the part of the board to impose any additional payment upon you. Such an event would be contrary to the entire spirit of the contract, as well as to the letter. I will, therefore, obtain for you a letter from the board undertaking, in the event of such a circumstance taking place, either to receive the payment of the additional amount called up from you in preference shares, or exchange the 3*l.* shares for paid-up 5*l.* shares. If this will be satisfactory to you, please say so, and I will obtain a resolution to that effect on Monday next."

On the faith of this letter Messrs. Ellis & Husler executed the deed for 16,670 shares; and a board of directors, on the 5th of September 1851, passed a resolution in the following form:—

"Messrs. Ellis & Husler having requested that the board would pass some resolution indemnifying them from the payment in cash of future calls over and above 3*l.* per share upon the shares to be taken by them in pursuance of their contract, and agreeing to accept a proportion of such shares in payment of such calls, in case they should hereafter be made, it was resolved, 'That the board accede to such proposition.'"

A copy of this resolution was forwarded to Messrs. Ellis & Husler, by the secretary.

Messrs. Colman and Bates, and two other directors, since deceased, were present at the board meeting when this resolution was passed.

The bill alleged that the letter of the defendant Bates and the resolution amounted to an express agreement and undertaking by Messrs. Colman and Bates, and the other directors who concurred in passing the resolution, on the part of the company, to indemnify Messrs. Ellis & Husler from any payment in cash of future calls over and above 3*l.* per share upon the shares to be taken by them under their contract, and to accept, on the part of the company a portion of such shares at par in payment of such calls, and that the defendants, by

joining in such resolution, and causing it to be sent to Messrs. Ellis & Husler, and otherwise by representing to them that the company, of whom they were the agents, by the terms of their act and otherwise, had the power, and had authorized them to enter into the agreement on their behalf, had induced Messrs. Ellis & Husler to believe that such representations were true.

The contractors commenced work on the 16th of September 1851, and from time to time, as the work progressed, a large number of shares were transferred to them.

Mr. Husler afterwards died, and upon the company calling up 2*l.* per share Mr. Ellis, in compliance with the resolution of the 5th of September 1851, tendered the requisite number of shares to the company in payment of the calls. The company refused them, and alleged that they were not bound by the resolution. The plaintiff, therefore, was compelled to pay cash. The shares fell to a discount, and the plaintiff alleged that by the repudiation of the resolution he had sustained a loss of more than 16,000*l.*

The bill then alleged generally that at the time when the resolution was passed, and throughout the whole of the preceding transactions with Messrs. Ellis & Husler as such contractors, the defendants Messrs. Colman and Bates were well aware, as the fact was, that the company had no power to enter into the agreement respecting the shares contained in the letter of Mr. Bates; that they were not authorized by the company to enter or to attempt to enter into the same on their behalf, but that the last-named defendant concealed the same from Messrs. Ellis & Husler, and led them to believe on all occasions that they were authorized by the company to enter into the agreement, and that the same was within the powers of, and would be strictly acted upon by the company. Under these circumstances, therefore, it was submitted that Messrs. Colman and Bates were personally bound by the agreement, and ought to indemnify the plaintiff and the estate of Mr. Husler (whose personal representative was a party to the suit,) from the consequences of the company's repudiation of the agreement.

The bill then prayed that the defendants

might be decreed to indemnify the plaintiff and the estate of Mr. Husler, deceased, from all liabilities in respect of the preference shares, contrary to the true intent and meaning of the agreement; and that they might be decreed, as far as possible, specifically to perform the said agreement, and to pay to the plaintiff the total amount of the call which had been paid by him in respect of the preference shares, the plaintiff being ready and willing, and thereby offering to deliver and transfer to the defendants so many 5*l.* preference shares as, taken at par, would be equal in value to the amount so to be paid by them to the plaintiff.

To this bill two demurrers were put in, one by C. R. Colman and the other by Josiah Bates, who each insisted that the plaintiff was not entitled to any relief for want of equity.

Mr. Selwyn and Mr. Begbie, for Mr. Colman.—The agreement made with Mr. Bates was, that the board should pass a resolution to indemnify them from the payment of future calls over and above 3*l.* per share, and that in case of calls they would accept a portion of the shares in payment. This was brought to the attention of the board, but all they resolved was, "that the board accede to such proposition." This was exceedingly vague. The company could not be brought before the Court. It was indeed difficult to see how such a bill as this could be filed for specific performance of such an undertaking, or how it could be asked that Messrs. Colman and Bates might indemnify the plaintiff against any payment made in respect of these preference shares. It was alleged that Messrs. Colman and Bates had been guilty of misrepresentations, and that they were personally bound by the agreement; but that would not support this bill. The only case made was for damages—*Gerhard v. Bates* (2).

Mr. Lloyd and Mr. Surrage, for Josiah Bates.—If an agent made false representations of the extent of his powers, he was

liable personally to make them good. Mr. Bates, however, had made no misrepresentations, neither had he incurred any personal liability. Messrs. Ellis & Husler well knew when they executed the deed that they were bound to pay the whole of the calls.

Mr. R. Palmer and Mr. C. Hall, for the plaintiff.—Nothing was delegated to Messrs. Colman and Bates by the shareholders but what was *intra vires*. If the plaintiff were led by erroneous representations into this contract, it was the duty of the defendants to take the shares off his hands. The Courts recognized the right to proceed against persons who, acting for an incorporated body, entered into transactions which did not bind the company.—

Polhill v. Walter, 3 B. & Ad. 114; s. c. 1 Law J. Rep. (N.S.) K.B. 92.

Smout v. Ilbery, 10 Mee. & W. 1; s. c. 12 Law J. Rep. (N.S.) Exch. 357.

Reynell v. Sprye, 1 De Gex, M. & G. 710; s. c. 10 Beav. 51; 16 Law J. Rep. (N.S.) Chanc. 117; 21 Law J. Rep. (N.S.) Chanc. 13, 633.

Smith's Mercantile Law, 172, 5th ed.
Stainbank v. Fearnley, 9 Sim. 556; s. c. 8 Law J. Rep. (N.S.) Chanc. 142.

Burnes v. Pennell, 2 H.L. Cas. 522.
Bell's case, 22 Beav. 35; s. c. 26 Law J. Rep. (N.S.) Chanc. 137.

Holt's case, 22 Beav. 48.

Blake v. Mowatt, 21 Beav. 603.

In re the Vale of Neath Brewery, ex parte Morgan, 1 Mac. & Gor. 225; s. c. 1 Hall & Tw. 320; 18 Law J. Rep. (N.S.) Chanc. 265; 1 De Gex & Sm. 750.

Bennett's case, 18 Beav. 339; s. c. 5 De Gex, M. & G. 248; 24 Law J. Rep. (N.S.) Chanc. 130.

Cridland v. Lord de Mauley, 1 De Gex & Sm. 459; s. c. 17 Law J. Rep. (N.S.) Chanc. 190; 2 De Gex & Sm. 560.

Gibson v. D'Este, 2 You. & C. C.C. 542, 575; s. c. 1 H.L. Cas. 605.

The MASTER OF THE ROLLS.—I assent to the arguments put forward on behalf of

(2) 2 El. & B. 476, 488; s. c. 22 Law J. Rep. (N.S.) Q.B. 384.

the plaintiff, but I cannot concur in their application to the present case. The bill is peculiar; it makes a distinction between the company and the directors for some purposes, and it unites them for others. No relief is sought against the company by this bill, and yet, the first misrepresentation stated is an advertisement published by the company; it is therefore a statement distinguished from one by the board of directors. It is impossible for any one to suppose that the Government Loan Commissioners merely required that the shares should be nominally 5*l.*, but not really more than 3*l.*, as an inducement for persons to advance the 40,000*l.*, or that any agreement to make them only 3*l.* shares would be legal as between the company and the Commissioners. The bill then states, that shortly afterwards the solicitor of the company prepared a contract, by which Messrs. Ellis & Husler agreed to take a certain number of shares at the value of 3*l.*; but the contract in form made them take them as 5*l.* shares; but the bill states that it was agreed between them, that they were not to be liable beyond the 3*l.* per share. It is clear, however, from the authorities, that if they subscribed for 5*l.* shares, they would be liable to the company for 5*l.* per share, and not simply for 3*l.*; and that, so far as regards the company, would be the result of the transaction between them. These observations, therefore, will at once make further consideration unnecessary, both as to the company and the representations made by the company. Then comes the question as to the representations made by the directors, and what their liability is distinct from the company. If the plaintiff is entitled to any relief against the defendants, it must be either for the specific performance of a contract, which they have entered into, or to make them liable to make good their representations, upon the faith of which Messrs. Ellis & Husler acted; because, if the plaintiff is not entitled to relief in one of these forms, it is not a case for the interposition of this Court, and the plaintiff's remedy must be at law, for damages. When a case comes on upon demurrer, and the bill contains general and specific allegations (following the rule

that the pleadings must be taken most strongly against the pleader) the general allegations must be referred to the particular and specific allegations contained in the bill with respect to the same matter. That is the principle laid down in the case of *Frietas v. Dos Santos* (3). There the bill was filed by a company, to whom a large sum in foreign specie had been remitted, to be converted into English money, against the persons by whom the specie had been remitted, for an injunction to restrain them from proceeding in an action, brought by them for the recovery of the produce of the specie. The bill alleged in general terms that, in the year 1813, the plaintiffs had frequently been employed as agents to the defendants, who resided abroad, and that there had been various dealings and transactions between them, and that there were mutual accounts subsisting, and, in particular, that at a period stated in the bill the defendants remitted the specie in question. A demurrer was filed to the bill, and it was allowed upon the ground that the general allegation respecting the mutual accounts was too loose and vague. In this bill, therefore, the general allegation contained in the bill with respect to the misrepresentations made by the defendants, Messrs. Bates and Colman, must be referred to specific representations of the same nature, stated in the bill. Now the alleged misrepresentations are two: namely, the letter and the resolution. These representations, therefore, must be considered, and what are the nature and extent of the liability of the defendants with respect to them. As to the letter, the first observation to be made is, that it does not affect Mr. Colman at all; and that it only affects Bates, by whom it was written. There is no question of authority; it is a mere undertaking to obtain a resolution for the plaintiff, and therefore this representation would solely affect Mr. Bates. It is in fact nothing more than a promise on his part to obtain that which was subsequently obtained. It is unnecessary therefore to distinguish between the case of Messrs. Bates and Colman, because they both concurred in obtaining

(3) 1 You. & J. 574.

from the board that resolution which was subsequently obtained from the board, and on the faith of which the plaintiff acted; and, consequently, it is upon this resolution that I must determine what the liabilities of the parties may be. Assuming then that the company had the power to enter into such a resolution, and that the board were duly authorized to make such a resolution, here is a distinct statement, that the board would indemnify the plaintiff and his partner. The first way of considering that engagement is, to see if it can be specifically performed by the defendants; and it is obvious that it cannot; it is an agreement that the company will do a certain thing, and it is so treated by the plaintiff himself in the bill. The directors, as directors, and distinct from the company, had no power to accept shares in payment of calls; and the case of the plaintiff is, that the company had no power to do it. How could I make a decree for specific performance? If I did, how could it be enforced? The order would be—"To accept a proportion of such shares in payment of such calls, in case they should hereafter be made." It is impossible that the Court could compel the performance of such an order. It is like the case of a person entering into a contract which cannot be performed, where, although he may incur liabilities in respect of it, specific performance is not the species of relief which this Court can give. The same observation applies in substance to the argument of the plaintiff's equity to compel the defendants to make good their representations; for the Court cannot compel the defendants to do what is impossible and illegal; though the rule is, that when a person makes a representation, upon the faith of which another acts, the Court will compel him to make the representation good, if it is possible for him so to do. Upon the facts stated in this bill, the proper remedy appears to be an action at law to recover damages for the loss which the plaintiff has sustained in consequence of the covenants of the defendants. Both the demurrers therefore must be allowed.

[IN THE HOUSE OF LORDS.]

1858.
March 16, 18, } CLARKE AND CHAPMAN
19, 22, 23. } O. HART.

Mines—Cost-book—Forfeiture.

In mines worked on the cost-book system there is no custom to forfeit shares for non-payment of calls, without special stipulation.

Assuming such a custom to exist, it must be strictly followed.

A, B. and C. joined in a mining adventure on the cost-book principle, as recognized in Devonshire and Cornwall. A. fell into arrear with his calls. Notice was given him of a meeting to declare his shares forfeited. The meeting was held, but instead of his shares being declared forfeited, a resolution was passed granting him an extension of time, "such extended time to cease on," &c. No payment was made and no further notice was given; but a fortnight after the extended time had expired the shares were declared forfeited:—Held, that such declaration of forfeiture was invalid.

This was an appeal against a decree of the Lords Justices, by which the appellants had been directed to account with the respondent, as a partner with them in a mining adventure, although they had formally declared him to have forfeited all share in the concern.

The facts of the case are fully set out in the report of it when before the Lords Justices (1). The following is a summary of them, sufficient for the purpose of this report:—

In 1848 Hart purchased from General Wyndham, on account of himself, Chapman, Clarke, and a person named Horne, the interest of Mr. W. Clements in the Goldscope and Uthwaite Mines, in the manor of Braithwaite and Coledale, in the county of Northumberland. These four persons afterwards met together, and constituted themselves a company to work these mines "on the cost-book system, as recognized in Cornwall, or such other system as the directors hereafter named shall deem expedient." They divided the mine into

(1) 24 Law J. Rep. (N.S.) Chanc. 137.

six shares, of which Clarke had two, Chapman two, Horne one, and Hart one. In January 1849 Horne withdrew from the company, and his share was divided equally among the remaining three proprietors. The resolution which effected this division concluded thus: — "We, the undersigned, hereby agree to fulfil the conditions before recited, but limit our responsibility for payment of costs, as also our claims to advantage, to the extent of the number of shares held by us in the Goldscope Mining Company, according to the principles of the cost-book system, as recognized in Cornwall and Devonshire." In February 1849 Clarke, Chapman and Hart became the lessees of the mine under General Wyndham for a term of twenty-one years. Hart fell into arrear with his calls, and in November 1849 wrote a letter, in which, referring to that subject, he said, "If I cannot pay my calls, my shares in Goldscope will be advertised to in our next meeting, and, when notice has been given of the intention of the company, they will be forfeited unless the money be paid. This is the usual mode of proceeding, and which I shall endeavour to avoid." He afterwards wrote two other letters, in which he spoke of selling his shares in order to liquidate the calls. Things went on in this way for some time, and in April 1850 Chapman wrote to Hart announcing a further call, and added, "I am also desired to give you notice, that unless the above call and your arrears are paid on or before the 30th inst., your shares will be declared forfeited, in accordance with the company's agreement." Hart wrote to ask to see the cost-book sheets since October preceding, and then wrote another letter, in which he said, "You can only dissolve our partnership with my consent. You possess no power to forfeit my shares, of which you are desired to give me notice, unless, &c. Consequently, this but little affects me." On the 2nd of May 1850 Chapman wrote to Hart, announcing a meeting for the next evening, "for the purpose of forfeiting your shares in the property, in pursuance of the notice to you of the 3rd ultimo." Hart answered this on the next day, denying the right of the company to forfeit the shares. On the 4th of May the meeting was held, and a resolution was adopted, "that whilst

deprecating the tone assumed by Mr. Hart, yet in consideration of the amount he has already expended in the adventure, the company grants an extension of time, with the view of further endeavouring to facilitate the payment of his arrears, or of his making a satisfactory settlement with the company, such extended period to cease on Wednesday, the 15th inst." The arrears were not paid, and on the 31st of May it was resolved that Mr. Hart's shares should be, and were then forfeited. Notice of this resolution was given to Hart, but he made no answer. In August 1850 Chapman wrote to him a letter on the subject of his arrears, in which it was said, "We trust, therefore, you will be able to make us some proposition whereby the affair may be settled, and the irksomeness of all our positions be removed. Mr. Clarke, who is at the mines, promised to send you a statement of your debt." No answer was received, and no statement was sent; but in April 1851, and on the 31st of October 1851, Hart wrote requiring information as to "our success," and "our joint undertaking," and "the interest we possess in common," and threatening, if the information should not be furnished, to travel to the mines, and charge Clarke and Chapman with the expense of his journey. On the 1st of November 1851 Clarke answered the latter of these letters by one, in which he referred to Hart's own letter of the 27th of November 1849, and to Chapman's letter of the 4th of May 1850, and the resolution, and added, that if Hart considered himself entitled to further information, the law was open to him. On the 10th of November Hart replied, that he should not go to law until the profits from the mine were sufficient to meet the law charges, but should do so then. Clarke and Chapman continued partners until the 31st of December 1851, when Clarke became the owner of Chapman's shares. In April 1853 Hart, through a solicitor, demanded an account of the mines, and in August of that year filed his bill against Clarke and Chapman, who put in their answers.

In June 1854 the Master of the Rolls, who thought that there had not been any forfeiture, but that what was done in May 1850 amounted to a dissolution of the partner-

ship, made a decree declaring the joint adventure to have been concluded on the 31st of May 1850, and directed accounts up to that time.

The Lords Justices, on appeal, reversed this decision, and ordered accounts to the date of their decree.

The case was then brought up to this house.

Sir R. Bethell, Mr. Malins and Mr. Thomas Tapping, for the appellants, contended that, by the agreement between the parties there was, according to the custom in Cornwall and Devonshire, a right of forfeiture of shares for non-payment of calls, and that that right had been duly exercised, or, if not, that the resolution of the 4th of May, and of the 31st of May 1850, operated as a dissolution of the partnership. They cited—

Tapping's Readwin Prize Essay, On the Cost-book Principle, p. 37.

Williams v. Attenborough, Turn. & R. 70.

Fenn's case, 4 De Gex, M. & G. 285; s. c. 22 Law J. Rep. (N.S.) Chanc. 692; 1 Sm. & G. 26.

Bargate v. Shortridge, 5 H.L. Cas. 297; s. c. 24 Law J. Rep. (N.S.) Chanc. 457; affirming *Shortridge v. Bosanquet*, 22 Law J. Rep. (N.S.) Chanc. 48; 16 Beav. 84.

Pickard v. Sears, 6 Ad. & E. 469.

Bainbridge on Mines, 628.

Watson v. Reid, 1 Russ. & M. 236; s. c. 1 Tam. 382.

Eads v. Williams, 4 De Gex, M. & G. 674; s. c. 24 Law J. Rep. (N.S.) Chanc. 531.

Clegg v. Edmondson, 26 Law J. Rep. (N.S.) Chanc. 673.

Clements v. Hall, ante, 349.

Parratt v. Palmer, 3 Myl. & K. 632.

Bowser v. Colby, 1 Hare, 109; s. c. 11 Law J. Rep. (N.S.) Chanc. 132.

Prendergast v. Turton, 13 Law J. Rep. (N.S.) Chanc. 268; affirming s. c. 11

Law J. Rep. (N.S.) Chanc. 22; 1 You. & C. C.C. 98.

Norway v. Rowe, 19 Ves. 144.

Townsend v. Stangrove, 6 Ves. 328.

Mr. R. Palmer and Mr. Wellington Cooper, for the respondent, contended that

there was no power of forfeiture here, or none that had been duly exercised. The respondent had a legal vested interest in the property, which could only be divested by legal means, and no such means had been employed. They commented on the cases already cited, and in addition referred to—

The Stannary Laws, p. 16.

6 & 7 Will. 4. c. 106; 18 & 19 Vict. c. 32.

Cockerell v. Van Diemen's Land Company, 18 Com. B. Rep. 454; s. c. 26 Law J. Rep. (N.S.) C.P. 203.

Rochdale Canal Company v. King, 2 Sim. N.S. 78; s. c. 20 Law J. Rep. (N.S.) Chanc. 675.

Featherstonhaugh v. Fenwick, 17 Ves. 298.

Crawshay v. Collins, 15 Ibid. 218.

Freeman v. Cooke, 2 Exch. Rep. 654; s. c. 18 Law J. Rep. (N.S.) Exch. 114; 6 Dowl. & L. P.C. 191.

Cook v. Collingridge, Jacob, 607.

Jefferys v. Smith, 1 J. & W. 298.

Beniley v. Bates, 4 You. & C. C.C. 182; s. c. 9 Law J. Rep. (N.S.) Ex. Eq. 30.

Howard v. Hudson, 2 El. & B. 1.

Newton v. Belcher, 12 Q.B. Rep. 921; s. c. 18 Law J. Rep. (N.S.) Q.B. 53.

Blissett v. Daniel, 10 Hare, 493.

Colyer v. Finch, 5 H.L. Cas. 905; s. c. 26 Law J. Rep. (N.S.) Chanc. 65.

Brown v. De Tastet, Jacob, 284.

Sir R. Bethell replied.

March 23. — The LORD CHANCELLOR, after stating the nature of the case, said that the first question which their Lordships had to consider was, whether under the agreement for working the mines the appellants were entitled to declare the respondent's shares forfeited; secondly, whether, if they possessed that power, they had duly exercised it; and, thirdly, whether, if there was no power to forfeit, or if it had not been duly exercised, the respondent had deprived himself by his own conduct of the right to ask the aid of a Court of equity. The principal point was, whether the agreement gave right of forfeiture for non-payment of calls. The agreement was this,—[His Lordship stated it].

Now, upon this agreement, the first question that arose was, whether the principle of forfeiture for non-payment of calls was inherent in the cost-book system. Evidence, both documentary and verbal, the former consisting chiefly of extracts from old mining laws and from valuable text-books and the latter of statements of living witnesses, had been given to prove the affirmative, and it was insisted that the practice was reasonable and necessary. If it had been absolutely requisite to decide that question, he must say that his opinion was that that evidence was not conclusive to establish the point, that forfeiture was a principle inherent in the cost-book system. Nor did he think that a letter of the respondent of the date of the 27th of November 1849 established the existence of such a power as that of forfeiture. But he repeated that it was unnecessary to express a decided opinion on this point, since he had come to the clear conclusion that, even if such power existed, it had not in this case been duly exercised. For forfeitures were *strictissimi juris*, and those who sought to enforce them must exactly perform all that was necessary to give them validity. In this case it was admitted on all hands that the proper mode of enforcing a forfeiture was by convening a general meeting, upon full notice of the purpose of the meeting, after the period limited for the payment of the calls. There could be no doubt here that the calls had been duly made and that the respondent was in default, so that assuming the right to forfeit to be a legally existing right, a general meeting might have been convened and the shares declared forfeited. Had that been done? On the 3rd of May 1850 a notice was served on Hart that his shares would be forfeited, and on the 4th a meeting was held, at which it was resolved to give some time, and notice had been given to him that unless the calls were paid on or before the 30th instant his shares would be forfeited. After that notice had been given, it would have been competent for the appellants at the meeting held for that purpose to declare them forfeited. On the 3rd of May 1850 they gave him notice that it was their intention to assemble the meeting on the following day for that purpose. On the 4th of May they might have

passed a resolution to that effect, but instead of doing so they resolved, "that for the purpose of facilitating the payment of the calls" by Hart they extended the period for payment "to the 15th instant." The time for payment, therefore, became the 15th of May, and so by their own act they had no power to forfeit Hart's shares till after that day. Then it was said, that a meeting to declare the shares forfeited was held on the 31st of May, when the declaration of forfeiture was made. But no notice appeared to have been given to Hart that such a meeting would be held, and for such a purpose, nor was there even evidence that it had been held. The first notice of it appeared on the date of April 1852. And after May 1850, namely, in August 1850, the letter to Hart shewed that the other parties to the concern still looked on him as a member of it, and even in 1851 the appellants in their correspondence with the respondent never referred to the 31st of May as the day when a forfeiture had been completely effected. It might be doubtful whether such a meeting was ever held at all, but at all events it was clear that no such formalities were observed as would make it binding upon Hart. Then it was said, and such had been the opinion of the Master of the Rolls, that though not effective for the purpose of declaring a forfeiture of the shares it might amount to a dissolution of the partnership. It was difficult to see how the same act, ineffective for one purpose, was operative for the other.

Under these circumstances, it was clear that Hart retained his vested interest in the mine; and then the question arose, whether there was anything in his conduct which disentitled him to apply to a Court of equity for relief. It was clear that when a party applied to equity to enforce the performance of an agreement, as to declare a trust, or to obtain any other right of which he was not in possession, he must come promptly. But when he was already in possession and was attempted to be dispossessed, unless his conduct amounted to waiving or abandoning a right, the same rule did not equally apply. As to waiving or abandoning a right, the case of *Freeman v. Cooke* was often quoted as introducing a qualification

into the doctrine laid down by Lord Denman in *Pickard v. Sears*. In that case Lord Denman had said, "the rule of law is clear, that where one by his words or conduct wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time." In the case of *Freeman v. Cooke*, Parke, B., in delivering the judgment of the Court of Exchequer, qualified the extent of that proposition by saying, "In most cases the doctrine of *Pickard v. Sears* is not to be applied unless the representation is such as to amount to a contract or licence by the party making it." That he apprehended to be the law as now established. The case of mines had always been considered by a Court of equity as a peculiar one. The property was of a precarious description, the emergencies to which it was subject required an instant supply of capital and a faithful performance of obligations, and therefore Courts of equity had said that they would not afford encouragement to parties who lay by and watched the adventure with a view to determine their own conduct as they should find the adventure prosperous or not. With the exception of the case of *Prendergast v. Turton*, it would be found that all the cases in equity were those in which the parties had found it necessary to come to the Court for the peculiar relief which it afforded when they were not in possession of the interests which they claimed. *Senhouse v. Christian* (2), *Norway v. Rowe* and *Clegg v. Edmondson* were all cases of that class, and in all these cases a strong opinion was expressed, not that the parties had by laches disabled themselves from applying to a Court of equity for relief, but that their conduct amounted to an abandonment of their right. In *Prendergast v. Turton* the Court proceeded, not upon the principle of any mere laches, but upon that of the party having abandoned his right, and that case appeared to be applicable to the state of things here, for there, as here, the shares remained vested

in the party to whom they originally belonged. The distinction between the two cases was one of fact, namely, that notice of the forfeiture had there been given, and the party to be affected by it took no steps to assert his interest for a period of nine years, while here no such notice had been given. On the contrary, the letter of August 1850 was quite sufficient to induce Hart to believe that his shares never had been forfeited, so that it was not necessary for him to do more than assert his right as he had done in the correspondence. Hart's own letter of November 1851 was in truth a challenge to the other parties to do what they had intimated their intention of doing, but which he asserted to be an act beyond their lawful power. Upon the whole, he was clearly of opinion that, even if the appellants possessed the power to declare a forfeiture, they had never duly exercised it. Hart, therefore, remained in possession of his shares, and there was nothing in his conduct which amounted to a waiver or abandonment of his right. The decree of the Lords Justices must consequently be affirmed, and the appeal dismissed, with costs.

LORD BROUGHAM said that, had his noble and learned friend stopped short before the last two words of his able and luminous judgment, he himself should not have troubled their Lordships with a single remark. Costs in equity were a matter of discretion, a discretion, of course, to be exercised upon reasonable principles; and, in this case, he thought that the appeal ought to be dismissed, but without costs. There were peculiar circumstances in this case. In the first place, there was a decree of the Rolls in great part in favour of the appellants, though, certainly, that decree, so far as it was in their favour, was reversed by the Lords Justices. A mere difference of opinion among the Judges of the Courts below was not, alone, though it was one considerable circumstance, a reason for not giving costs. But the Lords Justices had certainly entertained much doubt upon the matter, and this was a second circumstance against giving costs. A third was the conduct of Hart himself, which, though it did not amount to what the law treated as waiver or abandon-

ment, did amount to such standing-by as, though it did not actually disentitle him to relief, disentitled him to favourable consideration in giving that relief. Taking all these three grounds together, he thought that, had he been applied to as counsel, he should have advised this appeal, and therefore, though he was now of opinion that it must be dismissed, he thought it should be dismissed without costs.

LORD CRANWORTH.—The first question here was, whether, according to the cost-book principle, there was a right to declare a forfeiture for non-payment of calls, and the next, whether Hart, by his own conduct, was estopped from saying that there was such a right, by reason of his having done that which led the other parties to believe that he had entered into the partnership with the admission on his part that they should deal on the footing of there being such a right. In his opinion it was not made out that there was any such right. It might be almost a universal practice so to treat it, in many partnership deeds; but if it was to be established as a legal right in any particular case, it must be introduced into the deeds. Then came the question, whether Hart had by his conduct precluded himself from denying that right. Upon that, it must be remarked, that no such point had been set up by either of the appellants in the answer to the respondent's bill, and though such a matter might have been talked of among them in their dealings with each other, there was no proof that they deemed it included in the stipulations on which the company was to be conducted. But even if there had been a power of forfeiture, there was no valid declaration of forfeiture. The question of forfeiture must be decided on strict principles of law as well here as in any case of the forfeiture of an estate. As a matter of fact, no declaration of forfeiture was regularly made on the 31st of May 1850, nor was any act of forfeiture entered on that day by the appellants in their own minute-book. His Lordship examined the correspondence between the parties, and expressed a clear opinion that no forfeiture had been duly declared. But then it was said that whatever rights Hart might have, he had forfeited them by lying by. For that proposition he could find

no authority in principle or in argument. And, in fact, the person wrongfully excluded had, from the first, denied the right of the other parties to exclude him, and they themselves felt that in fact they had not excluded him, for, some time afterwards, one of them, one of the appellants here, wrote—"Your liabilities are increasing every day." The other partners might have filed a bill to wind up the concern, which they had the right to do, on account of his being in default with his calls. That course, however, was not taken, and nothing had been done legally to put an end to the partnership. The decree of the Lords Justices was correct, and ought to be affirmed, and the appeal dismissed, with costs, which, in his opinion, ought to follow, as Lord Cottenham had once declared, not as a penalty or a punishment, but as the necessary consequence of an unsuccessful litigation.

LORD WENSLEYDALE agreed that this appeal ought to be dismissed, and he thought it ought to be dismissed with costs. The notice, which was not sufficient to effect a forfeiture of the shares, even if there had been, which he denied, any right to forfeit them, was clearly not sufficient to operate as a dissolution of the partnership; it was not framed to effect such a purpose; there was no power so to effect that purpose, and the notice was given with a different intention. Then, was Hart estopped by his own conduct from objecting to the forfeiture? This was the most difficult question in the case, and depended entirely on the rules established in courts of equity with respect to persons so situated. The rule to be deduced from *Pendergast v. Turton* and *Norway v. Rowe* appeared to be, that if a party lay by, and by his conduct intimated to the other partners in the concern that he had abandoned his share and that they might deal with it as they pleased, he would be estopped. Had he done so here? The letters shewed an exactly opposite intention on his part. From the first to the last he had disputed their right, and had dared them to act upon the claim which they asserted. The judgment of the Court below was perfectly right and must be affirmed, with costs.

Decree affirmed accordingly.

KINDERSLEY, V.C. }
March 20. } HARTLEY v. ALLEN.

*Apportionment—Shares in a Company—
Period to calculate Payment.*

A. B. died leaving shares in a joint-stock company, the dividends upon which were declared half-yearly and made payable at a fixed period, about a month afterwards. There was a further sum of money due to the shareholders in the company arising from profits upon the sale of shares:—Held, that the dividends upon the shares were apportionable under the statute 4 & 5 Will. 4. c. 22, payment to be calculated from the last day on which the dividend was made payable, and not the day on which it was declared; but that the additional amount was not in the nature of a dividend, and therefore not apportionable under the act.

This suit was instituted to administer the estate of James Hartley; and the case now came on upon an adjourned summons from chambers.

By a settlement, made upon the marriage of James Hartley and Jane Gibbs, dated in the year 1848, certain property, consisting of (amongst other securities) eighty shares in the Peninsular and Oriental Steam-Packet Company, was assigned and transferred to trustees, upon trust to pay unto, permit and suffer J. Hartley and his assigns, to receive and take the yearly dividends as the same should become due and payable during his natural life, and after the decease of the said J. Hartley, to stand possessed of the said shares and the dividends to accrue and become due in respect thereof, upon trust for Jane Gibbs for life, for her separate use, and after her death upon certain other trusts therein mentioned.

The Peninsular and Oriental Steam-Packet Company was incorporated by royal charter in the year 1850, and the deed of settlement of the company contained certain clauses to the following effect.

Section 126.—The net profits of the company shall in every half-year be divided rateably amongst the proprietors to such amount as the board of directors shall from time to time decide upon, and as

shall be declared at the annual half-yearly meeting.

Section 127.—That the board of directors shall cause every dividend to be paid at the principal office for the time being of the company within twenty-one days after the same shall have been declared, three days' previous notice being given by advertisement or by letter to all proprietors.

Section 128.—That the owners of the said shares in the said undertaking shall be entitled to a dividend of such profits rateably according to the amount of the instalments on the said shares which shall have been actually paid up.

It appeared that the practice of the company was to declare a dividend upon the profits, on the 30th of September and the 31st of March in every year, but such dividends were not to become payable till the 26th of December next after the first and the 26th of June following the second declaration of the dividend. Accordingly, on the 29th of September 1856, a dividend was declared and the amount was received by J. Hartley on the 26th of December 1856. On the 30th of March 1857 a meeting of the company took place and another half-yearly dividend at the rate of 3l. 10s. per cent. was declared upon the net profits of the company, which dividend was made payable on the 26th of June following. At the last-mentioned meeting, it was also declared that a sum of 17,000l., which had arisen from profits made by the company upon the sale of certain new shares, should be divided among the shareholders rateably according to the number of shares held by them.

James Hartley died on the 31st of March 1857, and the questions now argued were, whether the dividends on the shares in the company standing in the names of the trustees of the settlement made previously to the marriage of Mr. and Mrs. Hartley in 1848 were apportionable under section 2. of the 4 & 5 Will. 4. c. 22; whether the additional payment to the shareholders declared in respect of the profit made by the company on the sale as aforesaid of the new shares was apportionable under the same section, and if such dividends and additional payments respectively or either of them was or were apportionable, such ap-

portionment was to be made from the 30th of September 1856, or from the 26th of December following.

Mr. Bovill, for the representatives of *Mr. Hartley*, submitted that the dividend was apportionable both as to what was paid upon the shares in the company and upon the additional profit.

Mr. Jessel appeared for the trustees of the settlement.

The following cases were cited :—

Tyrell v. Clark, 2 Drew. 86 ; s. c. 23

Law J. Rep. (n.s.) Chanc. 283.

Knight v. Boughton, 12 Beav. §12 ;

19 Law J. Rep. (n.s.) Chanc. 66.

Trimmer v. Dandy, 23 Law J. Rep.

(n.s.) Chanc. 979.

In re Markby, 4 M. & Cr. 484.

4 & 5 Will. 4. c. 22. ss. 2, 3.

KINDERSLEY, V.C.—It is at all times very unsatisfactory to decide upon the construction of an act of parliament because it is rarely expressed in language which conveys the meaning, and this act is a specimen. Now, the object of this act was not only to remedy the defects in the statute of Geo. 2, but also for the purposes recited in the first section, which is in these words :—"Whereas by law rents, annuities and other payments, due at fixed or stated periods are not apportionable (unless express provision be made for the purpose) from which it often happens that persons, and their representatives, whose income is wholly or principally derived from these sources, by the determination thereof before the period of payment arrives are deprived of means to satisfy just demands, and other evils arise from such rents, annuities and other payments not being apportionable, which evils require remedy." And then section 2. enacts, "that from and after the passing of this act, all rents service reserved on any lease by a tenant in fee, or for any life interest, or by any lease granted under any power (and which leases shall have been granted after the passing of this act), and all rents-charge and other rents, annuities, pensions, dividends, moduses, compositions, and all other payments of every description in the United Kingdom of Great Britain and Ireland, made payable or coming due at

fixed periods under any instrument that shall be executed after the passing of this act, or (being a will or testamentary instrument) that shall come into operation after the passing of this act, shall be apportioned so and in such manner that on the death of any person interested in any such rents, annuities, pensions, dividends, moduses, compositions or other payments as aforesaid, or in the estate, fund, office or benefice from or in respect of which the same shall be issuing or derived, or on the determination by any other means whatsoever of the interest of any such person, he or she, or his or her executors, administrators or assigns, shall be entitled to a proportion of such rents, annuities, pensions, dividends, moduses, compositions and other payments according to the time which shall have elapsed from the commencement or last period of payment thereof respectively, as the case may be, including the day of the death of such person or the determination of his or her interest, all just allowances and deductions in respect of charges on such rents, annuities, pensions, dividends, moduses, compositions and other payments being made." The real question in this case is, whether this payment is "a dividend" as being the income of the profits of a joint-stock company. In my opinion it is impossible to avoid holding that it is dividend in the popular and ordinary sense ; and not only so, but also in the technical sense in which the word is used by the legal profession. A conveyancer in preparing a will would so designate it as importing income, and moreover the word is used in the same sense in acts of parliament, and I do not think it can be said that the legislature in using the word "dividend" did not intend to include dividends in a joint-stock company. They are, therefore, apportionable under the act. Then comes the question as to the time from which the apportionment is to take place. The words of the act must here also be taken as they stand, whatever may be the conjecture as to the intention. The act says that the payment of interest shall be made according to the time which shall have elapsed from the commencement or last period of payment thereof, as the case may be, including the day of the death of such

person. Now, the last day of payment was not that on which the dividends were declared nor that upon which the profits were calculated; but the last day of payment was the 26th of December 1856; and assuming the payment to have been then made, the number of days must be calculated from that period up to the day of the death of Mr. Hartley, inclusive. As to the additional payment in respect of the profit arising from the sale of the new shares, that arose from a sum of 17,000*l.*, which in one sense was capital belonging to the company, but the division of the profit was not a dividend. It is clear that the company did not treat it as such, and neither in an act of parliament nor by a conveyancer nor by any one else would it be designated as a dividend. There is nothing in the nature of this sum to bring it within the words of the act. It cannot be held to be a dividend, and is not therefore apportionable.

LOKDS JUSTICES. }
 June 23, 24, 26; } DENTON v. LORD JOHN
 July 5. } MANNERS.

Mortmain—Tithe Redemption—Bequest
—Statutes, 6 & 7 Vict. c. 37, and 13 & 14
Vict. c. 94.

A bequest of pure personality to an association for buying impropriate tithes and vesting them in the Church of England, is void under the Mortmain Act (9 Geo. 2. c. 36); notwithstanding the 25th section of the 6 & 7 Vict. c. 37, and the 23rd section of the 13 & 14 Vict. c. 94.

The facts of this case are fully detailed in the report, *ante*, p. 199.

This was an appeal by the Tithe Redemption Trust Society, and the principal argument urged was founded upon two acts, 6 & 7 Vict. c. 37, and the 13 & 14 Vict. c. 94. The former act recited that an act, the 17 Car. 2. c. 3. s. 7, enabled impropriators to augment parsonages or vicarages in certain cases, and enabled incumbents in certain cases to receive lands, tithes and other hereditaments without licence in mortmain, and recited that by an act, 1 & 2 Vict. c. 106. s. 15, the act of Charles the Second was repealed; and then

it was enacted, by section 25, "That so much of the said act of King Charles the Second as enables any owner or proprietor of any impropriation, tithes or portion of tithes, to annex the same or any part thereof unto the parsonage, vicarage or curacy of the parish church or chapel where the same lie or arise, or to settle the same in trust for the benefit of such parsonage, vicarage or curacy, and authorizes parsons, vicars or incumbents, to receive lands, tithes or other hereditaments without licence of mortmain, shall be and the same is hereby revived; and that all augmentations and grants at any time heretofore made according to the said act of King Charles the Second, shall be as good and effectual as if the same had never been repealed." The enactment of the other statute, by section 23, was as follows:—"That the owner or proprietor of any impropriation, tithes, portions of tithes, or rent-charge in lieu of tithes, shall and may have power to annex the same or any part thereof unto the parsonage, vicarage or curacy of the parish church or chapel where the same lie or arise, or to settle the same in trust for the benefit of such parsonage, vicarage or curacy, any statute or law whatsoever to the contrary thereof in anywise notwithstanding."

From these two sections of the statutes it was contended, on the part of the appellants, that the law was placed, in the matter of tithes at least, in the same situation as it was in the reign of King Charles the Second, and so far the Mortmain Act had been practically repealed, so as to make the gift in the present case a good and valid application of the testator's bounty.

Mr. Selwyn and *Mr. Kenyon* supported the appeal, and, during their argument, referred to the following statutes, besides those above mentioned:—

1 & 2 Will. 4. c. 45. ss. 11, 20.

3 & 4 Vict. c. 113. ss. 55, 67.

17 & 18 Vict. c. 116. s. 8.

The following additional cases were cited:—

Brown v. Oldfield, 2 Vent. 349.

Sorresby v. Hollins, 9 Mod. 221.

The Church Building Society v. Barlow,

3 De Gex, M. & G. 120; s. c. 22

Law J. Rep. (n.s.) Chanc. 339.

Doe v. St. Helen's Railway Company,
 2 Q.B. Rep. 364.

Robinson v. Robinson, 1 De Gex, M. & G. 274; s. c. 21 Law J. Rep. (N.S.) Chanc. 111.

Mr. Roundell Palmer and *Mr. Osborne*, for the next-of-kin of the testator, cited the following cases, besides some of those which were referred to on behalf of the society, in the court below :—

Mather v. Scott, 2 Keen, 172; s. c.

6 Law J. Rep. (N.S.) Chanc. 300.

Middleton v. Clitherow, 3 Ves. 734.

The Trustees of the British Museum v.

White, 2 Sim. & S. 594.

Mr. Selwyn was heard in reply.

July 5.—**LORD JUSTICE KNIGHT BRUCE.**—The first question upon this appeal seems to be as to the true meaning of the words “above-mentioned charitable purpose” contained in the will of Mr. Lucius Graham Kinderley, the testator in the cause. They must, of course, be read not without attention to the context; and so reading them, I am of opinion that whatever, according to any reasonable and possible view of the evidence before us, may be or have been the purposes or objects of the body, or society, or association, which he calls “the association for buying inappropriate tithes and revesting them in the Church of England,” the words “above-mentioned charitable purpose,” as used by him, mean singly and merely the particular purpose of buying up inappropriate tithes and revesting them in the Church of England. The next question is, whether such a charitable gift could be effectually made by the will. It was argued that, by force of several statutes passed since the reign of George the Second, which were mentioned in the argument, if not independently of those statutes, it could; and this notwithstanding the statute of George the Second, commonly called the Mortmain Act. That, however, is not my opinion. I do not read the statute the 6 & 7 Vict. c. 37. s. 25, or the statute the 13 & 14 Vict. c. 94. s. 23, or any enactment on which stress was laid by Mr. Selwyn or by Mr. Kenyon (who both argued the appeal very ably), as meaning what they contend for. The appellants’ case is not in my judgment helped by the circum-

stance that tithes already vested in an ecclesiastical corporation, but not for the benefit of the rector, vicar, or curate of the parish where they arise, may be alienated for the benefit of that rector, vicar or curate. It appears to me that the disputed gift here is rendered by the statute of George the Second wholly void, and that the order under appeal made by Sir John Romilly is right; nor am I by any means sure that my conclusion would not have been the same, if I had read the words “above-mentioned charitable purpose” as importing merely the above-mentioned society, or generally the objects of the above-mentioned association.

LORD JUSTICE TURNER.—I have felt some doubts upon this case; but in the result I have come to the same conclusion as my learned Brother and the Master of the Rolls have arrived at. I am not indeed prepared to say that no legacy can be well given to this charity. It may be that there are legal purposes of this charity not merely incidental to its illegal purposes; and it may be that a gift to the charity could be supported as to its legal purposes, although it would of course fail as to its illegal purposes; but on these points I give no opinion. It is sufficient to say, that in my opinion the disposition which this testator has made in favour of the charity cannot be supported. The testator has given the charity a wrong denomination; but in the denomination which he has given it he has embodied the purpose for which his gift was made. What is asked by the appellants is in truth this: to substitute the real denomination of the charity for that which the testator has given, disregarding wholly the purpose embodied in the denomination which he has given, and which aptly applies to one of the purposes of this charity in its proper denomination. I think we cannot do this, but that we must take with us into the altered denomination the purpose embodied in the erroneous one; the more so from the language of the latter part of the will. I agree also with the construction put upon the statutes by my learned Brother, and am for these reasons of opinion that this appeal must be dismissed, but without costs.

L.C.
May 24, 25, 26, 27; { THE SOMERSETSHIRE
June 9. { COAL CANAL COMPANY
v. HARCOURT.

Company—Imperfect Contract for Purchase of Lands—Compulsory Powers unlimited by Act.

A company having powers, unlimited as to time, to purchase land for the purposes of their undertaking, took possession, in 1797, of the lands of an infant, but no effectual steps were taken for fixing the price, an informal award only having been made, which, upon the infant's coming of age, was repudiated by him, and an annual rent only being from time to time paid. Disputes having arisen in 1854, fifty-seven years after the lands had been taken, it was held (affirming the decision of the Master of the Rolls), that the company could not compel a conveyance of the land, upon the footing of what had already taken place between them and the landowner; but that both parties must, with reference to their respective rights, proceed under the act of parliament.

This was an appeal, by the plaintiffs, from the decision of the Master of the Rolls, reported *ante*, p. 139.

The circumstances of the case will sufficiently appear from the former report, and from the judgment of the Lord Chancellor.

Mr. R. Palmer, Mr. Osborne, and Mr. W. D. Lewis were for the plaintiffs.

Mr. Selwyn and Mr. Fischer were for the defendant.

Mr. Palmer, in reply.

In addition to the cases cited in the court below, the following were referred to:—

Lord Cawdor v. Lewis, 1 You. & C. Exch. 427; s. c. 4 Law J. Rep. (n.s.) Exch. 59.

Rochdale Navigation Company v. King, 2 Sim. N.S. 78; s. c. 20 Law J. Rep. (n.s.) Chanc. 675; 22 Law J. Rep. (n.s.) Chanc. 604; 15 Beav. 11; 16 Beav. 630.

Clare Hall (the Master, &c. of) v. Harding, 6 Hare, 273; s. c. 17 Law J. Rep. (n.s.) Chanc. 301.

NEW SERIES, XXVII.—CHANC.

June 9. — The LORD CHANCELLOR. — This case, which is an appeal from the decree of the Master of the Rolls, was fully argued before me, and, from its difficulty as well as its importance, I have been desirous of considering its various points with great attention. It arises upon a bill filed by the company of proprietors of the Somersetshire Coal Canal Navigation against the trustees of Lord Waldegrave, to obtain a conveyance of certain lands and hereditaments, which they allege they have contracted to purchase under the provisions of an act of parliament, under which they are incorporated, for the purpose of making and maintaining a navigable canal, with certain railways and stone roads from several collieries in the county of Somerset, to communicate with the intended Kennett and Avon Canal, in the parish of Bradford, in the county of Wilts, and also to restrain the defendants from making a bridge, arch, passage or other work upon, over or across the railroad or tramroad of the plaintiffs, formed along or in the place of the Radstock line of the said canal; and from carrying any such bridge, arch, passage or other work over such railroad or tramroad; and from proceeding at law against the plaintiffs for recovering possession of the lands mentioned or referred to in the award of the said Commissioners or any of them, or otherwise acting or taking any proceedings upon or by virtue of the notice to quit of the 20th of September 1854. The act under which the company was incorporated is the 34 Geo. 3. c. lxxxvi. passed in the year 1794; and, by the first section of that act, they were empowered to purchase land for the use of the undertaking. By the 20th section of the act they were enabled to contract with persons for the purchase of lands, tenements or other hereditaments, whether freehold, copyhold or leasehold, either in consideration of a sum of money to be paid for the same, or of an annual rent or payment, to be charged and secured as thereafter mentioned; and all sales and conveyances to the said company might be made and effected in the following form. The act then sets out the mode of conveyance. No time is limited for the execution of the works by the company, as is now usually the case in all acts

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for public undertakings, by the insertion of compulsory powers. It was, however, suggested that the 22nd section fixed a limited time, as all persons residing in Somerset and Wilts possessing certain qualifications are, in the words of that section, "hereby appointed Commissioners"; but as the functions of the Commissioners are not confined to this particular period, but exercised indefinitely from time to time, it seems to have been the intention of the legislature that all persons entitled by property would be entitled to be sworn Commissioners. It was also supposed that, after a certain time, the Commissioners' powers would cease; but this applies to injury or damage, and the injury or damage to which it refers, is that which is occasioned by the course of the works, and not the nature of the undertaking. The company was empowered to make one line from the place, and through the parishes in the act mentioned, and which line was in subsequent acts distinguished as the Dunkerton Line, and another line from the place and through the parishes in the act mentioned, and which line was in subsequent acts distinguished as the Radstock Line. For the purposes of the Radstock line, in 1797 (the act having passed in 1794), it became necessary to obtain leave of the Earl Waldegrave, a minor, to become copyholder for the ages and numbers of existing lives on such estates, and to ascertain the value of the then present interest of the Earl Waldegrave in such estates, and to take them in consideration of an annual rent or payment. It does not appear that the guardians of Lord Waldegrave took any part in the arrangement made with the company for the purchase of the lands. The transaction took place on behalf of the company by the Commissioners, on the 6th of December 1797, at a meeting of the Commissioners, held in pursuance of the act of parliament. An award was made by them determining the interest of Lord Waldegrave in the lands. They determined the value of the leaseholds at thirty years' purchase to be 24*l.* 12*s.* 6*d.*, out of which they found that the lessees were entitled to 81*l.* 5*s.* 11*d.*, and that the lord was entitled to the remainder, amounting to 165*l.* 6*s.* 7*d.*, and for lands in his own

possession 184*l.* 1*s.* 3*d.*, making a total of 349*l.* 7*s.* 10*d.*, which sum, or annual rent of 14*l.* in lieu thereof, they decided ought to be paid to Lord Waldegrave. That seemed hardly to be binding on Lord Waldegrave; for Billingsley, the steward, had no power to treat for him, and his guardians not having contracted for him, the amount of the purchase-money and damages, if any, to which he was entitled, could only be settled by the verdict of a jury. The company, indeed, did not seem to place much reliance upon what was done; for, by an entry in their book, a draft was given to Mr. Billingsley to undertake or procure proper execution, or, in default, to return the money. The Earl attained his majority, at which time he might have accepted or repudiated the whole transaction, and have recovered the lands taken possession of by the company—they have not been transferred to the company under the provisions of the act, and, if at all, certainly not in consideration of an annual payment, but for a gross sum; and, if Billingsley had been authorized to treat for and to bind the Earl Waldegrave, he had determined his choice in favour of payment of a gross sum, and the Earl could not afterwards have receded from it, and, in fact, whatever the agreement with Billingsley was, the whole was put an end to in the month of March 1807 by his returning to the company the sum of 349*l.* 7*s.* 10*d.*, with interest. It thus appeared, therefore, that the parties stood in this position towards each other, the company was in possession of Lord Waldegrave's land, they had paid the lessees for their interest in that part of the land on lease—Lord Waldegrave received nothing for his interest in the lands, and he might, if he pleased, have maintained an ejectment against the company. It was competent, if he pleased, to enter into another agreement with the company, and the company, if no agreement were made, might have proceeded to execute their powers under their act. Nothing of the kind appears to have been done on either side; but various transactions took place which, it is insisted on the part of the company, amounted to a recognition of the award of the Commissioners, or to a new agreement, or to such acquiescence as to stop the defendants;

while the defendants, on the other hand, contended that the arrangement only conceived a tenancy from year to year; and in support of these opposite views, it was argued, on behalf of the company, that it was unlikely they should have left themselves at the mercy of Lord Waldegrave, who might at will and pleasure have stopped their works. For Lord Waldegrave it was said, that he would not probably accept a small sum and abandon a large claim. A very strenuous effort was made by the company to reconcile those transactions with the award of 1797. It appeared to me that the counsel for the company had failed in shewing with any degree of certainty that any of these transactions agreed; although occasionally, no doubt, reference was made to the amount of the rent ascertained by the Commissioners as the criterion of what the company ought to pay, for, it must always be borne in mind that if the award was acted upon at all, it must be by payment of a sum of money in gross. It is unnecessary to go into the whole of the transactions down to the period when this unfortunate dispute arose between the parties. What are principally relied on by the company are the arrangements which took place in 1807, in 1813 and in 1826. At the first of these periods, 1807, we might have expected, if at all, to find the parties entering into some definite agreement to settle the terms by which the company were henceforth to hold the lands they had then been using for ten years. The money paid by the company had been paid back to them in the March of that year, and Lord Waldegrave shewed no disposition to disturb them. Under these circumstances, in the month of June 1807, an agreement appears to have been entered into, the particulars of which are to be found only in the minutes of the proceedings of the company. The entry is in the following words:—

“White Hart, June 3rd, 1807.

“At a general half-yearly meeting of the company of proprietors of the Somersetshire Coal Navigation holden this day, in pursuance of the act, Messrs. Woodstock & Broderip attended this meeting, on behalf of Lord Waldegrave in respect of his claim on the company for his land at Radstock, and it was settled and agreed that the com-

pany should pay for the said land by an annual rent as per a valuation and survey now produced, whereby it appears that the company have taken into their canal and works 6 a. 2 r. 32 p. of land, which is valued at 16*l.* 13*s.* 9*d.* per annum, exclusive of part of Walker's garden taken by the company, but which is not to be paid for by reason that the company, at their own expense, built a stable for the accommodation of his Lordship, and the company have already paid the lessees under his Lordship several sums of money for the purchase of their respective shares and interest in such lands. It is also understood and agreed that such an abatement should be made to the company out of the estimated annual value above stated, as shall be considered fair and equitable by the Rev. Mr. James; and in addition to the above, it was also agreed that the annual sum of 5*l.* 0*s.* 7*d.* shall be paid by the company to his Lordship for and in respect of 2 a. 26 p. of land taken and used by the company in their railroads, and that an estimate of the amount that ought to be paid to his Lordship in respect of quarries opened by the company, and fences shall be forthwith made, and the amount with the rent to the present time be paid.”

This, of course, is a mere statement by the company of the arrangement which was alleged to have been made at this period; it would not be evidence against the defendants, unless it could be shewn that it was acted on by Lord Waldegrave, and treated by him as a binding contract on the company.

By a further entry in the company's books, it appears that Mr. James made an award for the abatement of the annual amount to be paid by the company of 3*l.* 3*s.* 9*d.* from 16*l.* 13*s.* 9*d.*, which is as follows:—

“June 1st, 1808.

“At a general half-yearly meeting of the company of proprietors of the Somersetshire Coal Canal Company, holden this day, pursuant to the act, Mr. S. James this day delivered his award as to an abatement to be made by Lord Waldegrave out of the 16*l.* 13*s.* 9*d.* per annum, agreed and settled to be paid to his Lordship by this company for lands taken at Radstock on

the 3rd of June last, whereby he states that the sum of 3*l.* 3*s.* 9*d.* ought to be allowed. Resolved, that this company do allow and pay his Lordship the annual sum of 13*l.* 10*s.* for such lands exclusive of 5*l.* 0*s.* 7*d.* in respect of the railroad lands agreeably to Mr. James's award."

There is nothing in this arrangement which can be regarded as an adoption of the award of 1797, because, instead of its containing the slightest reference to the award as the basis, the entry of the 3rd of June 1807 states, that it was settled and agreed that the company would "pay for the said land by an annual rent as per valuation and survey now produced." The rent appears to be paid for the first time in 1809 down to the 29th of December preceding. A receipt was given in respect of the particular lands, specifying each particular land and its value. On the 7th of November 1809 a letter was written by the Earl's surveyor, in which he claims a rent of 13*l.* 7*s.* 7*d.* for one year; that in no way consisting with the award of 1797, or the alleged agreement of 1807, and it increases the perplexity of the case; and it also appears by the ledger of the company that in May 1812 a sum of money was paid for arrears due. That shews, however, that the agreement of June 1807 was not regarded as final. It appears that another statement was made by Mr. James on the 7th of July 1813, which was headed "Particulars of Lord Waldegrave's lands, estimate of value per annum 13*l.* 16*s.* 10*d.* to be paid by the Somersetshire Canal Company, made by the Rev. S. James, the 7th of July 1813;" and then there follows a statement of Lord Waldegrave's lands used in the canal with a description of each portion and the rent per acre, amounting to the sum of 10*l.* 17*s.* 6*d.* The other lands are described in the same manner, and at the foot of the second description there are these words: "for those the canal company stand as lessees under Lord Waldegrave, and the rents affixed to each piece to take place on the death of the lives thereon." There is then a description of the lands (divided in the same manner) which are used in the railroads, and at the foot of that there are these words: "these latter payable to the respective lessees, the rents affixed to each piece to be on the

death of the lives paid to Lord Waldegrave. Rents now payable to Lord Waldegrave: lands used in canal wharf, &c., 10*l.* 17*s.* 6*d.*; lands used in railroad, 2*l.* 19*s.* 4½*d.*; altogether a total of 13*l.* 16*s.* 10½*d.*" This document is important in many respects, but it certainly does not amount to a ratification or even a recognition of the award of 1797, for although the total amount of rents stated to be payable to Lord Waldegrave is 13*l.* 16*s.* 10½*d.*, and which amounts very nearly to the 14*l.*, yet this cannot be so understood, as in making up the 13*l.* 16*s.* 10½*d.*, there is included the sum of 2*l.* 19*s.* 4½*d.* in respect of land used by the railway. But this document has, in my opinion, an important bearing on another part of the case to which I shall have to advert directly. This sum of 13*l.* 16*s.* 10½*d.* is admitted on both sides to be paid down to Lady-day 1824, but in the year 1823 a negotiation commenced which resulted in a fresh adjustment of the rent to be paid, upon which the company placed great reliance; they proposed to give up 4 a. 17 p. of the land not required for the purposes of the undertaking, and Mr. Langford wrote to Capt. Waldegrave. He states the annual rent payable as 14*l.*, and proposes a reduction from that sum of 6*l.* 10*s.* 6*d.* in respect of land to be given up, leaving a rent to be paid of 7*l.* odd. If Mr. Langford meant the rent actually payable, he was in error about this; yet if there is one thing clear, amidst all the confusion and intricacy, it is that at the time this negotiation commenced, the rent was not 14*l.*, but 13*l.* 16*s.* 10*d.*, and that not on the footing of the award. It is unnecessary to dwell on the subsequent correspondence between the parties, which appears to have resulted in an arrangement that for the 4 a. 17 p. given up they were to have an abatement from the rent of 8*l.* 10*s.* 6*d.*; this is all stated in paragraph 13 of the bill—the paper itself is a "Settlement of the rent account between Lord Waldegrave's trustees and the Somerset Coal Canal Company up to Lady-day 1826, from Lady-day 1824. The perpetual annual rent to be paid to the trustees by the said company as settled by the Commissioners in 1797, 14*l.* Deduct for the 4 a. 17 p. of land given up by the said company to the trustees, being the old canal, Mr. Boodle's

plantation and John Crewe's garden, &c. as enumerated in a statement sent to Capt. Waldegrave in March 1823, 8*l.* 10*s.* 6*d.*, leaving 5*l.* 9*s.* 6*d.*. Then add for 2 a. 2 p. of land, being the railroad leading from Clandown and Welten, 5*l.*, which, being added to the 5*l.* 9*s.* 6*d.*, amounts to 10*l.* 9*s.* 6*d.*. Then, there is a deduction for certain land 2 r. 35 p. occupied by Mr. Dallamour with the inn, 2*l.* 3*s.*, also for a piece of land formerly Landsdowns in front of the inn, and occupied by the said Mr. Dallamour, 6*s.* 6*d.*, making a total of 2*l.* 9*s.* 6*d.*, which deducted from 10*l.* 9*s.* 6*d.* leaves a sum of 8*l.*, which is stated as the "future annual rent to be paid to the said trustees;" and then it ends thus: "settled by us, John Hill, for the canal company, J. M. Tucker, for the trustees;" and then there is a sum of 8*l.*,—two years at 8*l.*=16*l.*, said to be paid to Mr. Tucker. It is to be observed that this is not an original agreement for the sale of land used by the company, but it is a mere settlement of the rent which remained to be paid after taking away the 4 a. 17 p., and ascertaining on the footing of the account what was said to be payable. The whole, however, was based on an error in assuming the 14*l.* as the perpetual annual rent to be paid as settled by the Commissioners, as that rent was never intended to be the consideration for the purchase, but the gross sum to be paid to Billingsley as rent. The whole amount of the arrangement was this: the company appeared to be paying a certain sum annually for the land, and proposed to give up a part of that land, and the question is, what is the position of the parties? If it amounted to an agreement for the sale of the lands, upon the ground of the Commissioners' award, although Mr. Tucker might have no authority to bind the trustees or Lord Waldegrave, yet the receipt of the rent might amount to an express ratification of his act; but it appears to me nothing more than what it appears to be upon the face of it, a settlement of the rent account: and that cannot be converted from its original object, so as to give it an original force to entitle the company to call for a conveyance of the lands. The arrangement, however, was carried into effect, the four acres were given up, and the 8*l.* continued to be paid down to 1846, when a dispute arose

as to the form of the receipt. The defendants gave the company notice to quit, upon which the company imprudently resorted with a notice utterly at variance with the defendants'. The parties being thus at variance, the defendants first constructed their temporary bridge over the railway of the company, and were then proceeding to erect a permanent bridge when the company filed the present bill to have a conveyance of the land, and to restrain the erection of the bridge. With respect to that portion that seeks for a conveyance, I agree with the Master of the Rolls, and I may state that the company are not, in my opinion, precluded by the lapse of time from proceeding under their act to compel the defendants to sell their lands which form part of the canal and railway. I have already said that I can find nothing in the act which limits the time in which their compulsory powers might be exercised. By refusing the company a conveyance, therefore, the Court will not place them at the mercy of the defendants. The defendants, however, contend that, even assuming that the company may still exercise their powers and obtain a parliamentary title to their lands, they are entitled immediately to stand upon their rights and to treat the company as tenants from year to year. This makes it incumbent on the Court to regard the relations of the parties since Lord Waldegrave came of age. At that period he found the company had been in possession of his land for about ten years. Although these lands were essential to the existence of the canal, yet it would have been competent to Lord Waldegrave to proceed to remove them at once by ejectment, but he must have known, if he had done so, that the company would have proceeded at once, under their act, to obtain a conveyance. He then proceeds to an arrangement, and the company state that the parties never would have contemplated a mere possession by the company, determinable at the will and pleasure of the other, and that appears to be strictly proved by the statement of 1813. The words after the enumeration of the lands used in the canal and in the railroads are these: "for those the canal company stand as lessees under Lord Waldegrave, and the rents affixed to each piece to take place on the death

of the lives thereon;" and "these latter payable to the respective lessees, the rents affixed to each piece to be on the death of the lives paid to Lord Waldegrave," and they are very significant of the views of the parties. The company had actually paid to the lessees the value of their interests, and, of course, could not be disturbed as long as the leases existed, yet by uniting them together in one statement Mr. James apparently contemplated their continuance. The question then arises, whether this state of things does not bring the parties within the principle of those cases by which it has been held, that where a person stands by and encourages an act he cannot afterwards complain. It is true that where a party having a right stands by and encourages an act in derogation of that right he cannot afterwards complain, as in *The Duke of Leeds v. the Earl of Amherst* (1). Here, the act was done when the Earl was a minor, and when, therefore, nothing of acquiescence could be attributed. But, here, we find the company using lands day by day without any attempt on his part to disturb them after attaining his majority, he well knowing that when such attempt was made they could compel him, under the powers in their act of parliament, to convey. And the defendants, therefore, cannot now suddenly turn round upon them and attempt to remove them from lands which they have enjoyed for so many years. They must, therefore, be restricted from pursuing such an inequitable course; but, on the other hand, the company ought not to be allowed to remain as at present: they must take prompt measures for ascertaining the compensation to be paid to the defendants.

There only remains the question as to the bridge to be disposed of. The defendants can only be entitled to erect this bridge under the assumption that the land is theirs. If the company had made themselves owners of the land, the only mode by which the defendants could have proceeded would have been under the 51st section of the act, but, according to what has been already said, the defendants by their conduct have precluded themselves

from disturbing the company in the enjoyment of their lands; they are equally prevented from doing anything which would at all derogate from that state of things which they have established by their acquiescence, and from doing anything which would interfere with the possession of the company which the defendants have so long permitted or sanctioned. I think, therefore, that the defendants ought to be restrained from erecting or continuing the bridge; and as in refusing the company the conveyance I do not deprive them of the powers of their act by which they may obtain one, so in preventing the defendants from erecting or continuing the bridge, I do not deprive them from having one erected hereafter if it be desirable to have one under the powers of the same act. I refer both parties to the act of parliament by which their rights are clearly defined.

I hope, and have no doubt, that the parties will feel it to be for their mutual interests to enter into such an arrangement as well to establish their rights on a firm basis as to prevent the necessity of further litigation; and this, too, because and in consequence of the confidence with which they have been dealing with each other for more than half a century. I must dismiss the appeal against the Master of the Rolls' decree, so far as relates to the conveyance, and dismiss the bill, so far as that goes, with costs, and grant an injunction to restrain the defendants from erecting and continuing the bridge over the railway. With regard to the remainder of the case I shall say nothing.

WOOD, V.C. { BATHE v. THE GOVERNOR
June 3, 4. { AND COMPANY OF THE
BANK OF ENGLAND.

Divorce and Matrimonial Causes Act, Section 21.—Feme Covert Executrix—Protection Order.

A feme covert executrix having obtained an order for the protection of her property, under the 21st section of the Divorce and Matrimonial Causes Act, is entitled to a transfer of stock standing in the name of her testator without the concurrence of her husband.

(1) 16 Law J. Rep. (N.S.) Chanc. 5; a. c. 2 Phil. 117: affirming 15 Law J. Rep. (N.S.) Chanc. 351; 14 Sim. 357.

The plaintiff in this case was the wife of John James Bathe, who deserted her in 1845 in New Zealand, and was last heard of in January 1857 as living at Singapore.

Jane Howroyd, by her will, dated the 27th of November 1857, appointed the plaintiff sole executrix and residuary legatee, and the plaintiff proved the will on the 1st of February 1858.

On the 18th of February the plaintiff obtained an order from one of the Metropolitan Police Magistrates for the protection of her property, under the 21st section of the Divorce and Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85.), which order was duly registered on the same day at the Clerkenwell County Court.

There being a sum of 220*l.* 3*l.* per cent. Bank annuities standing in the books of the Bank of England to the credit of the testatrix, and some dividends due thereon, the plaintiff caused the will to be registered at the Bank, and made application to be allowed to sell the annuities and to receive the dividends, but the application was refused on account of her husband not being present.

The bill was then filed by the plaintiff, suing as a feme sole under the provisions of the act, and it prayed a declaration that she was entitled to sell, transfer and otherwise deal with the 220*l.* consols, and to receive the dividends thereon in the absence and without the concurrence of her husband, and consequential relief.

Mr. W. M. James and *Mr. J. Sidney Smith*, for the plaintiff, referred to the 21st, 25th and 26th sections of the act. Under the old law the husband was liable for a *devastavit* committed by the wife executrix during the coverture, and it was on this ground only that he was allowed to interfere—*Russell's case* (1). But now the husband is expressly exempted from all liability in respect of her acts. If she were sued by a creditor as executrix and a feme sole, would it be a good plea to say that her husband was not joined? If she has the liabilities of a feme sole she ought to have the rights of a feme sole.

They also referred to the 7th and 16th sections; and

Williams on Executors, 166, 3rd ed.

Taylor v. Allen, 2 Atk. 213.

Mr. Cotton (with whom was *Mr. Rolfe*), for the Bank.—The 21st section applies only to property to which the wife is beneficially entitled. As to the inconvenience of her being sued by creditors, she might have obtained an order under the Trustee Act vesting the right to transfer in some one else, the husband being out of the jurisdiction — *Ex parte Bradshaw* (2). The proviso in the 21st section, giving double damages to the wife for property seized by the husband, would be very inequitable if it referred to property which she held in trust.

Mr. James replied.

June 4. — *Wood, V.C.*—The question in this case is, whether or not a married woman who has obtained an order from a magistrate under the recent Divorce and Matrimonial Causes Act, whereby she is placed in the same position as if a judicial separation had been pronounced, in reference to the clauses in that act which I have to consider, is or is not entitled, as executrix and residuary legatee under the will of Jane Howroyd, to require a transfer from the Bank of England of stock standing in the name of the testatrix. I observe that, as far as regards the separation, although the order for separation is dated the 18th of February 1858, the desertion reaches back to an earlier period; and, therefore, clearly the 21st section would apply to that anterior period at which the desertion took place, by virtue of the words at the end of the 21st section, which enacts that she is to be deemed to be and to have been since the desertion in the same position as a person who has obtained a judicial separation. I notice also, with reference to the probate, that it was obtained since the desertion. The doubt that has been raised on the part of the Bank is, whether or not the clauses in the act to which I must refer are intended to

(1) 5 Rep. 27.

(2) 2 De Gex, M. & G. 900; s.c. 22 Law J. Rep. (N.S.) Chanc. 180.

apply to trust property; and perhaps the argument can be raised to the fullest extent on the present case, inasmuch as both the legal and the beneficial interest are in this lady, she being both executrix and residuary legatee. The words of the 21st section of the act are these. On applying to a magistrate, she is to have "an order protecting her earnings and property acquired since the commencement of such desertion, from her husband and all creditors and persons claiming under him." Then there is the clause to which Mr. Cotton called my attention, that any creditor attempting to possess himself of the property of the wife contrary to the effect of the provisions of the act, is to be answerable to the wife for double the value of the property so taken or so held after notice of the order. No doubt that points very materially, as far as that portion of the section is concerned, to property which she should acquire in her own right. Mr. Cotton very properly observed, that it is scarcely conceivable that it should have been intended by the legislature that he should forfeit to the wife double the value of the property held by her solely *en autre droit*, in which she had herself no special interest. Then comes a proviso at the end of the 21st section, which seems to be a totally separate provision, "If any such order of protection be made, the wife shall during the continuance thereof be and be deemed to have been during such desertion of her in the like position in all respects with regard to property and contracts, and suing and being sued, as she would be under this act if she obtained a decree of judicial separation." Therefore, that throws us into a totally different section, and I apprehend that the true construction of this section is, that the thing done by the magistrate is one thing, and this is something additional, and besides that species of protection which she acquires by order of the magistrate. Therefore, one is not embarrassed by any consideration, whether or not the first portion of the section refers to trust property, because it is intended that some additional benefit should be conferred by the latter part of the clause. That additional benefit is to be found in the 25th and 26th sections. The

25th section says, "In every case of a judicial separation, the wife shall from the date of the sentence"—which is here to be extended by the operation of the 21st section to the date of the desertion,—“and whilst the separation shall continue, be considered as a *feme sole*, with respect to property of every description which she may acquire, or which may come to or devolve upon her,”—of course, as far as those words go, they carry every sort of property, trust or otherwise, which she might have—"and such property may be disposed of by her in all respects as a *feme sole*, and on her decease the same shall, in case she shall die intestate, go as the same would have gone if her husband had been then dead." That, Mr. Cotton insists, points solely to property which she takes beneficially, because there is no need to insert it, as he says, with reference to any case where she is possessed simply in her administrative and executorial capacity. Of course, without those words being used, the same result would take place. Then it says, "Provided that if any such wife should again cohabit with her husband, all such property as she may be entitled to when such cohabitation shall take place, shall be held to her separate use, subject however to any agreement in writing made between herself and her husband whilst separate." That, again, somewhat more points to that which she may hold in a beneficial capacity. On the other hand, we must proceed to the next section, the 26th, which says, "In every case of a judicial separation, the wife shall whilst so separated be considered as a *feme sole*, for the purposes of contract, and wrongs and injuries, and suing and being sued in any civil proceeding; and her husband shall not be liable in respect of any engagement or contract she may have entered into, or for any wrongful act or omission by her, or for any costs she may incur as plaintiff or defendant." Those words certainly point very strongly to every description of wrongful act that can be performed by this lady in respect of property as well as in respect of everything else. It would be difficult to say, that the husband would not be able on those words, upon being sued in respect of a *devastavit*,

which took place during the separation, to deny that he was liable in respect of her wrongful act, and if so, of course the correlative right must exist in the wife of having the controul over the property during the separation. It would be absurd to say that she could be sued in respect of any *devastavit*, if at the time she was not the person who had the sole right to interfere with respect to the protection of the property. Looking, however, to the ancient state of the law, with respect to matters of this kind, it appears to me that the later cases with reference to abjuration of the realm have not very much to do with the matter; because Lord Eldon, as Chief Justice of the Common Pleas, put these cases upon the true ground in *Marsh v. Hutchinson* (3), where he had to consider the effect of some previous decisions which had allowed considerable latitude to married women suing alone, extending it not merely to the case of abjuration of the realm, but in some instances to transportation and other matters of that kind, in which he thought that the authorities went too far, and he comments upon those cases. The case before him was the simple case of a husband, who had been absent on his country's service, as minister or consul abroad; he was employed by the British government, and was resident in a foreign country, as the marginal note says, "and having lands there, upon the cessation of his employment, in consequence of war between the two countries, sent his wife and family to this country, but continued to reside abroad himself: Held, that the wife, not having represented herself as a *feme sole*, was not liable to be sued as such." Lord Eldon says, "Had the defendant's husband been engaged in the service of government only, it might have made a material difference in the case. The question, however, in the view of the law may, perhaps, be reduced to this, whether the defendant's husband having been employed in Holland, by the British government, he has remained there after the cessation of that employment, merely to collect what the civilians call *summas rerum*, or with any further views. And

yet if it were clear that this man never intended to return to England, and might therefore be represented as incapable of being sued in this country, before we come to a conclusion upon the case, there are many considerations to be weighed. In the case of abjuration, and in those other cases which amount to a civil death, I think that I understand the situation in which the wife was placed. The husband being civilly dead, the wife was entitled to dower of his land in the same manner as if he were actually dead, so she became entitled to the enjoyment and profits of her own land, though if he had not been civilly dead he would have been seised of the lands in her right; and, indeed, she might have sued for an assault in her own name, and might have been made a defendant without her husband in all cases in which the husband must otherwise have been joined. In those cases there is no difficulty, because the fiction of the law which considers the husband as civilly dead, puts the wife in the same situation as if he were actually dead." He proceeds to state all the difficulties which had arisen upon the case in which transportation takes place by way of pardon of a criminal, and what the result would be if he returned to England afterwards, and he points out numerous other difficulties. He seems, however, to place the case of abjuration and positive banishment upon a totally different ground from any which it is material to consider in this case. Lord Eldon took the same view that the authorities had gone too far with respect to suing married women alone, in the case of *Pannell v. Tayler* (4), where, having first followed a case before Lord Hardwicke, in which he granted a writ of *ne exeat* against a married woman, an executrix, her husband not being a party to the suit, he said, that when the older cases came to be sifted, the authority upon which Lord Hardwicke founded himself did not support the decision; and he reversed his own order which granted a writ of *ne exeat*, and again considered the whole question, how far a married woman could be dealt with apart from her husband. But there

(3) 2 Bos. & P. 226.

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(4) 1 Turn. & Russ. 96.

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is a case which appears to me to have considerable bearing upon the construction of this act of parliament, and that is *Innell v. Newman* (5). It has some bearing upon the construction that ought to be put upon this section. In that case the wife was an executrix, and had brought an action in the names of herself and her husband, as she was obliged to do, to recover certain property of the testator: it is not stated whether or not she was residuary legatee, or had any beneficial interest in the property when it was recovered, but what took place was this: the husband gave to the defendant a release of the debt, and the motion was to set aside the release, on the ground that there had been an agreement for separation between the husband and wife. The affidavit set out, "that on the 7th of December 1798, a regular deed of separation was entered into between Charles Innell and his wife, whereby he agreed to allow her to enjoy, as her distinct and separate estate and property, all such effects whatsoever which she might thereafter purchase or acquire, or which by any gift, grant, limitation, devise, bequest, descent or representation, she or the said Charles Innell, his heirs, executors or administrators, in her right, should be entitled to, and that these should be enjoyed without any interruption by the said Charles Innell, and that he would not at any time do any act to impede the operation of that deed, but would at all times allow of, ratify and confirm all lawful and equitable proceedings to be brought or prosecuted in his or their name or names, with or without the said Elizabeth, his wife, for recovering and obtaining such real and personal estates." Reading that, I cannot help observing, that it is very much like the 25th section here, and has very much the appearance of reference to property belonging to the wife simply in her own right, and not to property that she was to acquire in an executorial capacity; and, indeed, so it was argued by the counsel who shewed cause against setting aside the release. Nevertheless, the Court held, that the release was to be set aside, and that the agreement in fact precluded the husband from exe-

cuting the release; and two of the Judges did not think it necessary to determine whether or not, in truth, he would be able to deal with the property when he got it; so that in effect two of the Judges said they would not determine whether or not the beneficial interest was to be enjoyed in the whole of this property which she might so acquire; but they held that the contract not to interfere with any operation of hers for acquiring property, and which, of course, was a contract not to interfere with any operation for acquiring the property referred to, prevented his interfering to prevent her recovering that which she was suing for *quâ* executrix. Abbott, C.J. says, "Whilst the husband continues to relinquish his marital rights, it would be contrary both to equity and justice if we were to allow him, in direct violation of the contract which he has made, to execute a release of this sort, and thereby to render the suit commenced by his wife, in her character of executrix, utterly unavailing. It is not necessary for us to decide as to the right of the husband to receive the money when recovered by the present action. All that we can do on the present occasion is to say, that he shall not be allowed in this manner to prevent the suit from proceeding." That, of course, could only be upon his undertaking not to interfere with her recovering the property there referred to. Bayley, J. says, "I am of the same opinion. The wife in this case is bound as executrix to act for the general benefit of all persons interested under the will of the testator, and the husband ought not to be permitted to prevent this by a wrongful act which would amount to a *devastavit* on his part: he is not to release the debt without sufficient compensation, but ought to suffer the suit to go on to ascertain the amount of the debt. He may, perhaps, be entitled to intercept the money, when it is ascertained upon a trial how much is due, but he ought not to be allowed in this manner to prevent any trial from taking place." Holroyd, J. says more: he says, "I think that this release ought not to be available to the defendant, being given under such circumstances and in the progress of the cause. I do not agree in the construction which has been put upon the deed in the

course of the argument. It seems to me to extend to property claimed by the wife in her representative capacity, and I think that this release is clearly in fraud of the deed of separation. Here, too, the husband is only named as plaintiff for conformity, and he ought not to be allowed to release the debt, for to do so would be a fraud upon the persons having interests under the will of the testator." That is a separate question. Best, J. says, "This action is brought on the faith of the stipulation contained in the deed of separation, and I think that the husband ought not under such circumstances to be allowed to release the debt and altogether to defeat the action." It suggests at once to one's mind, beyond the actual decision, why a liberal construction should be given to this act of parliament with reference at least—and that is all I have now to determine—to the position of a wife executrix and residuary legatee. Of course if it is not so, the husband may release the debt in question, and thereby directly diminish the personal estate to which the wife is entitled as residuary legatee; or, much further than that, if I were to hold that a wife executrix and residuary legatee is not protected by these sections, the husband might sue for and recover payment, without any possibility of the wife preventing him, of the debts of the testator which form part of the residuary estate given to her. I confess I find it very difficult to discover a sound distinction between the case of a specific legacy, which upon the bequest being assented to becomes her immediate property, and the case of this residuary estate which is her property subject to the payment of debts. What appears to me to make it more imperative is the coupling of the 25th and 26th sections upon which the wife can sue and be sued in all proceedings alone, and the husband is not responsible for any engagement or wrongful act or omission of hers. Therefore, he not being answerable for a *devastavit* which would be a wrongful act or omission, and she being capable of being sued, I think it follows as a necessary inference that she must have power to sue and get in that estate. In the present case I am dealing with one who is both executrix and residuary legatee, who has both the legal and the beneficial interest, and,

therefore, it is not necessary for the present purpose to decide further than that I think I am bound to give this lady the full means of recovering that property to which she is entitled; and I shall therefore decree payment to her.

M.R. }
March 19, 29. } WROUT v. DAWES.

Vendor and Purchaser—Purchase-money—Lien—Solicitor.

A firm of solicitors were employed in May 1853 by trustees to sell some copyhold estates. The purchaser also employed them to complete the purchase. They had money of his in their hands, more than sufficient to pay the purchase-money, and the purchaser directed the solicitors to apply it and pay the purchase-money. The purchaser was let into possession in October 1853. In December following the vendors executed a deed of covenant to surrender the estates purchased, and they signed the receipt for the purchase-money indorsed thereon: the title-deeds were retained by the solicitors, who deposited them in a box containing other title-deeds and documents of the purchaser. The steward of the manor was one of the firm of solicitors, and in June 1854 he admitted the purchaser to the land purchased. The purchase-money was not actually paid by the solicitors as directed by the purchaser, but they settled accounts with the vendors, the trustees, and gave them credit for the purchase-money as received by them, and after allowing costs and charges, there was a balance due to the trustees. Four-fifths of this balance were paid to four of the five cestuis que trust entitled to the proceeds of the sale. The solicitors retained the other one-fifth in their hands, and upon the remaining cestui que trust requiring payment of his share, the solicitors stated that the purchaser had not paid the purchase-money, and that they had retained the deeds which the trustees required them to hold as security. The solicitors did not pay the purchase-money, and, in February 1856, became bankrupt. Upon a bill by the vendors,—Held, that they were entitled to a lien upon the estate for the balance of the purchase-money remaining unpaid.

This suit was instituted, by the trustees of the will of John Wrout, deceased, to obtain a declaration that they were entitled to a lien for the purchase-money upon several copyhold estates which they had sold to the defendant.

Mr. Lloyd and Mr. B. L. Chapman appeared for the plaintiffs.

Mr. R. Palmer, Mr. Selwyn and Mr. Hopwood, for the defendant.

The cases cited were—

Vandaleur v. Blagrove, 6 Beav. 565.

Young v. White, 7 Ibid. 506; s.c. 13

Law J. Rep. (N.S.) Chanc. 419.

Dart's Vendors and Purchasers, 346.

March 29.—The MASTER OF THE ROLLS. —The question involved in this suit is, which of two innocent persons is to bear the loss occasioned by the defalcation of a solicitor, a member of a firm who were the common agents of both. The plaintiffs are the trustees under the will of J. Wrout, deceased, who died in November 1852, and in that character they sold all the copyhold estates of the testator. The sale took place in May 1853, and they employed as their solicitors and agents for this purpose Messrs. Sturton, Key & King. The defendant was the purchaser of lots 2, 3, 4, and 6; the aggregate amount of purchase-money was 1,600*l.*; 160*l.* as deposit-money was paid at the time of the sale, and 1,440*l.* remained due. The defendant also employed for the purpose of this purchase Messrs. Sturton, Key & King. The sum of 968*l.* 18*s.* 9*d.* still remains due to the plaintiffs in respect of the purchase-money. The defendant says that Messrs. Sturton, Key & King had this money belonging to him in their hands, that they were expressly authorized by him to apply it in payment of the remainder of the purchase-money, and that the plaintiffs accepted them as their debtors, and that they cannot now maintain any claim against him. In the absence of any special circumstances, I think that this is clear on the one hand, that if the defendant had paid the purchase-money to Messrs. Sturton, Key & King this would have been a complete discharge to him, and that the plaintiffs, if they had not received

it from Messrs. Sturton, Key & King, would have lost all remedy against the defendant, and would not have been entitled to any lien on the property for the unpaid purchase-money, or rather for the purchase-money not received by them. On the other hand, it is also clear that if an agent for the sale of property owes the purchaser a sum of money, that person cannot obtain payment of his own debt and discharge himself from the purchase-money by directing his agent, who is also his debtor, to pay to the vendor the sum owing to him, the purchaser. The matter may, of course, be qualified by various circumstances, such as by the absence of proper care on the part of the vendor, or by the vendor accepting the common agent as his debtor, with a full knowledge of the circumstances. The additional facts which affect this case are as follows. At the time of the sale, Messrs. Sturton & Co. were the debtors of the purchaser. They had received for him, on the 24th of March previously, the sum of 2,359*l.*, and that money was still in their hands at the time of the sale, at least I assume that to be the case, although there is some question whether they had not paid 1,300*l.* out of it, but any observation which may arise on that will be embraced in the general remark that I shall presently have to make.

In the September following the sale they received for the defendant the further sum of 697*l.* 10*s.* The defendant was let into possession of the property purchased by him on the 11th of October 1853. He directed Messrs. Sturton & Co. to pay the purchase-money to the plaintiffs out of the money they had in their hands belonging to him. The exact time when he did this does not appear; it was not done by any writing, but verbally. The time is not very material, but I assume it to have been done at or about the time when he entered into possession. The deed of conveyance was executed by the plaintiffs in the month of September 1853, and at the same time a receipt for the purchase-money indorsed on the deed was signed by the vendors. The conveyance, however, was not delivered over to the defendant, nor the title-deeds of the estate, but they were kept by Messrs. Sturton & Co., and, as appears by the evidence of Thornton, their

clerk, in a box appropriated for the papers and deeds of the defendant. The fact, however, undoubtedly is, that Messrs. Sturton & Co. never lost the possession or controul over the deeds and papers, and that they were never delivered over nor got into the possession of the defendant. In June 1854 Mr. Key, who was one of the partners in the firm of Sturton & Co., and who was also steward of the manor, presented this indenture to a court baron, and caused the defendant to be admitted to the copyholds, by which the legal estate became vested in him. In July 1854 Mr. King, one of the partners of the firm of Sturton & Co., died. On the 16th of August 1854 a meeting took place at the office of Messrs. Sturton & Co. for the purpose of settling the accounts of the testator's estate. It was attended by the first two plaintiffs, Mrs. Gibbons and Mr. Wrout. They, together with the last plaintiff on the record, were the only persons interested in the residue of the estate of the testator. At this meeting a paper was produced, which gave an account of the estate of the testator, and by the heading of that account it treated Messrs. Sturton & Co. as having received all the purchase-money for all the lots. It appears twice over in the evidence. It is in this way, "Dr. The real estate of the late John Wrout, deceased. Cr." On one side receipts, and on the other payments. Under the receipts is the 1,600*l.* from the Rev. S. Dawes for lots 2, 3, 4, and 6. On the other side of the accounts are set forth the payments and charges. The balance divisible is set forth at 4,844*l.* 13*s.* 9*d.*, which being divided into fifths, gives 968*l.* 18*s.* 9*d.* as the share of each of the parties entitled. Four of these sums were paid or accounted for by Messrs. Sturton & Co. to the four persons beneficially interested, who attended the meeting. The whole amount was not paid at this meeting, various portions being paid upon subsequent occasions. The remaining fifth was not paid. The plaintiff Frederick Wrout, who was not present at that meeting, and who is the only one who has not been paid, made repeated applications to Messrs. Sturton & Co. for this balance. They stated to him that they were unable to pay it, because the defendant had not paid his purchase-money. Neither the plaintiff Frederick Wrout, nor any of the

other plaintiffs, made any application to the defendant for payment, but they contented themselves with directing Messrs. Sturton & Co. not to part with the conveyance or the title-deeds until the purchase-money was paid. Matters proceeded in this way through the whole of the year 1855. In December 1855 the junior partner of that firm, Mr. Key, absconded, and the firm of Sturton & Co. were then on the eve of bankruptcy. In January following the plaintiff Frederick Wrout insisted upon the deed of conveyance and the title-deeds of the estate being deposited with Messrs. Gurney & Co., bankers of Holbeach, as a security for the unpaid purchase-money. This was done in the joint names of Sturton and the plaintiff Henry Wrout. The firm claimed a lien on the deeds, as against the defendant, for unpaid costs. In February 1856 the firm became bankrupt, and the plaintiffs made their claim against the defendant. The defendant, having been admitted tenant of the copyhold, is invested with the legal estate. There is a long unsettled account between the defendant and Messrs. Sturton & Co., but that account is not established by the evidence. I assume it to be true that from the date of the purchase, or at least, from December 1853 till the present time, after attributing a proper portion of the money in their hands to the payment of the purchase-money of the copyholds, a balance has always been and is now due to the defendant from Messrs. Sturton & Co. It is also proved to my satisfaction that the plaintiffs were never aware of, and therefore never sanctioned the peculiar mode of payment of the purchase-money insisted upon by the defendant. The account between the plaintiffs and Messrs. Sturton & Co., to which I have referred, certainly does not give any such information. The utmost that can be said of it, treating it in a manner most favourable to the defendant, is, that it asserts that the whole of the purchase-money has been paid by the defendant to Messrs. Sturton & Co.; but if so, that payment must be presumed to have been made in the manner usual in such cases, namely, by actual payment of the money in cash after the sale, and not by writing off a debt due to the purchaser from the agent. If there had been such a payment in cash, there is no doubt it would have

exonerated the defendant, but I am of opinion the plaintiffs cannot be treated as having acquiesced in or sanctioned an arrangement of which they were ignorant, or as having consented that the transfer of the debt of Sturton & Co. from the defendant to them should be treated in the same manner as if the defendant had paid the purchase-money in cash to Sturton & Co., the more especially when the fact of such a payment might depend upon the settlement of an account. This writing off of a certain portion of a debt cannot be treated as a payment to Messrs. Sturton & Co. In *Lambarde v. Older* (1) I held that a creditor of an intestate could not purchase from the legal personal representative goods belonging to the intestate, and pay for these goods by wiping off the debt which was due to him from the intestate's estate, and that the creditor must pay for the goods and must come in for a dividend only *pari passu* with the other creditors; and that if this species of set-off had been allowable, the legal representative would not have been justified in selling to the creditor of the intestate. I look at this case on the same principle. Suppose Sturton & Co. had been employed by the plaintiffs to sell the copyholds by private contract, and had agreed with the defendant to sell them to him at the price specified by the plaintiffs, the defendant could not have paid for the purchase, so far as the plaintiffs were concerned, by transferring to them the debt due to himself from Sturton & Co. If he could, the sale would not have been justified on the part of Sturton & Co., unless the circumstances had been disclosed beforehand to the plaintiffs, and it had been sanctioned by them. In like manner, the plaintiffs might, if this mode of payment were allowable, have objected to sell the copyholds to any one who was a creditor of their agent, for it may reasonably be inferred that if these copyholds had been sold to another person, who had actually paid 1,440*l.* to Sturton & Co., the plaintiffs would have had a much better chance of being paid their purchase-money. This is the view I should have taken of this case if it had been sold by private contract. The

case does not differ in principle by the sale being by public auction. One of the most serious objections to the case set up by the defendant is, that the question of payment or non-payment of the purchase-money must depend on the taking of the accounts between himself and the firm of Sturton & Co., involving the making out and taxation of their bill of costs, all which matters the plaintiffs have no privity with, of which they must necessarily be ignorant, and into which they cannot be required to go, as they have no means of establishing the facts; and yet in this view of the case, it would be a matter in which they would have a most material interest. This cannot, therefore, be treated as a payment of the purchase-money. Are there, then, other circumstances to deprive the plaintiffs of that which, under ordinary circumstances, would be their right? The fact of the defendant having obtained the legal estate, by being admitted by Mr. Key, is not a matter affecting this question. If, independently of that fact, a lien for unpaid purchase-money exists, it must still exist, notwithstanding the legal estate had become vested in the purchaser. Have the plaintiffs, then, by their laches, forfeited their right to enforce this lien? In October 1853 the defendant was put into possession to the knowledge of the plaintiffs; the deed of covenant to surrender was executed by them in December following; and the receipt for the purchase-money was signed by them. A meeting took place at the solicitors' to settle the purchase in August 1854; and from that time up to the bankruptcy of Sturton & Co., in February 1856, no word is said or communication made to the defendant on the subject of his unpaid purchase-money, which the plaintiffs allege and believe to have been unpaid. There is some uncertainty upon the evidence as to this; but I will assume, as the most favourable way of looking at it for the defendant, that nothing was said to him until after the bankruptcy. The fact that the deed of covenant to surrender was not delivered over to the defendant, and that the title-deeds of the property were still in the possession of the agents of the plaintiffs, and known by them to be so, is a sufficient exoneration to them for not having applied to the defendant before. This neglect

(1) 17 Beav. 542; s.c. 23 Law J. Rep. (N.S.) Chanc. 18.

Re Sharp. 3 P.D. 76.

M.R. }
 March 29. } BROOKE v. BROOKE.

*Baron and Feme—Wife's Savings—
 Demurrer.*

A husband, on his return from India, filed his bill asking the Court to secure and settle a sum of money which his wife had saved out of remittances made by him for her maintenance and support:—Held, upon a demurrer of the wife, who persisted in living separate from her husband, that no case was made either for discovery or relief, and that the demurrer must be allowed.

The bill in this case was filed by Major-General Brooke, of the Hon. East India Service, against his wife Catherine, and against Messrs. Achille Adam and others, bankers at Boulogne, to obtain a declaration of the right of himself and his wife in a sum of 39,000 francs, and in any other savings or accumulations made by his wife out of remittances or allowances made to her by the plaintiff.

The bill contained the following statements. Major-General Brooke was married to his present wife in 1820. There was no settlement or agreement for a settlement made at the time of marriage or since. They resided together for some time in India, and in 1821 returned to England together. In 1824, when the plaintiff returned to India, his wife ceased to reside with him, left him, and remained in England, and had since lived separate and apart from him, chiefly at Boulogne-sur-Mer, where she continued to reside. From 1824 to 1855 the plaintiff resided in India. No deed of separation or other agreement or arrangement for any allowance by the plaintiff to his wife was on the occasion of her leaving him or had since been made or entered into by the plaintiff, but he from that time to the 1st of January 1853 voluntarily supplied his wife, first, with 250*l.* a year, subsequently with 300*l.* a year, and from the 1st of January 1853 to the present time with 350*l.* a year, for her support and maintenance as his wife, and he believed that the same were expended by her for those purposes. These sums, or the greater part of them, were from

of theirs is to be balanced by the neglect of the defendant in not requiring the title-deeds and deed of covenant to be delivered up to him. I regard as wholly immaterial the circumstance whether the title-deeds and the deed of covenant in the possession of Sturton & Co. were in a box, which had on it the name of the defendant or the names of the plaintiffs; or whether it was kept with the papers of one, or with the papers of the other. In either case they were in the custody of Sturton & Co., and they were known by both the plaintiffs and the defendant to be so. As long as they were so the plaintiffs were entitled to believe—and I am of opinion that they did believe—that their lien for the purchase-money unreceived by them remained secure; and the defendant was bound to know that as long as the deeds were in the custody of a common agent the transaction could not be complete, so far as the transfer of those documents from the plaintiffs to him was essential to make it complete. The case is the same as if the defendant had taken proceedings for the delivery up of these papers. Could I order them to be delivered up without payment of the purchase-money remaining due to the plaintiffs? I could not; and if I could not, it must be because a lien exists for the unpaid purchase-money, and if such a lien exists, I am bound to give the plaintiffs the relief which they ask. In fact, the case comes back to this: whether the attribution of the debt due from Sturton & Co. to the defendant for the payment of the purchase-money was a good payment to the plaintiffs of that purchase-money, as between the plaintiffs and the defendant; and both upon principle and upon authority, I am of opinion that it was not. The case of *Young v. White* expressly applies to this case; and, consequently, the plaintiffs are entitled to a decree. I think also that the case is not varied, because four persons entitled to the testator's residuary estate have been paid in full, and because one alone remains unpaid. The plaintiffs are the persons who are bound to receive the purchase-money, and to distribute it among the *cestuis que trust*.

time to time remitted by the plaintiff from India to Messrs. Crawford, Colvin & Co., his London agents, and they were either paid to Mrs. Brooke herself or remitted in quarterly payments, with few exceptions, to Messrs. Adam & Co., her bankers at Boulogne. The plaintiff lately ascertained that she applied only 100*l.* a year, or thereabouts, for her support and maintenance, and that she permitted the residue of the remittances to accumulate in the hands of Messrs. Adam & Co., who now had a sum of 39,000 francs or 1,560*l.* standing to her credit, arising from the unapplied remittances.

The bill alleged that the remittances were made by the plaintiff under the impression that the whole of the amounts were necessary for her due support and maintenance according to his station, and that they would be and were applied and expended by her for those purposes, and that the plaintiff did not thereby intend to create or confer upon his wife any separate estate or interest in any part of such remittances which should not be applied or expended by her for the purposes for which they were made, and he claimed the balance in the hands of Messrs. Adam & Co. as his property; that the plaintiff apprehended that his wife might be induced by persons resident at Boulogne, who it was believed exercised undue influence over her, to dispose of the balance for other purposes than those for which the remittances were made, and that the plaintiff desired to take steps for securing to Mrs. Brooke the benefit of such balance during her life, and at the same time of preventing her from absolutely disposing of such balance.

It appeared, though it was not stated in the bill, that the plaintiff had taken some proceedings in France, but the Court at Boulogne considered that it had no jurisdiction as the suit was between foreigners, and that the right to the money involved a question of English law; the Court, therefore, remitted the parties to the English Courts, and decreed that after a definite judgment in England the property should be sent to the person to whom the English Court ordered it to be paid: in the mean time the money was to remain in the hands of the bankers.

It was in consequence of the failure of these proceedings that this bill was filed, and both Mrs. Brooke and the Messrs. Adam put in general demurrers to the bill for want of equity, and because no case was made either for discovery or relief.

Mr. R. Palmer and Mr. Renshaw, for Mrs. Brooke.

Mr. Selwyn and Mr. Dryden, for the plaintiff, in support of the bill.

Messenger v. Clarke, 5 Exch. Rep. 388; s. c. 19 Law J. Rep. (N.S.) Exch. 306.

Barrack v. McCulloch, 3 Kay & J. 110; s. c. 26 Law J. Rep. (N.S.) Chanc. 105.

THE MASTER OF THE ROLLS. — The statements in the bill must be taken most strongly against the plaintiff, and the sums remitted by the husband from time to time must be treated as an allowance made for the separate maintenance and support of the wife, and the money in question must be considered as part of her separate estate. The husband says that the money was intended and was supplied for her support and maintenance; it necessarily follows that it was for her separate maintenance and support. He was residing in India during the whole of the period, and if so, she was entitled to save any portion she pleased, and according to every principle of equity to deal with the savings of her separate estate as she thought fit. The case of *Messenger v. Clarke*, although it seems startling at first, was rightly decided. In that case the wife had been allowed by agreement between the husband and wife a sum of money for her separate support and maintenance. Undoubtedly in equity she could have disposed of it as she thought fit. She invested it in stock, and shortly before her death she sold it out and gave the proceeds to another person. The husband claimed that property, and a Court of law held that he was entitled to it. I do not see how it could have been held otherwise. To hold in this case that it was not the property of the married woman would be to decide at variance with the current of authorities in

equity. Supposing the case of *Messenger v. Clarke* to be binding upon the present occasion, it must be observed that the money was given to the wife for her maintenance and support. Alderson, B., whose judgment was the strongest, says, "we do not wish to be understood as entertaining any doubt that if she had disposed of the money for the payment of her debts, or had parted with it for a good and valid consideration, under such circumstances it could be recovered back," meaning, I suppose, that the Court entertained no doubt that it could not be recovered back. What evidence is there in this case that the whole of this money is not required to discharge the wife's liabilities, debts which she incurred in the support and maintenance of herself? The bill contains no allegation upon the subject; every shilling may be required for that purpose, and if deprived of this, she may be left penniless. The bill contains no allegation as to how this fund is constituted. If the money was in this country and could not be obtained without the intervention of this Court, I should settle every penny of it upon the wife, and allow her to dispose of it as she thought fit. This fund must be treated as the separate estate of the wife, and the demurrer must be allowed. The case is altogether new. The bill, however, cannot be supported upon the allegations it contains, and therefore the demurrer must be allowed.

should the plaintiffs make any claim against or demand upon the said corporation for or on account of any work executed by them, unless the engineer of the corporation should certify the amount thereof, and that the plaintiffs were reasonably entitled thereto; and further, that in case of disputes or differences arising touching the works, or the construction of the contract, or concerning any certificate, order or award which might have been made by the engineer, such disputes or differences should be referred to and decided by the engineer of the corporation, and that it should not be competent to the plaintiffs or the corporation to except, at law or in equity, to any hearing or determination before or of the said engineer, nor should the said engineer be made party to or required to defend or answer any suit or proceeding, at law or in equity, at the instance of the said corporation or of the plaintiffs, nor should he be required or be compellable by any proceeding whatsoever, either at law or in equity, or otherwise, to answer or explain any matter touching or relating to any certificate made by him. The bill also stated that a certain portion of the works had been completed by the plaintiffs, but the engineer, acting under the direction and in collusion with the corporation, withheld his certificate of such completion, and thereby prevented the plaintiffs from recovering payment therefor, and that he also, under the like direction, refused to certify the correctness of the plaintiffs' claim in respect of such work, or to deliver his award as arbitrator in respect thereof. The bill (which was filed against the corporation and their engineer) prayed that the withholding of the said certificate by the engineer might be declared a fraud upon the plaintiffs, and that the plaintiffs might be declared entitled to receive such an amount of money for the work performed by them as they would have been entitled to if such certificate had been granted:—Held, that it was of the very essence of the contract that no sum should be considered due and owing to the plaintiffs on account of any of the works executed by them, unless the engineer should certify the amount; and, it appearing upon the result of the evidence that the engineer had not refused to discharge his duty according to the contract, and had not done anything to disqualify himself, but that he

STUART, V.C.

AND

ERLE, J.

1857.

Dec. 2, 3, 4, 12.

1858.

April 29.

SCOTT v. THE CORPORATION OF LIVERPOOL.

Building Contract—Account—Arbitration Clause—Jurisdiction of Ordinary Tribunals, how far excluded.

The bill stated that the plaintiffs contracted with the corporation of L. to perform certain works, and the corporation agreed to pay for them in a certain specified manner, with a proviso that no sum of money should be considered to be due and owing, nor

was ready and willing to discharge the same according to the terms of the contract, the bill was dismissed with costs, as against the defendants.

James Scott and Joseph Nowell, the plaintiffs in this case, were the contractors for certain works required by the defendants, the Corporation of Liverpool, to be done in and about the formation of a reservoir, called the Rivington Reservoir, which, amongst other works and undertakings, the corporation were authorized to construct and carry into effect by the statute 10 & 11 Vict. c. cclxi., being the Liverpool Corporation Waterworks Act, 1847, and by subsequent acts of parliament passed in 1850 and 1852.

The defendants to the bill were the corporation and T. Hawksley, their principal engineer.

The bill prayed an account of works done by the plaintiffs for the defendants, and payment of what should be found due to them in respect thereof. By the contract made between the plaintiffs and the defendants, and pursuant to which the works in question had been performed, the plaintiffs were required to observe a specification which had been drawn up of the works required by the defendants for constructing the reservoir. To this specification certain general conditions were annexed, and amongst them the following: "The contractor shall truly and satisfactorily complete his undertaking in all its parts on or before the 1st of January 1854, on which day, or on such other day (not being earlier) as may be allowed, in writing, by the engineer, in pursuance of the power hereinafter for that purpose contained, he shall deliver up the said works to the said corporation, &c.; provided always, that if, by reason of any additions to or enlargement of the works (which additions or enlargement the said engineer is hereby authorized to make), or from any other just cause arising with the said corporation, or with the engineer, or his clerk, assistant or inspector, the contractor shall, in the opinion of the engineer, have been unduly delayed or impeded in the completion of his contract, it shall be lawful for the said engineer to grant, from time to time, by

writing under his hand, such extension of time as to him may seem reasonable, without thereby prejudicing or in any manner affecting the validity of the contract, or the sufficiency of the tender, or the adequacy of the sum or prices therein mentioned; and any and every such extension of time shall be deemed to be in full compensation and satisfaction for and in respect of any and every actual and probable loss or injury sustained or sustainable by the said contractor in the premises, and shall in like manner exonerate him from any claim or demand on the part of the said corporation for or in respect of the delay occasioned by the cause and causes in respect of which any such extension of time shall have been made, but not further or otherwise; and it shall be lawful for the said corporation, in case the said contractor shall fail in the due performance of any part of his undertaking, or shall not, in the opinion and according to the determination of the said engineer, exercise due diligence and make such due progress as would enable the works to be efficiently completed at the time and in the manner aforesaid, to determine the contract, by a notice in writing under the hand of the town clerk, and to enter upon and take possession of the said works, and of the plant, tools and materials of the said contractor, and use or sell the same as the absolute property of the corporation. The plant, tools and materials provided by the contractor shall in all cases, from the time at which they or any of them may be brought upon the works and land of the corporation, and during the construction and until the completion of the said works, become and continue the property of the said corporation, and the contractor is hereby prohibited from removing the same, or any part thereof, during the progress of the works without the consent in writing of the said engineer; and when the contract shall have been so terminated, or so soon thereafter as the engineer may think convenient, the said engineer shall fix and determine what amount, if any, is then reasonably earned by the contractor in respect of work actually done, and in respect to the value of any materials, implements and tools provided by the contractor and taken by the

corporation, and the amount thereof, after allowing for all sums then already paid to the contractor on account, shall remain in the hands of the corporation, without interest, until twelve months after the date of the engineer's certificate of the final completion of the works, as herein provided; and the said engineer shall be at liberty to authorize, by his certificate, the said corporation to deduct the damages, losses, costs, charges and expenses in his opinion incurred by them in consequence of the premises, or to which they may be put or liable, together with the forfeitures, if any, incurred by the said contractor, from any sum of money which would so become due and owing to the said contractor."

The specification, after making provision for a sum to be paid by the contractor by way of stipulated damages in case the works should not be completed within the stipulated time, proceeded as follows:—

"And the said contractor shall be entitled to payment for his work in manner following, that is to say, to a monthly instalment equal to 80*l.* per cent. of the value of the amount executed in the then preceding month; to a further instalment of 10*l.* per cent. of the value of the amount of work executed when such works are completed and delivered to and accepted by the said corporation in manner aforesaid, and to the balance, whatever the same may be found to amount to, so soon as the responsibility of the said contractor shall cease and determine and shall have been entirely fulfilled; provided that no sum or sums of money shall be considered to be due and owing, nor shall the said contractor make any claim against or demand upon the said corporation for or on account of any work executed by him, unless the said engineer shall certify the amount thereof, and that the said contractor is reasonably entitled to such instalment or balance respectively; nor unless such certificate shall have been presented to the town clerk of the said borough; nor shall any such sum or sums of money be considered payable to the said contractor until the expiration of seven days after such certificate shall have been so presented; nor shall any omission to pay the amount of such certificate at the time the same

shall be payable, be held or deemed to vitiate or avoid the contract, but in such case the contractor shall be entitled to interest thereon at and after the rate of 10*l.* per cent. per annum, for such time as such omission shall continue." "And in case of any doubts, disputes or differences arising or happening touching or concerning the said works or any of them, or relating to the quantities, qualities, description or manner of work done and executed, or to be done and executed by the said contractor, or to the quantity or quality of the materials to be employed therein, or in respect of any additions, deductions, alterations or variations made in, to or from the said works, or any part of them, or touching or concerning the meaning or intention of this specification, or of any part thereof, or of the contract entered into by and between the said corporation and the said contractor, or of any plans, drawings, instructions or directions referred to in this specification or the contract, or which may be furnished or given during the progress of the works, or touching or concerning any certificate, order or award which may have been made by the said engineer, or in anywise whatsoever relating to the interest of the said corporation, or of the said contractor in the premises, such doubts, disputes or differences shall from time to time be referred to and be settled and decided by the said engineer, who shall be competent to enter upon the subject-matter of such doubts, disputes or differences, with or without formal reference or notice to the parties to the said contract or either of them, and who shall judge, decide, order and determine thereon; and to the said engineer shall also be referred the settlement of the said contract and the determination of the said sum or sums or balance of money to be paid to or received from the said contractor by the said corporation, and the directions, decisions, admeasurements, valuations, certificates, orders and awards of the said engineer (which said directions, decisions, admeasurements, valuations, certificates, orders and awards respectively may be made from time to time) shall be final and binding upon the corporation and the said contractor respectively, and shall not be set aside, or be attempted to be set aside, by reason

or on account of any technical or legal defects therein, or in this specification, or in the contract founded thereon, or on account of any informality, omission, delay or error of proceedings in or about the same, or any of them, or in relation thereto, or on any other ground, or for any other reason, or for any pretence, suggestion, charge or insinuation of fraud, collusion or confederacy, or otherwise howsoever. And it shall not be competent for the said contractor, or the said corporation, to except in law or in equity to any hearing or determination before or of the said engineer, or to any certificate, order or award had, proposed, made or executed by such engineer, on the ground of any want of jurisdiction, or excess of authority, or irregularity of proceeding, or otherwise howsoever; but any and all matters made the subject of any such hearing or determination, or included in any certificate, order or award, and whether of retrospective or prospective operation or effect, shall be held and deemed, both at law and in equity, to have been properly submitted to the said engineer, and be taken to be properly adjudicated upon; nor shall the said engineer be made party to or required to defend or answer any suit, bill, claim or proceeding at law or in equity, at the instance of the said corporation or of the said contractor; nor shall the said engineer be required or compellable by any proceeding whatsoever, either at law or in equity, or otherwise, to answer or explain any matter touching or relating to any certificate or award made by him, or to state or shew how or why, or in what manner, or on what grounds he settled, ascertained or determined, or omitted to settle, ascertain or determine any matter whatsoever; nor shall he be required or be compellable in any way to state or give his reasons for any proceeding whatever which he may take, or direct to be taken in or about the premises; nor shall he be required or be compellable to produce or shew to any person or persons, or for any purpose whatsoever, any plans, drawings or documents whatsoever, or any calculations or memoranda whatsoever in his possession or power."

In 1851 the plaintiffs made a tender to the defendants for the execution of part of the works mentioned in the specification, which tender was accepted by the defendants; and thereupon an agreement, dated the 6th of November 1851, was entered into between the plaintiffs and the corporation, whereby the plaintiffs covenanted with the defendants, the corporation, to construct such works, and to observe and perform all the matters mentioned in the specification on their part to be observed and performed. The bill alleged that the defendant, the engineer, did not give to the plaintiffs possession of the land, upon which the works mentioned in the contract were to be done, until six months after the time when, according to the terms of the specification, possession ought to have been delivered to them, and that the plaintiffs were on that account entitled to an extension of the time within which the said works were to have been completed; that by reason thereof, and of numerous other undue delays, impediments and hindrances in the execution of the said works occasioned to them by the defendant, the engineer, and other agents of the corporation, they were prevented from completing the works by the time specified in the specification; but the engineer, nevertheless, refused to extend the period within which the said works were to be completed, and insisted that the plaintiffs were not entitled to any such extension of time.

The bill then stated that the engineer refused to certify the correctness of a portion of the claim of the plaintiffs in respect of work done by them, and that after requiring that the amount payable in respect thereof should be determined by himself as an arbitrator, and having had the matter discussed before him, he had neglected to deliver any award thereon, though a period of eighteen months had elapsed since the matter was discussed before him; that the engineer had, in fact, withheld the certificate, to which the plaintiffs were justly entitled, by the direction of the defendants, the corporation, and for the purpose of preventing the plaintiffs from obtaining the amount to which they would have been entitled if such certificate had been duly given, and that the withholding of such certificate

was, under the circumstances, a fraud upon the plaintiffs.

The bill then alleged that, in February 1855, a notice having been previously served upon the plaintiffs according to the terms of the specification, the corporation entered upon and took possession of the works referred to in their contract with the plaintiffs, and took possession of the plant, tools and materials belonging to the plaintiffs; that the plaintiffs then offered by letter to the defendants to refer their claim to independent arbitrators, but that to this no answer was returned. It then stated that the plaintiffs had forwarded to the corporation a detailed statement, from which it appeared (as was the fact) that a large sum remained due to the plaintiffs in respect of the said works, and that the defendant, the engineer, then declared his intention of proceeding to determine the amount due to the plaintiffs on account of the said works; that the said engineer had not, however, made or delivered any certificate or award of the amount due to the plaintiffs on account of the said works, and that the plaintiffs were wholly unable to compel or induce him to do so, and that they were consequently unable to recover at law the amount due to them, inasmuch as such amount had not, through the default of the defendant, the engineer, been duly ascertained.

The bill then,—after alleging that the transactions out of which the plaintiffs' claim arose were so complicated, voluminous and intricate, that they could not properly be dealt with by means of an action at law, and that the defendant, the engineer, was able to furnish discovery which was highly material for the purpose of establishing the plaintiffs' case,—stated, lastly, that the defendant, the engineer, had, under the direction of the defendants, the corporation, aided and abetted them in withholding from the plaintiffs payment of the monies justly due to them in respect of the said contract, and that the defendants had joined in acts which amounted to a fraud upon the plaintiffs; using the word "fraud," however, not in its offensive or obnoxious sense, as meaning a fraudulent scheme or intention deliberately formed or entertained for the purpose of cheating

the plaintiffs, but as meaning conduct which would be the instrument of fraud, if it should prevail to prevent the plaintiffs from recovering payment of what was justly due to them.

The bill prayed that it might be declared that the withholding of the certificate which the defendant, the engineer, was, by the terms of the specification and contract, bound to give to the plaintiffs of the amount remaining due to them for works executed by them under the said contract was a fraud on the plaintiffs, and that the plaintiffs were entitled to receive all such sums of money as they would have been entitled to if such certificate had been duly granted; that the accounts necessary to be taken for ascertaining what was due to the plaintiffs in respect of such sums might be taken, and that payment of what should be found due might be decreed (1).

The result of the very voluminous evidence adduced on both sides is stated in the judgments of Erle, J. and the Vice Chancellor.

Mr. Malins, Mr. Collier (of the common-law bar) and *Mr. Karslake* appeared for the plaintiffs.

Mr. Bacon, Mr. Knowles (of the common-law bar), *Mr. Milward* and *Mr. C. E. Hawkins*, for the defendants.

The following cases were cited, in addition to those referred to in the judgment:—

Thompson v. Charnock, 8 Term Rep. 139.

Hotham v. the East India Company, 1 Ibid. 638.

Milnes v. Gery, 14 Ves. 400.

M'Intosh v. the Great Western Railway Company, 2 De Gex & Sm. 758; s. c. 18 Law J. Rep. (N.S.) Chanc. 94; s. c. on appeal 2 Mac. & G. 19; 19 Law J. Rep. (N.S.) Chanc. 374; 2 Hall & Tw. 250.

Blackburn v. Smith, 2 Exch. Rep. 783; s. c. 18 Law J. Rep. (N.S.) Exch. 187.

(1) A demurrer to this bill put in by the defendant, T. Hawksley, the engineer, was overruled, with costs—see 26 Law J. Rep. (N.S.) Chanc. 227.

M'Intosh v. the Great Western Railway Company, 3 Sm. & G. 146; s. c. 24 Law J. Rep. (N.S.) Chanc. 469.

Dec. 12.—ERLE, J.—To the question of his Honour the Vice Chancellor, whether, upon the terms of the contract, and the evidence of the course of conduct of the parties to the contract in regard to the execution of the works, the case is one in which, if tried at law, the jury would be directed to find a verdict for the plaintiffs, my answer is in the negative. I think there is no evidence to support a claim by the plaintiffs to recover anything in respect either of the work done, and the materials supplied before the 28th of February 1855, or of the plant taken by the defendants on that day when the contract was lawfully determined. The question refers to the contract, and to the course of conduct of the parties thereto; and I would propose to consider, first, the rights under the contract, and, secondly, the effect of the conduct of the parties. By the contract, it appears to me that the engineer is interposed between the corporation and the contractors, and made the absolute judge of the performance of the works, and that there is no right in the contractors to demand payment, and no liability on the corporation to pay, throughout the contract, unless the condition of obtaining a valuation by the engineer, and his certificate, has been fulfilled. I pass over, with the mere mention, the clauses giving to the engineer his powers in respect of the works, such as the absolute discretion over alterations and additions and the valuations of them, and the powers to inspect and reject materials and workmanship, and to suspend or delay the progress of any part of the works, and to settle about the extension of time; and I come to the clauses regulating the contractors' right to demand payment. The parties provide, first, for paying instalments during the progress of the works, and the balance on the final completion; and, secondly, for compensating for the work and the plant taken, in case the contract should be terminated before completion. In the first case, that is, if the works progress to completion, the stipulation for the certificate

is express. In paragraph 34. it is provided, "that no sum or sums of money shall be considered to be due and owing, nor shall the contractor make any claim against or demand upon the said corporation, for or on account of any work executed by him, unless the said engineer shall certify the amount thereof, and that the said contractor is reasonably entitled to such instalment or balance respectively." This clause comprises every right to payment, except in case of termination of the contract, and makes every right universally conditional upon obtaining the engineer's certificate. Then, with respect to the clauses for determining the contract, in paragraph 33. it is provided, "that if the contractors should not, in the opinion and according to the determination of the engineer, exercise due diligence, as there described, the corporation may determine the contract, and enter on the works, and take possession of the plant of the contractor as the absolute property of the corporation." Then follows the express provision defining the rights of the parties in respect of such works and such plant:—When the contract shall have been so terminated, or as soon thereafter as the engineer may think convenient, the engineer shall fix and determine what amount, if any, is reasonably earned by the contractor in respect to work actually done, and in respect to the value of any materials, implements and tools (that is, plant) provided by the contractor, and taken by the corporation; and the amount thereof, after allowing for all sums then already paid to the contractor, shall remain in the hands of the corporation until twelve months after the date of the engineer's certificate of the final completion of the works, and the engineer may by his certificate authorize deductions therefrom for losses and forfeitures. Thus the contractors stipulate that the corporation shall be liable only to the amount which the engineer shall fix for work done and plant taken at the termination of the contract—liable, therefore, to nothing until an amount is so fixed, and then only subject to the term for the deductions and the delay above specified. The contract gave to the corporation the right to terminate, and made

it liable to make the payments in the manner specified. The contract also made the contractors liable to such a termination, and gave to them the right to the payments in the manner specified. The contract expressly defines the rights of the parties in the event that has happened, and the law can only enforce rights under a contract according to that contract. It is not necessary to cite authorities on such a point; I refer only to some of those cited in the argument. In *Grafton v. the Eastern Counties Railway Company* (2) the contract was to deliver to the satisfaction of the agent of the defendants. It was held, that the promise was on condition that the agent was satisfied, and that no action lay for the price of the coke, unless the condition were fulfilled. So in *Milner v. Field* (3) the same point prevailed. In *Ranger v. the Great Western Railway Company* (4) the stipulation that the engineer should be the absolute judge during the progress of the works of the mode in which the contractor was discharging his duties was recognized both as valid and reasonable, though the engineer was a shareholder in the company; and in pp. 106, 107, the notion that accounts of the work done under a similar contract to this might be taken by the Master in Chancery, instead of the engineer, on the ground that the contract had been abandoned, was repudiated as erroneous. The stipulation is of great importance; for if the contractors can open this contract on account of alterations and additions, with mutual disputes, and can insist that an account should now be taken before a stranger of the entire works, which can ill be examined after completion, they may inflict litigation complicated, expensive, and doubtful in the extreme—an evil which the stipulation is framed to avert. The question remains, whether the conduct of the parties affords any evidence of a right of action, either on the ground of waiving the conditions, or of departing from the original contract, and substituting another, either expressed or implied, or on the ground of a wrong. My answer is in the negative. I am not aware that the defen-

dants are shewn to have committed any wrong, or any breach of their contract, or any departure from it. The complaints of the plaintiffs against the engineer in respect of the extension of the time, and of vexatious delays, and of withholding certificates for payment and the like, relate all of them to matters left to the discretion of the engineer by the contract; and if the conduct of the engineer was unsatisfactory to the plaintiffs, it was no breach of contract. At the same time, it should be observed, that the evidence on the other side is at least equally strong, to shew that the plaintiffs were wanting in ability for the contract, and that the engineer did his duty to the corporation in resisting them. I take the result of the evidence to be, that the engineer was and is able and willing to do all the duties imposed on him by the contract, and not incapacitated by collusion, corruption or otherwise. It is possible that the plaintiffs object to his arbitration because he knows the truth, and would decide according to it; but be this as it may, I cannot discover that the corporation have by their conduct created a liability at law not imposed on them by the terms of the contract. My answer thus far rests on the contract to pay being conditional, and is entirely independent of the clause for referring all disputes and differences to the final arbitration of the engineer. If the defendants resorted to that clause, it appears to me to express an intention, both to refer to the engineer the matters there mentioned, and to exclude other tribunals; and although there are cases against giving effect to the latter part of such an intention, yet later decisions have limited that doctrine. In *Scott v. Avery* (5) such a reference was held to bind to the extent of the instrument then in question. In *Livingston v. Ralli* (6) an action was maintained for refusing to fulfil such an agreement to refer. These decisions are an authority for holding, that an agreement to refer a question of amount, and to exclude the jurisdiction of the ordinary tribunals, till the award should be made, would be valid. Now the question between these parties is a question of amount;

(2) 8 Exch. Rep. 699.

(3) 5 Ibid. 829; a. c. 20 Law J. Rep. (N.S.) Exch. 68.

(4) 5 H.L. Cas. 72.

(5) 5 H.L. Cas. 812.

(6) 24 Law J. Rep. (N.S.) Q.B. 269.

that is, of the amount due for works and materials and plant, the plaintiffs wishing to have that amount ascertained by a Court; the defendants, by the arbitration named in the contract. I therefore incline to think that the defendants could, if necessary, make a further valid defence to an action for this amount in the arbitration clause.

April 29.—STUART, V.C.—This case was heard before me, with the assistance of Mr. Justice Erle. The opinion delivered by that very learned Judge is entirely unfavourable to the right of the plaintiffs to any relief in a court of law, and there is no doubt whatever in my mind as to the soundness of that opinion. There remains, therefore, only the question whether there are any circumstances to entitle the plaintiffs to relief in a court of equity. What is asked on behalf of the plaintiffs is, an account of the works executed by them, under the contract, since the date of the last certificate, and payment of what may be found due in respect of them. As to the relief prayed on the ground of improper conduct on the part of the defendant Hawksley, the engineer, in withholding his certificate of the work done, the case of the plaintiffs has, on the evidence, wholly failed. It has also entirely failed as to the allegations that the plaintiffs were prevented from properly performing the contract and executing the works by the acts and defaults of the engineer. This is not a case in which there has been on both sides, or on either side, such a course of conduct as amounts to a substitution of some other terms of agreement. The stipulations in this contract are of a most stringent kind and expressed in very clear language. All the complaints as to delays of a vexatious kind, in withholding the certificate, relate to matters which, by the contract, are left to the absolute discretion of the engineer. This Court has no right or power to impose upon either of the parties to the contract any other terms than those which they have prescribed for themselves, and by which they have agreed to be bound. It is of the very essence of the contract that no sum shall be considered due and owing to the plaintiffs on account of any of the works executed by them, unless the en-

gineer shall certify the amount, and that all his directions, admeasurements, valuations and awards shall be final and binding upon both parties to the contract. The bill, indeed, alleges that the engineer has refused to perform his duties, and that he has withheld the certificate to which the plaintiffs were justly entitled, and withheld it for the purpose of preventing the plaintiffs from obtaining the amount to which they were entitled. If, indeed, the evidence had established a case of gross misconduct upon the part of the engineer, and of wilful neglect or refusal or absolute incapacity in him to perform his duties, the case might have been brought within the jurisdiction of this Court upon that ground. But it is proved, by documents and testimony of the clearest kind, that the engineer has acted reasonably and properly in the discharge of his duties. It is shewn that he has been hitherto prevented from making a satisfactory award by the plaintiffs' own conduct. The contract expressly requires, as to all extra work for which instructions in writing shall not have been given by the engineer or his assistants, that it shall be claimed for in writing by the plaintiffs within the week in which such work is executed and the materials used, and before the same shall be placed out of view and beyond check or admeasurement. It is satisfactorily proved that the plaintiffs refused or intentionally neglected to send to the engineer the proper weekly claim paper before the work was placed out of view and beyond reach of admeasurement. It is also proved that the plaintiffs neglected or refused to produce their books and vouchers so as to enable the engineer to make a proper certificate. So far from any evidence of unreasonable or improper conduct on the part of the engineer, it is proved that when he was unable, owing to the conduct of the plaintiffs, to make a formal award or certificate satisfactory to himself, he determined upon making reports from time to time for the plaintiffs' convenience, and to enable them to obtain money on account. There is nothing proved on the part of the plaintiffs to contradict the clear, positive and circumstantial statements, supported by letters and other documents, in the evidence of the engineer, to shew that he discharged

his duty honestly, and with a reasonable indulgence towards the plaintiffs, so far as was consistent with his duty to the corporation. It is impossible, therefore, to sanction the view urged by the plaintiffs' counsel, that the engineer is disqualified by his conduct from properly proceeding, according to the terms of the contract, to decide all questions that remain to be decided between the plaintiffs and the corporation. It appears that, since the institution of this suit, the engineer has offered to proceed to ascertain and settle what remains due as between the plaintiffs and the corporation, if the plaintiffs would attend him for that purpose. But the plaintiffs refused to accept this offer, except upon the terms that the certificate and award of the engineer should not be binding upon them, and should not have the effect given to it by the contract. It appearing that the engineer has never refused to discharge his duty according to the contract, and that he has done nothing to disqualify himself, but is still ready and willing to proceed to decide all matters between the plaintiffs and the corporation according to the contract, there remains no ground whatever for the equitable interference of the Court. The stipulations of the contract are binding upon the plaintiffs and the defendants, and the bill must be dismissed, with costs, as against both the defendants.

KINDERSLEY, V.C. }
 April 21. } LAW V. THORP.

*Will—"Children and their Issue"—
 Words of Limitation or Purchase.*

A testator gave the share of one of his daughters, in his personal estate, to trustees, to pay the interest to his daughter for life, and after her decease to divide the same among "her children and their issue, such children and their issue to be entitled as amongst themselves to the benefit of survivorship and accruer of surviving shares":—Held, that all the children and the issue of such children coming into esse during the life of the daughter were entitled to take

after her death as tenants in common with benefit of survivorship.

This suit was instituted for the administration of the estate of William Law, and a question was raised upon the construction of a codicil to his will, dated the 13th of January 1831, the words of which were—"I have purchased estates at Littlemore, Cowley and Kidlington; I declare my will to be that they shall be considered as personal property, and be sold by my trustees, and the proceeds applied in the same manner as directed in the codicil to my will respecting the Oxford houses. And I direct that the purchasers shall not be liable to see to the application of the purchase-money. And as to the share of my daughter Catherine, the wife of James T. Hester, in the residue of my property after the decease of my wife and after payment of her legacy of 500*l.*, it is my will that my trustees shall place such share out at interest and pay the interest to the said Catherine Hester during her life, and after her decease divide the same among her children and their issue, such children and their issue to be entitled as amongst themselves to the benefit of survivorship and accruer of surviving shares."

The testator died on the 5th of December 1840. His widow survived, and died in December 1856.

The testator left five children, including Catherine Hester, who died on the 23rd of July 1856, leaving six children, two of whom had children living at the time of her death. The question now raised was, whether under the gift to "the children and their issue" the children only of Catherine Hester, or the children and grandchildren living at her death, were to take the personal estate as tenants in common.

Mr. Baily and Mr. Josiah Smith appeared for the plaintiff.

Mr. Glasse and Mr. Speed, for the children of Catherine Hester.

Mr. H. G. Bagshawe, for the grandchildren.

Mr. B. L. Chapman, Mr. Goren and Mr. Simpson, for other parties.

The following authorities were cited :—

Ex parte Wynch, 5 De Gex, M. & G.
188 ; s. c. 23 Law J. Rep. (N.S.)
Chanc. 930 ; 22 Law J. Rep. (N.S.)
Chanc. 750 ; 1 Sm. & G. 427.

Knight v. Ellis, 2 Bro. C.C. 569.

Butler v. Ommaney, 4 Russ. 70.

Clay v. Pennington, 7 Sim. 370 ; s. c.
6 Law J. Rep. (N.S.) Chanc. 183 ;
8 Sim. 359.

Jarman on Wills, p. 348.

Prior on Issue, 171, 308.

KINDERSLEY, V.C.—There is no doubt that this codicil, though in a small compass, presents considerable difficulties. The testator seems to have thought he was making limitations about which there could be no doubt; but there is really great difficulty arising, not from any captious argument, but from the doubt as to what the testator actually meant. His Honour then read the codicil, and continued—There can be no question, but that Catherine the daughter took a life interest only: then the question is, what class the fund is to be divided amongst upon her death? A description of the class comes first, a gift to “her children and their issue.” Now where there is a gift to children and their issue, there are three possible constructions which may be put upon such a gift. First, that the word “issue” is to be considered as a mere word of limitation expressive of the estate the children are to take; secondly, the words may mean generally, if not in this particular case, an intention to substitute the issue for children, if any of the children died in the lifetime of Catherine. The third possible construction is, that all the issue of all the children, whether children or grandchildren, are to take equally as purchasers directly under the will. It does not appear to me that there is any other possible construction to be put upon these words. Now the second construction—taking that first—I must at once reject, and in fact it has not been contended for. Then, let me consider the first construction I have named; that the word “issue” is a word of limitation only. Now it is a settled rule, that where real estate is given to a man and his issue, that creates

an estate tail, and it has been said that such words are the most proper form in a will to create an estate tail. Also, where personal property is given to a person in terms which, if it were real estate, would give him an estate tail, as a general rule that personal estate will go to his executors. It appears from the cases of *Ex parte Wynch* and *Knight v. Ellis*, that it does not follow that the word “issue” is a word of limitation, but that it will yield to the intention of the testator; nor that the same words would give the whole interest to a legatee of personal estate which would give an estate tail in real estate. Now, in this case, the trust is to divide among the children and their issue, and it is difficult to come to a decision, both in accordance with the case of *Butler v. Ommaney*, and the case of *Clay v. Pennington*. The word “issue” might have been used to denote the quantum of interest which the children were to take. On the other hand, it is contended that the children and the issue who came into existence during the life of Catherine Hester were to take. One thing is certain, that as this is a gift to a class after the life of Catherine Hester, all those who constitute the class and come into existence during her life, would take whether they consisted of children only or of issue of those children; and the gift to the children of the tenant for life would apply to any children born during her life. The words, I think, receive some illustration from the clause which follows, that is, “such children and their issue to be entitled as amongst themselves to the benefit of survivorship.” It was not only the children who were to be entitled to the benefit of the survivorship, but the children and their issue. If these words were intended to be words of limitation, the gift should have been to the children only, and there would have been no use in adding the word “issue.” Survivorship must have meant that if any of the children, or the children of children, should die in the lifetime of Catherine Hester, such shares should go to those who survived her. It is true that in using this word, the testator might have had an intention of expressing the amount of estate the children were to take, but that would be a forced construc-

tion, and I do not think that the argument in its favour can hold good. I cannot, therefore, construe the words as words of limitation only; but that there is a direct gift to the issue: and as it cannot mean by way of substitution for the deceased parent, the only construction I can put upon the clause is, that the children and grandchildren who came into *esse* before the determination of the life of Catherine Hester, are entitled to take as tenants in common, with benefit of survivorship among them.

KINDERSLEY, V.C. }
April 23, 27. } SOUTHGATE v. CLINCH.

Will—"Vesting of Personality"—"Next Heir-at-Law."

*A testator bequeathed a sum of 2,000*l.* consols to be divided between his children when each of them attained the age of twenty-one years, but should neither of them attain that age, then he bequeathed the said sum to his wife for her life and afterwards to his "next heir-at-law":—Held, that the "heir-at-law," at the death of the testator was the person entitled, and not the next-of-kin.*

The bill in this case was filed for the purpose of obtaining the decision of the Court upon the construction of the will of William Southgate, dated the 12th of May 1807.

The testator, after making various specific bequests, continued in the following words:—"With respect to my house, at Peckham, I wish my wife, F. S., to enjoy it during her natural life, and at her death to be sold, and the money equally to be divided among my children, should they be living, but should they die before their mother, then I request, at her death, my house to come to my brother, John Southgate, or his next heir-at-law. Item.—I will and bequeath unto my dear children, Elizabeth and Ann Southgate, the sum of 2,000*l.* 3*l.* per cent. consols; as my wife is now pregnant, should she be delivered, I recommend the said 2,000*l.* to be equal divided when each of them attain twenty-one years; should each of

them die, the survivors or survivor to receive the whole sum, but should neither of them attain the age of twenty-one years, I then request the said 2,000*l.* 3*l.* per cent. consols to go to my wife for her natural life, and afterwards to my next heir-at-law. I likewise request my wife may receive the interest of the above 2,000*l.* for the support of the two children."

The testator died soon after the date of his will, and a son was afterwards born. The son and two daughters died infants and unmarried during the life of the testator's widow. The testator also left a brother John Southgate and two sisters, all of whom died before the widow, leaving children. The widow died in July 1855, having made her will and appointed the defendants, Elizabeth Clinch and Susan Longley, her executrices. The widow received during her life the dividends upon the stock in the funds left by the testator, and the question now raised was, who was entitled to that sum?

Mr. Glasse and *Mr. Beales*, for the plaintiff, John Southgate, the son of the testator's brother, contended that he was entitled as heir-at-law and next-of-kin of the testator at the death of the widow.

They cited—

De Beauvoir v. De Beauvoir, 3 H.L. Cas. 524; s. c. 15 Law J. Rep. (N.S.) Chanc. 305; 15 Sim. 163.

Doody v. Higgins, 2 Kay & J. 729; s. c. 25 Law J. Rep. (N.S.) Chanc. 773.

Low v. Smith, 2 Jur. N.S. 344.

Jones v. Colbeck, 8 Ves. 38.

Miller v. Heaton, 8 Cooper, 274.

Say v. Creed, 5 Hare, 580; s. c. 16 Law J. Rep. (N.S.) Chanc. 361.

Mounsey v. Blamire, 4 Russ. 384.

Mr. Ellis, for the representative of John Southgate, the brother, claimed as heir of the testator, if the persons mentioned in the will were excluded, and contended that the next heir meant the heir next after the proper heir of the testator.—

Baker v. Wall, 1 Raym. 185.

Dormer v. Phillips, 3 Drew. 39; s. c. 24 Law J. Rep. (N.S.) Chanc. 168: affirmed 4 De Gex, M. & G. 855.

Barker v. Barker, 5 De Gex & Sm.
753 ; s. c. 21 Law J. Rep. (N.S.)
Chanc. 794.

Mr. Bailly and Mr. Stiffe, for the representatives of the widow, claimed on the ground that the words "to my next heir-at-law" constituted a bequest to the heir-at-law of the testator at the time of his death, and not at the death of the widow, and that as the testator's son and two daughters died during the life of the widow, she became entitled to the fund as representative of the son.—

Holloway v. Holloway, 5 Ves. 399.

Ware v. Rowland, 2 Phill. 635 ; s. c.
16 Law J. Rep. (N.S.) Chanc. 427 ;
15 Sim. 587 : affirmed 17 Law J.
Rep. (N.S.) Chanc. 147.

Urquhart v. Urquhart, 13 Sim. 613.

Mr. Shapter and Mr. W. Cooper, claimed on behalf of the next-of-kin of the testator at his death, exclusive of his children, and cited—

Gwynne v. Murdock, 14 Ves. 488.

Gittings v. M'Dermot, 2 Myl. & K.
69 ; s. c. 2 Law J. Rep. (N.S.)
Chanc. 212 ; 4 Law J. Rep. (N.S.)
Chanc. 217.

In re Porter's Trusts, ante, 196.

Pattenden v. Hobson, 22 Law J. Rep.
(N.S.) Chanc. 697.

White v. Briggs, 2 Phill. 583 ; s. c.
15 Law J. Rep. (N.S.) Chanc. 182 ;
17 Law J. Rep. (N.S.) Chanc. 196 ;
15 Sim. 17, 33.

Thomason v. Moses, 5 Beav. 77.

Mr. Ellis and Mr. Surrage appeared for other members of the family.

Mr. Glasse was heard in reply.

The following cases were also cited :—

Jacobs v. Jacobs, 16 Beav. 557 ; s. c.
22 Law J. Rep. (N.S.) Chanc. 668.

Holloway v. Holloway, 5 Ves. 399.

Pearce v. Vincent, 2 Keen, 230 ; s. c.
5 Law J. Rep. (N.S.) C.P. 82 ; 2
Bing. N.C. 328 ; 7 Law J. Rep.
(N.S.) Chanc. 285.

Holloway v. Radcliffe, 23 Beav. 163.

The VICE CHANCELLOR.—The will of the testator in this case was made by, I

will not say an uneducated person, but certainly by one of not much education. It is couched in language which renders the difficulty of construing it very great. Considerable industry has been exerted by counsel in searching for authorities to guide the Court on this occasion, and if I thought it necessary I should reserve my judgment for the purpose of further reflecting upon them. But I think that is not requisite. The clause of the will upon which the present question turns, and which clause, I may observe, is a simple bequest of pure personalty, is as follows.—[The Vice Chancellor read the clause as above stated, and proceeded]—The question then is, who is meant by the words "my next heir-at-law"? At the testator's death he had two daughters, named in the will, and he left them and his widow, who was then *enccinte*, surviving him. He had also a brother John, who had a son John. He had also two sisters. Now, all the children of the testator, including that one of which he left his widow *enccinte*, died under twenty-one years of age and in the lifetime of the widow, so that she became entitled to the 2,000*l.* for her life. She then died, and now the question is, who was entitled to that 2,000*l.* on her death? Excluding the possible contention, and which was one that, I think, was not raised in the argument, that this bequest was void for uncertainty, there are eight possible constructions that may be put upon this clause, and it might be possible for all those eight constructions to be different, and maintained by different individuals, but I do not say it is so. The matter then, as it appears to me, resolves itself in the first instance into this general question: Does the 2,000*l.* go on the death of the testator's widow to his heir-at-law or his next-of-kin? If it is to be regarded as going to the heir-at-law, then there are four possible contentions that may be raised upon the inquiry who is the heir-at-law. It may be considered, first, is it the heir-at-law at the death of the testator, the heir-at-law *simpliciter*? Secondly, is it the person who was his heir-at-law at the death of his widow? Thirdly, is it the person who would have been his heir-at-law had he died immediately after the death of his last

surviving child? And, fourthly, is it the person who would have been the testator's heir-at-law had he died immediately after his wife? Those are the four contentions that may be raised on the supposition that the heir-at-law is to take. If, on the other hand, the next-of-kin is to be the person, there are four analogous contentions, which may equally be insisted upon as possible, namely, first, is it the next-of-kin at the death of the testator, the next-of-kin *simpliciter*? Secondly, is it the person who was his next-of-kin at the death of his widow? Thirdly, is it the person who would have been his next-of-kin had he died immediately after the death of his last surviving child? And, fourthly, is it the person who would have been the testator's next-of-kin had he died immediately after his wife? First, then, let us consider whether this 2,000*l.* goes on the death of the testator's widow, to any and which of the first class of persons?

Now, I am almost ashamed to repeat the rule of this Court, which is so well known that every word of a will must, in the construction of it, receive its primary and natural interpretation, unless you find from the whole context of the instrument that the testator himself intended any word to bear a different and peculiar signification. That rule is universal; and there is no exception to it. The words in the clause in question are, "to my next heir-at-law." Omitting for a moment the word "next," the words "heir-at-law" point naturally to the person who is heir-at-law of the ancestor at the time of his death. Any man, the testator for example, might have used the words "heir-at-law" to point out "next-of-kin," or with any other particular meaning. But if that particular meaning or intention is not clearly apparent from the whole will, the words ought to be treated as used in their natural sense. It was said in the argument they must here mean "next-of-kin," because this is a bequest of personalty, and that ought not to be given by words denoting a devise of realty. But where personal property is bequeathed to an heir-at-law in such words as these, "I give 2,000*l.* to my heir-at-law," there is nothing to prevent the legatee taking it under such a bequest; for there is no more reason why a testator should not give a

sum of money to his heir-at-law, than real estate. All that it is requisite for the legatee to prove is, that the testator meant by the words "heir-at-law" the person who should answer that description and be his heir-at-law at his death. I have so far considered the case of the testator's own heir-at-law; but there are of course many cases in which the words "heir-at-law" are used in a sense different from that in the present one, or in that which I have assumed. Take, for example, a bequest of a sum of money by A. to the heir-at-law of B. *simpliciter*. A question might then be made whether that meant the "heir-at-law proper" of B, or B.'s next-of-kin? But, again, that must depend for its solution on the intention of the testator to be gathered from the whole context of his will. Then, again, take the case of a bequest of personalty "to B. and his heirs." There, indeed, the word "heirs" would be considered by this Court as a word of limitation; and personal property cannot go by limitation to a man's heir. It might be given to A. for life, and after his death to his heir-at-law, but that is a different thing. You cannot give personalty so as to make it devolve in the former of these two modes. If personal property is given to a person "and his heirs," the effect of that must be to give to the person, the first taker, an absolute interest in it. The gift of personal property to A. for life, and after his death to his heir-at-law, is not a limitation, it is a succession, in this sense, that the person who takes it on the death of A. does not take *ab intestato*, but by force of the gift or intention of the original testator. If I had to determine the present question upon any such construction or gift as that, I might consider the next-of-kin to be intended; but I have not.

Then, again, there is another class of gifts of personalty to an heir-at-law, a class involving substitution, as thus: a bequest of personalty to A. for life, and after A.'s death to B. or his heir-at-law. There the words "or his heir-at-law" are substitutive, that is, the person to take on the death of A. is either B, or, if B. is then dead, the person who may then be his heir-at-law; the Court, in such a case considers it to be the intention of the testator to substitute the heir-at-law of B.

for B. himself, in the event of B.'s not living to take at A.'s death; but in no case has it been determined that where there is a bequest of personal property to a testator's heir-at-law, *simpliciter*, the words "heir-at-law" have meant "next-of-kin." And I may add, that whether that personal property is given to the heir-at-law in possession, remainder or reversion, makes no difference in the case, whether the gift be an immediate one, or not, the testator's heir-at-law, the person who, at the death of the testator, answers that description, is the person to take the property. It is, in such a case, the testator's heir-at-law, and not his next-of-kin, who is to take. In this case we have the words "next heir-at-law": does the word "next" make any difference in the construction of the words "heir-at-law"? It was said, and with some truth, that the word "next" implied propinquity; and if so, that there must have been more than one person in the contemplation of the testator, as a possible heir-at-law, to give rise in his mind to the use of the word "next"; that is, not his heir-at-law *simpliciter*, but his "next" heir-at-law. Now, it is quite true that if one person is heir-at-law to an ancestor, and another person comes after that heir-at-law, as his heir-at-law, only one of those two can really be the heir-at-law of the ancestor. Thus, A. grandfather, B. father, C. grandson; A. dies, leaving B, his son, surviving, B. is the heir-at-law of A; B. dies, leaving C, his son, C. is not properly the heir-at-law of A. The only person who can be strictly called the heir-at-law of A. is the person who, at the moment of A.'s death, fills that character. But, in fact, the word "next," as it was also contended in the argument, is out of place when applied to an "heir-at-law." It was said that if you retain it, as you ought in construing the clause, you must read the words "next heir-at-law" as if they had been "next-of-kin." But that would not be so on this supposition, because if you retain the word "next," you must, *ex concessis*, also retain the words "heir-at-law"; and even if you then read the words "heir-at-law" as "next-of-kin," you must read all the words as if written "next-next-of-kin." But that would certainly be to put upon the words of this will

a construction quite as inappropriate as the literal expression "next heir-at-law." The word "next" means nearest or highest; not in the sense of propinquity alone, as, for example, three persons on three chairs, one in the midst, those on each side of the middle one are equally near, each "next" to the centre one. But it signifies also order or succession or relation, as well as propinquity. I think in this case, that the use of the word "next" by the testator, when speaking of his heir-at-law, does not in any way affect the ordinary meaning of the words "heir-at-law," that is, that the testator meant only that the person who in relation to him should come next, that is, immediately after him in order or succession, should be the person to take this 2,000*l*. Therefore, I am of opinion that the person to take it must be the person who, at the death of the testator, was his heir-at-law.

But then it was also said, assuming that the heir-at-law of the testator at his death is the person to take this money, that person was *one* of the individuals mentioned in the will as being provided for out of this very fund, and therefore the testator could not have intended such person to take any other than the benefit provided for him previously out of the fund. But, I think, notwithstanding that circumstance, it is not clear upon the authorities that where a person has been mentioned in a will as provided for out of a fund in certain events, he may not also take a benefit out of that fund larger or other than the previous one, in different events. I do not think that this objection at all interferes with the opinion I have already stated. Then, with regard to the other three questions, I need only refer to them: Did the testator mean by these words, "next heir-at-law," his heir-at-law at the death of his widow, at the death of his last surviving child, or at the time of his own death, supposing himself to have died immediately after his wife? Had he intended either of the two former meanings, that is, had he meant to use the word "next" as designating a period of time, and not of order or succession, the strict way to express his views would have been for him to have said, "the person who at that particular time or times shall be my

heir-at-law, or who shall be my heir-at-law if I die at that time." But he has not said so; and, feeling as I do, that the word "next" must be taken to mean nearest or nighest, a nearest or nighest heir must mean an heir nearest or nighest to that person to whom he is heir; in this case, therefore, next, nearest or nighest heir to the testator himself. I do not think the word "next" can mean in this case next after some person other than the testator, or next after some event. And my view is, I think, justified by considering the language of the clause in the will immediately preceding the bequest in question.—[The Vice Chancellor read that clause as above stated, and proceeded]—The testator is there speaking of his house at Peckham, and I think there is no doubt, or at all events much less doubt, as to his meaning there. The heir-at-law, the next heir-at-law, of John Southgate, was unquestionably the person who was (or might be) his heir-at-law at his death. If it is not so, if John Southgate's heir-at-law is not the person next to John Southgate, to whom is his heir next? No one is mentioned by the testator, still the heir-at-law of John Southgate is called his "next" heir-at-law. No event is there referred to, and if the word "next" there means next to any person, that person must be John Southgate. Did, then, the testator use the expression "my next heir-at-law" in the second passage in the same sense as in the first? I think he clearly did. I cannot think that he intended his own heir-at-law at his widow's death, or at any other time, or upon any other event than his own death. And this, too, is quite consistent with common parlance, for we all—lawyers as well as other people—frequently speak of "heir-at-law" as the person, whoever he may be, who is to succeed to property, on the death of another who is the ancestor of that heir. From all these considerations, therefore, I come to the conclusion that the testator meant by the words "my next heir-at-law" in the clause in question, not his next-of-kin, but his heir-at-law *simpliciter*, and his heir-at-law at the time of his death. There must be a declaration accordingly, that the person who answered that description at the death of the testator is entitled to this sum of

2,000*l*. As the questions that have been raised were very fair and proper, and necessary for all parties to have decided by the Court, I think the costs must come out of the fund, which, I understand, is in court.

WOOD, V.C. }
May 3. } ANDREWS v. HULSE.

Copyhold—Forfeiture—Jurisdiction.

A bill by a copyholder to set aside a wrongful seizure by the lord is maintainable, notwithstanding that there is a remedy at law by action of trespass.

This was a demurrer.

The bill stated that, by an indenture of lease dated the 8th of November 1854, Caroline Farquharson, a customary tenant of the manor of Cockermouth, in Dagenham, Essex, in pursuance of a licence from the lord, demised to Thomas Palmer certain copyhold premises, reserving timber and other trees, for fourteen years from the 29th of September 1853, and afterwards surrendered the same premises to the use of Eliza Ann Brickwell, who was admitted thereto in fee. On the 21st of May 1856 Eliza Ann Brickwell intermarried with the plaintiff Charles Abdy Andrews, and on the same day, but previously to the marriage, executed a conditional surrender of the copyhold premises to trustees for securing the re-transfer of a sum of 1,086*l*. 13*s.*, 3*d*. per cent. reduced annuities.

By the settlement made on the marriage of the plaintiff Andrews with E. A. Brickwell, Andrews and his intended wife covenanted to surrender the copyhold premises to the use of trustees, upon trusts for the benefit of themselves and the children of the marriage; and in the settlement was contained a provision for raising money by sale or mortgage for the purpose of enfranchisement.

The lord of the manor having expressed a desire that the premises should be enfranchised, a correspondence took place between the steward and Mr. Metcalfe, the solicitor to the plaintiffs Andrews and his wife, who had shortly after their marriage gone to India, where they still remained;

and a proposal was made for the enfranchisement in consideration of a gross sum of money. Mr. Metcalfe thereupon wrote to his clients on the subject; but owing probably to the disturbed state of India, he received no reply.

On the 21st of November 1857 a summons was inclosed in a letter to Mr. Metcalfe, giving notice of a general court baron to be held for the manor on the 3rd of December then next, and requiring Eliza Ann Brickwell, or by whatsoever other name or names the said E. A. Brickwell was then called or known, personally to appear to do her fealty and perform her suit and service as one of the copyholders of the said manor. This, of course, neither Mr. Andrews nor his wife was able to do, and the bill proceeded to state that, notwithstanding the aforesaid negotiations relative to the enfranchisement were pending, and notwithstanding other the circumstances thereinbefore stated, without any further communication whatever between the steward and Mr. Metcalfe, and without any notice or intimation from the lord or his steward to the plaintiffs, or any of them, it was the lord's intention to seize the premises as for a forfeiture; and without the presentment by the homage of any act of forfeiture, and without any proclamation, the lord by his steward, on the 10th of December 1857, directed his bailiff to seize the premises, and procured the lessee to attorn tenant to him.

The precept to the bailiff, a copy of which was inclosed in a letter from the steward to Mr. Metcalfe, recited that E. A. Brickwell had committed divers acts of forfeiture; that she had fallen timber and dug and sold gravel without a licence, that she had neglected to pay the annual quit-rent, and had neglected to attend the court, although duly summoned.

The bailiff indorsed the following return on the precept:—"By virtue of the within precept, I have in the presence of Edward Sage, steward of the manor, seized the within-mentioned lands and premises into the hands of the lord, as commanded by the within precept."

The bill was filed by Andrews and his wife and the trustees of their marriage settlement, against the lord of the manor and the lessee, who had attorned tenant to him.

It denied the several acts of forfeiture recited in the precept, and prayed a declaration that the seizure was not justified by the circumstances, and that the same might be set aside; that the plaintiff E. A. Andrews might be reinstated as a copyholder, and if necessary readmitted; that the lord might account for the rents and profits since the seizure; that the attornment by Palmer might be declared void, and he might be decreed to attorn or re-attorn tenant to the plaintiff E. A. Andrews, and that the lord might be restrained by injunction from insisting upon the alleged acts of forfeiture, and from commencing and prosecuting any proceedings at law or otherwise for the purpose of enfranchising the premises, and from interfering with the receipt of the rents and profits by the plaintiffs.

The defendants severally demurred.

Mr. W. M. James and *Mr. Erskine*, in support of the demurrers, contended that the case set up by the plaintiffs, if true, would shew that the forfeiture was not good at law; and if bad at law, there was no necessity for coming to equity for relief.

Peachey v. the Duke of Somerset, 1 Stra. 447; s. c. Prec. Cha. 568; 2 White & T. L.C. 2nd edit. 895.

Widdowson v. the Earl of Harrington, 1 Jac. & W. 532, 544.

Doe d. Le Keux v. Harrison, 6 Q.B. Rep. 631; s. c. 14 Law J. Rep. (n.s.) Q.B. 77.

Job v. Bannister, 2 Kay & J. 374.

Nokes v. Gibbon, 3 Drew. 681; s. c. 26 Law J. Rep. (n.s.) Chanc. 433.

The Guardians of the Monastery of Otteries' case, 4 Leon. 117.

Co. Litt. 63, a.

Vin. Abr. 'Copyholder,' (E, d.)

Mr. Rolt, *Mr. Badeley*, of the common-law bar, and *Mr. J. T. Humphry*, in support of the bill, referred to the following passage in *Coke's Compleat Copyholder*, sect. 9:—"But now copyholders stand upon a sure ground, now they weigh not their lord's displeasure; they shake not at every suddaine blast of wind, they eate, drinke, and sleepe securely, onely having a speciall care of the mainchance, (viz.) to performe carefully what duties and services soever their tenure doth exact, and

customs doth require; then let lord frowne, the copyholder cares not, knowing himselfe safe, and not within any danger, for if the lord's anger grow to expulsion the law hath provided severall weapons of remedy; for it is at his election either to sue a *subpœna* or an action of trespass against the lord. Time hath dealt very favourably with copyholders in divers respects." This shewed that a Court of equity had concurrent jurisdiction with the courts of law. So also *Com. Dig. tit. 'Copyholder,' p. 2*: "But if the lord refuses admittance to the heir or surrenderee the copyholder may sue in Chancery and shall be there relieved. So if the lord ousts his tenant without cause. So if he ousts his copyholder for an involuntary forfeiture." They also cited—

Cary, 3, 4.

Fitz. N.B. 12.

Fitzh. Abr. Spa. 21.

Baxter v. Taylor, 4 B. & Ad. 72; s. c.

1 Nev. & M. 11; 2 Law J. Rep. (N.S.)

K. B. 65

Roswell's case, *Dyer*, 264.

1 *Eq. Cas. Abr. 'Copyhold,'* 118.

Mr. James, in reply.

WOOD, V.C.—It seems to me, in this case, that I must overrule this demurrer, regard being had to the older authorities. Certainly the *dicta* are of the highest possible authority, and *Litton's case* (1) seems almost to amount to an actual decision on the subject. The *dicta* stand thus:—You have Lord Coke stating that the copyholder formerly having no remedy at all in respect of the weakness of his title, has, in case of the lord's wilfully depriving him of his possession, a right either by *subpœna* or by action of trespass. It is perfectly clear that he is referring, not merely, as Mr. James suggests, to the question of the lord refusing plaints in court, which is one of the numerous cases put by Fitzherbert; but he must be referring to some act by the lord, as the actual act of ouster, on which he says the tenant, at his election, may have his remedy, either by *subpœna* or by action of trespass. Then you have Chief Baron Comyns, a considerable authority, adopting that, and

recognizing it as the law as it existed in his day. You have the note in *Fitzherbert's Natura Brevium*, that if the lord "will put out his copyholder, that payeth his customs and services, or will not admit him to whose use a surrender is made, or will not hold his court for the benefit of his copyholder, or will exact fines arbitrary where they be customary and certain, the copyholder shall have a *subpœna* to restraints or compel him as the case shall require." It appears from those *dicta* of such weight and authority, that there had been a process going forward, in which probably this Court had taken the initiative, but in which it had, at all events, a concurrent jurisdiction with the Court of law, in proceeding by way of *subpœna* to give a remedy to the tenant on ouster by the lord, although the tenant had also his remedy by action of trespass. Then, if you once get it to this position, that the Court had concurrent jurisdiction, I apprehend it would not be proper in the Court, on demurrer, to abdicate that jurisdiction, though there may be strong facts stated on the face of the bill to shew that not only there is a remedy at law, but even that the remedy at law is equally clear, simple and advantageous to the tenant. I take it, that in the clearest case you could put of a simple ouster, unaccompanied by any act on the court rolls, in which it was mere trespass, and where the tenant therefore had a right to proceed immediately by ejectment, it would probably be competent to the Court in that state of things to say, assuming the case not to be proved, and therefore to be a case which it is not proper for us to act on, still the Court will not until the time comes for the trial of the right, stop it *in limine* on demurrer; but reserving to itself all the powers it would have with regard to costs—a power which it would exercise if any costs were uselessly occasioned by taking this circuitous process—it would not abdicate that right which had once existed, and which, having once existed, no subsequent proceedings of the Court of law could determine. Now, in this case there are considerable grounds for saying, that if the jurisdiction ever existed, which on those ancient *dicta*, fortified by the *dicta* in the 3rd page of *Cary*, it would

(1) *Cary*, 6.

seem the Court has exercised, the case here presents strong additional reasons why the Court should assume jurisdiction; because, though it may be true that there are remedies at law, they are accompanied with considerable difficulty and embarrassment, in the present case amounting to this, that unless the plaintiffs are willing to put an end to the lease of their tenant, proceeding against him by way of forfeiture, so as to bring themselves up to the lord for any possessory right they may have, either by ejectment or action of trespass, in consequence of what he has proceeded to do, they must wait until the determination of the lease before their rights can be ascertained; and in the mean time there is, on the face of these proceedings, the document served by the steward of the manor, which professes to be a copy of the proceeding which has taken place, and that copy consists, first, of a precept to the bailiff to seize, with a requisition that he will return it to the General Court Baron to be held for the manor; and then another document, entered the 17th of December 1857, apparently extracted from the court-rolls, "At a court then held for the manor of Cockermouth, the bailiff returned that, by virtue of the within precept he had seized the premises therein mentioned into the hands of the lord." So that the case is not that which Mr. James suggested, of a stranger asserting a right pending a lease, and procuring the tenant to attorn to him during a lease, so as to put the reversioner, either to say that the tenant has forfeited his lease, and so to leave him at liberty to bring ejectment, or, if he prefers affirming the lease, to wait until the termination of the lease before he can try his right against the parties who have attempted to dispossess him. It is a case in which the copyhold tenant has against him this entry, forming a considerable difficulty in his way, and a great embarrassment of his title. It therefore appears to me, that the very grounds exist on which the Court assumed the jurisdiction, even putting it on the lower view of the case, that the Court could only proceed where the lord is acting inequitably, either by refusing to hold a court, or by taking some step in his court which this Court takes on itself to correct.

Those very grounds exist in a case in which you find the lord entering on the rolls a history of this forfeiture and its reasons, and so placing this blot on the title of the plaintiffs, who aver throughout that no case of forfeiture has actually occurred. It appears to me that, assuming the jurisdiction ever to have existed, which I must assume having regard to the very grave authorities to which I have referred, there being nothing to shake it in any subsequent cases, and being of opinion that if the choice ever existed I ought not upon demurrer to deprive the plaintiffs of it, and that, as regards the particular merits of the case, there are certain grounds and reasons set forth shewing that, there being concurrent jurisdiction, there may very possibly be reasons why the remedy sought in this court should be preferred to any remedy which is competent to the plaintiffs at law, I think I ought to overrule the demurrer. I shall do so, making the costs costs in the cause. If the result of the ultimate proceedings should be to shew that in truth the whole thing is to proceed at law, it would be very unreasonable that the defendant should be put to additional costs by the proceedings in this court. I leave the costs of the demurrer to be determined at the hearing of the cause.

LORDS JUSTICES. { *In re* **THE MEXICAN AND
May 1, 5.** { **SOUTH AMERICAN MINING
COMPANY.**

Practice—Winding up—Right of Creditors' Representative to be present at the Settlement of the List of Contributories.

A creditors' representative appointed under the 1st section of the Joint-Stock Companies Winding-up Amendment Act, 1857 (20 & 21 Vict. c. 78.) is entitled to attend the Master at the settlement of the list of contributories, he being interested in watching who is put on and who is struck off the list.

In the above-named matter appeals came before the Master of the Rolls from decisions of the Master on five different occasions. In the two reported, *post*, pp. 660, 664, viz., on the 8th and 12th of May, the

creditors' representative appeared and took part in the discussion; but on one of the previous occasions part of the appeal consisted of a question as to the right of that functionary to attend before the Master. The circumstances attending the formation of the company are fully detailed in the two following cases, and need not be further alluded to. The order for winding up having been made under the Winding-up Acts, 11 & 12 Vict. c. 45. & 12 and 13 Vict. c. 108, and under the Joint-Stock Companies Winding-up Amendment Act, 1857, 20 & 21 Vict. c. 78, a creditors' representative was duly appointed, and when the Master, to whom the matter of the winding-up was referred, was about to settle the list of contributories, the representative applied for leave to be present; but the Master refused to allow it: whereupon the representative appealed to the Master of the Rolls, when his Honour reversed the order, and directed that the representative of the creditors should be at liberty to attend before the Master at the settling of the list of contributories, but confined such order to the settling of the list, and did not then extend the liberty given to any future proceedings in the Master's office, and he intimated his desire that the question should be brought before the Court of Appeal. The present appeal motion was accordingly made, on behalf of the official manager. The 1st and 3rd sections of the Amendment Act are as follows:—Section 1, "In all cases in which an order heretofore has been or hereafter shall be made for the dissolution and winding up, or for the winding up of any company, it shall be lawful for the Judge or Master charged with the winding up of any company, at the instance of any creditor of such company, in all cases where it shall appear expedient, and for the benefit of the parties interested, in and by the advertisement for proof of debts required by the 72nd section of the Joint-Stock Companies Winding-up Act, 1848, or by subsequent advertisements, or by notice transmitted to each of the creditors by post, as directed by the said two before-mentioned acts, from time to time to call upon the creditors of the company to meet before such Judge or Master at such time and place as shall be fixed by him, for the purpose of

appointing one or more person or persons other than the official manager to represent all the creditors of the said company in and about the said proceedings before him, or in and about so many and such of the same proceedings as to such Judge or Master shall from time to time seem expedient; and it shall be lawful for two thirds in value of the creditors present at such meetings, whose debts shall have been proved before such Judge or Master, or who shall previously to such meeting have lodged an affidavit of their debt before him, and who would be entitled to vote in the choice of assignees under a bankruptcy, by themselves or by some person authorized by any letter or writing under the hand of such creditor, and which letter or writing shall require no stamp duty to be paid thereon, to choose some person or persons to represent all the creditors of any such company accordingly." Then followed a proviso that after such advertisement as aforesaid, all the creditors of the said company should be deemed parties to the winding up. Section 3, "That it shall be lawful for such representatives or representative as hereinbefore mentioned, to join and concur or take part in all the proceedings in and about the winding up of the said company, or such of the same proceedings as the Judge or Master shall deem expedient for the interest of the creditors, and also, subject as hereinafter is mentioned, and so far as the creditors of the said company are concerned, to make or enter into, take part in, consent to, or approve of any compromise, composition, or arbitration, or other arrangement, whether for the discharge and satisfaction of the liability of all and every the shareholders and members, or any or either of them, to the debts and liabilities of such company or otherwise, as such representatives or representative for the time being shall think fit; and it shall also be lawful for such representatives or representative as hereinbefore mentioned (subject as aforesaid) to take part in, consent to, or approve of any compromise, composition, arbitration or other arrangement which the official manager may propose to make or enter into with the debtors or creditors of the said company, in respect of its estate or affairs; and all the creditors of the said company, whe-

ther their debts shall have been then proved or not, shall, subject to the provisions hereinafter contained, be fully and effectually bound by the acts of such representatives or representative, as to all such matters as are authorized by this act."

Mr. Roundell Palmer and Mr. Roxburgh, for the appellant, argued, that the settling the list of contributories was not a proceeding in which it was intended that the creditor should take part: that was a question for other persons. They cited *Sutton's case* (1) and *Re London and Eastern Banking Corporation* (2).

Mr. Follett and Mr. Southgate, for the representative of the creditors, supported the decision of the Master of the Rolls.

Mr. Roxburgh was heard in reply.

LORD JUSTICE KNIGHT BRUCE.—It appears to me probable, if not certain, that there are responsible persons whose names are, or ought to be, upon the list of contributories, and whose names might be absent therefrom. In the present state of the law the interest of the creditors might be affected by this. I think that the creditors are entitled to what the order now under appeal gave them. A more enlarged order is not now asked or needed, and perhaps never will be. The appeal must be dismissed.

LORD JUSTICE TURNER.—By the 1st section of the statute the creditors are made parties to the winding up, and it was the object of the act to work out the payment of the creditors of the company ordered to be wound up, through the provisions of the act. It would be very strange, if payment of the creditors was to be worked out by the medium of the provisions of the partnership, that the creditors were not to be at liberty to know who were the partners, and as such liable to the payment of their debts. The Court has a discretion whether the creditors should be allowed to bring actions against the debtors, and the Court may give leave to issue a summary process for the purpose of recovering the debts. The creditors have

therefore in two ways an interest in attending the settlement of the list of contributories: first, to strike parties off the list; and, secondly, to put them upon it. The question is, who shall be on the list of contributories; and that is a proceeding in which it is expedient that the creditors and those who represent them should concur and take part. The appeal must certainly be dismissed; but as the Master of the Rolls desired that an appeal should be brought before this Court, the costs will be paid out of the estate.

LORD JUSTICE KNIGHT BRUCE.—The very limited and guarded nature of the order which the Court has made upon this occasion ought to be noted and remembered.

M.R. { *In re THE MEXICAN AND SOUTH*
May 8. { *AMERICAN MINING COMPANY,*
 { *ex parte BARCLAY.*

Winding-up Acts—Scrip Certificates—Contributory.

A company was formed without any deed or act of incorporation. Scrip certificates alone were issued; these were passed by delivery without any other transfer. A stockbroker bought several on the Stock Exchange; he received dividends and paid calls, and he was the holder of certificates when a winding-up order was made against the company:—Held, that he must be placed on the list of contributories.

A party about to be put on the list of contributories is entitled to question the regularity of the winding-up order.

The Mexican and South American Company was established in 1835. Its object was the promotion of mining by making advances to miners, and to supply them with stores in anticipation of the produce of their mines, and to receive in return the gold and silver produce at fixed rates. The scheme also embraced a general mercantile establishment for dealing in bullion, metals and stores.

The company was projected by John Diston Powles, Henry Ewbank and John Schneider. They were the first directors,

(1) 3 De Gex & Sm. 262.

(2) *Ante*, p. 457.

and Henry Ranking was subsequently added, and, for anything that appeared, the directors had the sole management of the affairs of the company. It was a scrip company, and was formed without any deed of settlement or other instrument of incorporation. The directors opened offices in London, and in 1835 they issued scrip certificates for 10,000 shares, of 10*l.* each. Upon the back of these certificates was printed the prospectus originally circulated, and that was the only document which contained any provisions for the guidance, regulation, controul or management of the company; and after setting out the objects contemplated, the prospectus continued:—“For the foregoing purposes it is proposed to raise a capital of 100,000*l.* in 10,000 shares of 10*l.* each; of this sum 5*l.* per share to be paid at the following periods: viz., 1*l.* per share on subscribing, 1*l.* ditto on the 1st of September 1835, 1*l.* ditto on the 1st of December 1835, and 1*l.* ditto on the 1st of April 1836. The remainder of the capital to be called for when required by the directors, in sums not exceeding 1*l.* per share at each call, and at an interval of not less than two months between each call, thirty days' notice to be given of each call in the *London Gazette* and three daily morning and evening papers. If any call be not paid within thirteen days of the same becoming due, the directors shall, at the first convenient opportunity, sell the shares so in default, and hold the proceeds thereof, after deducting the amount of the call and interest thereon at 5*l.* per cent. per annum, at the disposal of the proprietors thereof. As the principle upon which the company is formed is that of putting its capital speedily into active operation, and as one engagement has already been made for this purpose, it is proposed that the dividend at the rate of 6*l.* per cent. per annum on the subscribed capital shall be at once fixed, and that the directors shall make such additions from time to time thereto, in the shape of bonus, as the state of the company may authorize. The first dividend to be paid on the 1st of January 1837. In the event of the operations of the company admitting of the advantageous employment of a large amount of capital, the directors shall have the power

to create 70,000 additional shares, of 10*l.* each, the same to be issued preferably to the holders of the existing shares; and in the event of its appearing expedient still further to increase the capital, a further creation of shares may take place, with the consent of the majority of the shareholders, at the general meeting to be called for that purpose, the same being in all cases issued preferably to the holders of existing shares. The affairs of the company to be managed by the board of directors. The directors shall remain in office until the second Wednesday in May 1840, when, and at the same period annually, one director shall go out of office. Vacancies in the direction previous to the second Wednesday in May 1840 shall be filled up by the directors; after that period they shall be filled up by the proprietors at the general annual meeting, or at a general meeting called specially for that purpose. A director retiring to be immediately re-eligible. The auditors shall be annually elected at the general meeting of the proprietors. Fifty shares shall be the qualification of a director; forty shares the qualification of an auditor. A general meeting of the proprietors will be holden on the second Wednesday in May, when the state of the company's affairs will be laid before them. Certificates will be issued for the shares. A proprietor of twenty-five shares to have one vote, a proprietor of fifty shares to have two votes, a proprietor of seventy-five shares to have three votes, a proprietor of one hundred shares to have four votes, and all above at the rate of one vote for every fifty. It is proposed that on the payment of each dividend a sum equal to 10*l.* per cent. of the amount thereof shall be appropriated to form a reserve fund; and that if at any time the shares of the company should be below par, the directors shall have authority, if they shall see fit, to apply the amount of the reserve fund to the purchase of such shares on account of the company; such shares if afterwards disposed of to be sold by public tender for the account of the company.”

The certificates issued stated that “The holder of this certificate having paid 5*l.* to the directors of the Mexican and South American Company will be entitled to

five shares on his making the following payments," &c.

These certificates purported to be signed by three of the directors.

After the commencement of business, some mines were supplied with stores. The company also worked some silver and quicksilver mines.

In 1836 the directors issued other scrip certificates for 10,000 shares of 10*l.* each.

In 1848 the directors engaged a manager and superintendent, and established works and commenced smelting copper in Chili.

In 1852 it would seem that the directors called in the scrip certificates first issued, and substituted for them other scrip certificates in the following form:—"The holder of this certificate is entitled to five shares of 10*l.* each in the Mexican and South American Company, on which 9*l.* per share has been paid."

The scrip certificates were prepared with coupons attached, and these were cut off and sent to the office of the company as they became due.

On the 12th of February 1855 the directors called a special general meeting of the scripholders at the London Tavern, at which a resolution was passed, authorizing the directors to create 10,000 additional shares of 10*l.* each, on such terms as they might think expedient, which were to stand in all respects on the same footing as the other existing shares, and to enjoy dividends from the date of the new issue, which, however, was not to be made at a less price than 6*l.* 10*s.* per share.

The 10,000 additional shares were accordingly issued, and the scrip certificates were in the following form:—

"No. —

"Mexican and South American Company.

"The holder of these specifications having paid 10*l.* 10*s.* to the directors of the Mexican and South American Company, will be entitled to five of the additional shares of 10*l.* each in the said company, created in pursuance of the resolution of the special meeting of the proprietors held on the 12th of February 1855, on his making the following payments to Messrs. Barclay, Bevan, Tritton & Co., viz., 10*l.* on the 31st of May 1855, and 10*l.* on the 31st of August 1855."

The scrip certificates of the several issues contained a short extract from the prospectus originally published relating to the qualification for directors, the votes of scripholders, the appropriation of the reserved fund and of its application to the calls on shares, and to the sale of forfeited shares. A few years since the directors wrote off 140,000*l.* of the capital as lost, and they now alleged that a great portion of the capital was lost, first, by the destruction of their money operations in consequence of the American invasion of Mexico; and, secondly, by the dishonest contrivances of their manager in Chili, who, as alleged, improperly and without authority borrowed money of Messrs. Huth, Gruning & Co., amounting, with interest, to 140,000*l.*; to satisfy this debt the directors alleged that they surrendered the stock of ores of the company to Messrs. Huth & Co.; that they also contracted in their own names, as they alleged, on behalf of the company, a loan of 27,000*l.*, and that they applied a call of 1*l.* per share upon the 30,000 shares in the company.

The whole capital of the company had, however, been lost, and a large floating debt remained, which consisted principally of renewed bills for large amounts.

The scrip certificates were dealt with by delivery without any other transfer, the holder being considered the owner.

On the 24th of November 1857 an order was made for winding up the company, under the 11 & 12 Vict. c. 45. and the 12 & 13 Vict. c. 108.

Mr. Barclay was then a holder of forty new shares in the company; he purchased them on the Stock Exchange, of which he was a member, and had paid a call and received a dividend.

The official manager now insisted that he ought to be put upon the list of contributors.

Mr. R. Palmer and Mr. Roxburgh, for the official manager.—This is a scrip company, it has no deed of settlement; it was, however, a trading partnership making profits, the shareholders whether by participating in those profits, or by making a payment to the general stock of the company, became owners not only to receive,

but also to discharge the liabilities of the company: Mr. Barclay, therefore, ought to be put upon the list of contributories.

Mr. Follett and Mr. Southgate, for Hyde Clarke, the creditors' representative, appointed pursuant to the 20 & 21 Vict. c. 78. —Mr. Barclay could not complain of the constitution of the company, he had become a co-partner, and as such the body had a claim against him; he received dividends, which no one but a partner could; he had also taken a receipt for money paid on calls. The company, therefore, could not say that the shares were not duly issued, nor could Mr. Barclay say that he was not a holder.

Mr. Selwyn and Mr. Cotton, for Mr. Barclay. —The company was illegally formed, it was an usurpation of prerogative to make the shares pass by delivery. Mr. Barclay was a purchaser of these shares, but though a holder of shares he never entered into any contract with the company. The issue of the last 10,000 shares was also illegal, as it was never duly authorized. How could the shareholders be called together? As there was no register, it was an ever-varying body, and the holders of the certificate could never be known to the directors. The receipt of dividends and the payment of a call could create no responsibility; the severance of the coupon gave a right of payment to anybody; it was a mere cheque payable to bearer: and the payment of a call did not create a contract, though the non-payment might be made a forfeiture. If any one was liable on these scrip certificates, it was the original allottee.

In re the Vale of Neath Brewery, ex parte Morgan, 1 Mac. & Gor. 225; s. c. 1 Hall & Tw. 320; 18 Law J. Rep. (N.S.) Chanc. 265; 1 De Gex & Sm. 750.

Blundell v. Winsor, 8 Sim. 601; s. c. 6 Law J. Rep. (N.S.) Chanc. 364.

Clough v. Ratcliffe, 1 De Gex & Sm. 164; s. c. 16 Law J. Rep. (N.S.) Chanc. 476.

Duvergier v. Fellows, 5 Bing. 248; s. c. 2 Mo. & P. 384; 7 Law J. Rep. C.P. 15; 10 B. & C. 826; 8 Law J. Rep. K.B. 270; affirmed in the House of Lords, 1 Cl. & F. 39; 6 Bligh, N.S. 87.

THE MASTER OF THE ROLLS.—The questions are, whether the association itself is illegal, and whether this Court will sanction a notice and make a decree for winding up the company so as to ascertain the rights and shares of the various shareholders and partners among themselves, or whether it will withhold the powers of the Court and not interfere at all. It was argued that the winding-up order decided the questions, but that order does not bind Mr. Barclay. Assuming the association to be illegal, no stranger is interested in inquiring whether this Court interferes or not, or whether its attention is called to the association, to enable it to say whether its functions will apply to it or not; but as soon as he is made a contributory, for he is already made a partner in the partnership, it then becomes of the most vital importance to him to be able to submit to the Court the grounds upon which he considers it is one in which this Court has no right or duty to interfere at all; at the same time, although it is proper to raise the question on an application to make him a contributory, still I cannot entertain it: and, therefore, assuming that the winding-up order is correct in putting him on the list of shareholders, I must give him a reasonable time to move to discharge the order, if so advised. He will then give the other side notice of the grounds and object of his application: they will then be prepared to meet the case, which at present they can hardly be expected to do. I must, however, assume the order to be right, and therefore express no opinion whether this association, by attempting to create stock constantly assignable by mere transfer of the scrip, is an illegal association, it having been created prior to the 7 & 8 Vict. c. 110. and 10 & 11 Vict. c. 78. for the registration of joint-stock companies. It is necessary, therefore, only to consider whether, assuming the illegality of this partnership, the shares could be issued within the provisions of the partnership, because Mr. Barclay, having bound himself by his own acts not to take that objection, it does not lie in his mouth, nor is it now in his power to assert that these shares were not lawfully and legally issued by the company. The question is, that these shares were originally 10*l.*, and it was proposed to make a new list of share-

holders, giving them the same privileges upon payment of 6l. 10s. per share as the other shareholders enjoyed, and this was not within the ordinary scope of a partnership which necessarily professes equality, unless with the sanction and consent of all the other shareholders of the company. Assuming that to be so, and that every shareholder in the company who had not attended the meeting and sanctioned that particular application, could raise that objection if he thought fit, Mr. Barclay cannot raise it, because the scrip which he took expressly stated these facts upon the face of it, and gave him notice of the very objection, and subsequently to that he sends a written notice to the company claiming the benefit of his shares and insisting on the payment of the dividends, two of which were actually paid to him. He is no more able to take that objection than a shareholder would be able to say that those shares were illegally issued and ought to be taken away from Mr. Barclay. If the converse case had occurred in this company, and it had been a prosperous and profitable company, and one of the shareholders had received the dividends arising from the profits produced by the money paid for the new shares, all of which he knew, and when the matter turned out favourably then said, I will set aside these shares and shareholders, merely paying to the new shareholders the amount of the original deposit which they had paid, with interest upon it, and making them account for the dividend they had received, I should hold, that no shareholder could adopt that course; exactly in the same way by parity of reasoning in the converse case. Mr. Barclay cannot, therefore, now insist on that objection, assuming the company to have been legal, and expressing no opinion whatever as to whether these shares were originally issued or not by the company, so that any person not having notice of the matter and not having acquiesced in it could now set that aside. The result will be, that Mr. Barclay will be put on the list of contributories, but without prejudice to his being at liberty to move to discharge the original winding-up order, which is the foundation on which the Court now proceeds.

M.R.
May 12.

In re THE MEXICAN AND SOUTH AMERICAN MINING COMPANY, *ex parte* FINLAY, HODGSON & COMPANY.

Winding-up Acts—Contributory—Scrip Certificates—Principal and Agent.

A merchant held shares in a scrip company, some in his own right and others on behalf of parties abroad; he received dividends and paid calls on all the shares in his own name, without disclosing that any of the shares were held on behalf of other parties. Upon an order to wind up the company,—Held, that he must be put on the list of contributories for his own shares, but that as agent or trustee he was not responsible to the company on the shares of his cestui que trust, or liable to be put on the list of contributories.

Messrs. Finlay, Hodgson & Co. were merchants and foreign bankers in London. At the date of the winding-up order they were apparently holders of 1,455 shares in the Mexican and South American Company. They admitted they held 60 of these shares in their own right; the remaining 1,395 shares they held as the agents and bankers of three gentlemen of the name of Muriel, who, it appeared, resided abroad. These shares comprised some of three several issues. On the last issue of these shares these gentlemen severally applied in their own names, through a clerk of Messrs. Finlay, Hodgson & Co., for some of the additional shares, and an allotment was made to Messrs. Finlay, Hodgson & Co., upon these applications, without distinguishing their own from those which they received as agents.

It was the practice of the company when a dividend was to be paid or received, to require the parties who were entitled to send in a form, saying, "I claim the dividend of so much per share," &c. These were signed by them. In this paper they were required to represent that they were entitled to the shares in the company on which the dividend was claimed. These forms were furnished by the company, and lists of the names of persons making these claims were kept in the office, and at the bottom there was a note, "This claim with

the coupons must be left three clear days for the purpose of examination." There was then a *nota bene*:—"In the case of new shares the shares must at the same time be lodged for the purpose of examination and verification. Coupons paid between the hours of eleven and three."

The company paid in the whole twenty-one dividends.

The following was the form of claim for the 16th—"Number on list 113. 16th dividend. I claim the dividend of 7s. 6d. per share on — shares, the coupons representing which are numbered as below and left herewith." Then followed the number of the coupons. It summed up thus at the bottom—"96 coupons representing certificates of five shares each, making 480 shares, at 7s. 6d. per share, 180*l*. Dated the 2nd of July 1853. Signature for Finlay, Hodgson & Co., S. Miller. Address, No. 8, St. Helen's Place."

The subsequent claims were in a similar form, varying only in the number of shares.

The dividends were paid by a cheque on Messrs. Barclay, Bevan & Tritton, the bankers of the company, the twenty-first and last dividend being claimed on 1,680 shares, on which Messrs. Finlay & Co. received a dividend of 630*l*.

Messrs. Finlay, Hodgson & Co. also, during a corresponding period, paid calls upon the shares which were held by them from time to time, and the last call, evidenced by the bankers' receipt, was paid by them on the 28th of August 1856, upon 1,455 shares. In none of these receipts was the name of "Muriel" mentioned, nor was there anything to shew that any portion of the payment was made by Messrs. Finlay & Co. as agents. There was also a receipt for 330 shares; this was signed "*pro* Finlay, Hodgson & Co., Richard Smerdon." These original shares were stamped with the payment of the calls on the production of them.

The official manager insisted that Messrs. Finlay, Hodgson & Co. ought to be placed on the list of contributories, not only for the sixty shares, but also for the other 1,395 shares.

Mr. R. Palmer and Mr. Roxburgh, for the official manager.—The holders of the shares were partners in the company even

though they held them for parties residing abroad. It was on the footing of partners that they received the dividends and paid the calls in their own names, and the evidence is clear that they made no distinction between the 60 and the 1,395 shares. The company had not the slightest notice that the shares were held in two characters. Mr. Ranking, it was true, knew that Mr. Barclay was a trustee of some shares, but the private knowledge of an individual director is not evidence to establish either a general notice to a company at large, or a general course of dealing. The certificates passed by delivery. No notice of this was ever given to the company, but shareholders were required to prove their position as partners upon the receipt of dividends, and their rights and privileges were determined and admitted. The question is one of contract to be determined on fact, and Messrs. Finlay & Co. are within the definition stated in *Paley on Principal and Agent*, 371, of an agent who has rendered himself liable as a principal. The dividends here are in fact profits, and the payment of a call is a payment to the capital stock of the partnership; it constituted the contract between Mr. Barclay and the other members of the partnership, and he has been held a contributory. Mr. Barclay said, You must apply to the allottee; Messrs. Finlay & Co. might say the same. The contract, however, was the receipt for the last dividend and the payment of the last call. The contract, then, is made by Messrs. Finlay & Co. in their own names; they never disclosed the names of the contracting parties or said that they had an undisclosed principal, but they presented the coupons and claimed their share of the profits as owners. A further capital was then asked for by advertisement to carry on the business, and Messrs. Finlay & Co., representing themselves as holders of 1,445 shares, gave a cheque in their own name for a proportion of the capital. They again, therefore, made no distinction between what they called their own, and what they now professed to have held as agents. It clearly, therefore, comes within the principle that when an agent contracts in his own name, and does not disclose his principal at the time of the contract,

he is personally bound. Were this otherwise, it would open a wide door to fraud, for if an attempt were made to attach liability to a holder of shares he would, though he had received dividends and paid calls, immediately say he did not hold them beneficially, but for some one in Australia. Under these circumstances, therefore, Messrs. Finlay ought to be put on the list of contributories:—

Thompson v. Spiers, 13 Sim. 469;
s. c. 14 Law J. Rep. (N.S.) Chanc. 453.

Story on Agency, 261.

Mr. Follett and Mr. Southgate, for Hyde Clarke, the creditors' representative.

Mr. Selwyn and Mr. Cotton were not called on.

THE MASTER OF THE ROLLS.—There is no doubt of the liability of an agent who does not disclose the name of his principal. I have to consider, not a case of strangers contracting with each other, but to ascertain between members what was the contract of partnership between themselves. There is also the question between the creditors and the partners. In saying, therefore, that Messrs. Finlay are not contributories, I do not express an opinion upon the question whether they would or not be liable to creditors of the concern, upon the principle that those who allow their names to be held out to the public as partners are liable to make good the debt. There is nothing in the concern which makes it illegal for a person to become a partner solely as a trustee. In such case his name would only appear, and the real and substantial partner would be his *cestui que trust*. The rules contained in the prospectus do not hold out to the public that a person shall not be allowed to be a trustee for another; and in the evidence an instance is mentioned shewing that the directors knew Mr. Barclay held shares as a trustee for another person. Members of the concern, therefore, may be partners themselves, but they may hold shares for others whose names are not known to the directors. There is also no rule which makes the validity of the transfer of a share depend upon any sanction given to it by the company itself. Were that

so, it might be held impossible for persons to hold shares as trustees for others without the company being aware that the *cestuis que trust* were solvent and sufficient persons. But as there is no such rule, and no rule that they shall not hold as trustees for others, there is nothing to prevent any persons who are nominally shareholders upon the book, holding shares for other persons who would be entitled to the benefit of the concern and liable to its obligations as between the partners themselves. The trustee may be rich and the *cestui que trust* poor, and *vice versa*; but still, all such cases must be considered by the Court with relation to the practice and dealing of the company, and the rules that have been sanctioned by them. Cases certainly may arise in which shares may be repudiated; but if it is established that the shares were got rid of to avoid the liability, the party would be placed on the list as a contributory, and he would be liable to the same obligations as if he had not endeavoured to get rid of his shares. There may be difficulty in obtaining evidence, but that does not affect the principle. In this case, however, Messrs. Finlay, Hodgson & Co. must be put on the list of contributories in respect of the sixty shares they admit to have held beneficially; but they must not be put on the list in respect of the 1,395 shares held by them as trustees for other persons. Liberty, however, must be reserved to Messrs. Finlay, Hodgson & Co. to contest the winding-up order. The official assignee and the creditors' representative must also have their costs out of the estate.

See *Magee v. Atkinson*, 2 Mee. & W. 440; s. c. 6 Law J. Rep. (N.S.) Exch. 115.

*In re THE LONDON AND
KINDERSLEY, V.C. COUNTY ASSURANCE
April 27. COMPANY, ex parte
JONES.*

Winding-up Acts—Contributories—Forfeiture of Shares.

A. B., a director and promoter of an insurance company, took 500 shares in order to enable the company to obtain registration, upon an understanding that he was not to be

called upon to pay anything in respect of those shares. Calls were made, and a resolution was then passed declaring the forfeiture of all those shares upon which the calls had not been paid, but payment of past calls was not required, although the directors had power to enforce such payment. The 500 shares (upon which no calls had been paid) were declared to be forfeited, and were taken up by other parties. The directors subsequently voted a sum of money to A. B. for his services, and compromised the question of forfeiture for that sum, which was only half the amount of the calls due. Upon the winding up of the company, it was held, that A. B. was liable to be placed on the list of contributories in respect of the 500 shares.

A question was raised in this case whether Mr. Jones should, on the winding up of the London and County Assurance Company, be placed upon the list of contributories for 500 shares. It appeared that the company was completely registered on the 18th of October 1851, and Mr. Jones signed the deed of settlement for 650 shares, 500 of which were taken in his name for the purpose of enabling the company to get registration, and it was alleged by him that although the 500 were to stand in his name, he was not to be liable to make any payments for those shares, but that they were to be got rid of to any persons who would take them. It appeared that Mr. Jones and his partner were acting as solicitors to the promoters of the company, and after the company was formed his partner continued to be the solicitor, and Jones became one of the directors. Three calls of 5s. each were made during the first year upon the shares, but Jones was not called upon to pay his calls upon the 500 shares. On the 19th of October 1853 a resolution was passed at a meeting of the directors, at which Jones was present, "that the secretary be directed to write to all those shareholders who have signed the deed of settlement for more than 100 shares, to pay up the calls due, and in default of payment within twenty-one days, to declare them forfeited, and the books of the company to be made conformable therewith." In pursuance of this resolution, a printed circular was sent

to all the shareholders, including Jones. On the 30th of October a fourth call of 4s. 6d. per share was made. None of these calls were paid by Jones; and at a meeting held on the 4th of January 1854, Jones being in the chair, a resolution was passed that certain shares (including the 500 shares in question) should be forfeited, the proper notice to pay the calls having expired. The deed of settlement contained a clause providing that, notwithstanding any forfeiture of shares, the directors might still be at liberty to require payment of past calls; but this stipulation was not alluded to in the resolution of 1854. In the following April a design was formed to amalgamate this company with another, entitled "The Hercules Company," and upon the negotiation respecting this amalgamation, Jones resigned his office as director of the company, on certain specified terms. On the 14th of June 1854, a resolution was passed to the effect that all the certificates for shares should be called in and new certificates issued. With respect to the 500 shares in question no certificates had ever been issued; and in issuing new ones, the old numbers registered in the name of Mr. Jones were not adhered to, and some of these shares were issued to three persons, named Sexton, Simmons and Hayes. In February 1856, Jones being anxious about his liability in respect of the 500 shares, wrote to the secretary, requesting that they might be entered on the register as forfeited shares, but the directors entertaining some doubt as to the transaction, refused to recognize the forfeiture. The affairs of the company, about this time, became embarrassed, when, by the influence of Mr. Jones, a Mr. Sheridan was introduced, and it was arranged that he should become the managing director, and should obtain a sum of money for the purpose of carrying on the concern. A resolution was then passed by the directors, that in consideration of the services rendered to the company by Mr. Jones, in introducing Mr. Sheridan, a sum of 250*l.* should be presented to him, and that, on account of the peculiar circumstances attending the allotment of the 500 shares to him, the sum of 250*l.* should be received by the directors in full discharge of all claims and liabilities in respect of such shares.

The question now argued was as to the validity of the forfeiture of the 500 shares, and the liability of Mr. Jones to be placed upon the list of contributories in respect of them. No question was raised as to the remaining 150 shares originally taken by Mr. Jones.

Mr. Glasse and *Mr. H. Humphreys* appeared for the official manager; and

Mr. Baily and *Mr. Roxburgh*, for Mr. Jones.

KINDERSLEY, V.C. — The question in this case is, whether Mr. Jones is to be placed upon the list of contributories of this company in respect of 500 shares. About the other 150 there is, as I understand, no question. It appears that he signed the deed of settlement in October 1851 for 650, upon the understanding, as he says, that the 500 were only to stand in his name, in order that a sufficient number might appear to have been taken to enable the company to obtain complete registration; but that the intention was that he should not be liable to make any payments in respect of those shares, but that they were to be got rid of to other persons. It is impossible to justify such a scheme; but it seems he was not the only person who took shares under similar circumstances, for several others did the same thing. This Court, however, has nothing to do with that now; but the effect is, that notwithstanding his intention and any agreement as between himself and all others who took shares, he was still liable if he had not got rid of his liability. He seems to have been acting as solicitor to the promoters of the company, and he afterwards became a director, and his partner continued to act as solicitor. There were three calls of 5s. each made upon the shares in the first year, but Jones was not called upon to pay anything in respect of his 500 shares. Then, in October 1853, a resolution was passed by the directors, at which Jones was present, that all those shareholders who had signed for more than 100 shares should be called on to pay their calls, and in default of payment, that their shares should be forfeited. Why that resolution was confined to persons who had signed for more than 100 shares it is impossible to say, except that

it was intended to meet the case of persons like Mr. Jones, and it is said that the resolution was passed with the object that he and others should be discharged from all liability. The circular was sent out and received by Mr. Jones. There was then a further call made of 4s. 6d. per share, of which Mr. Jones also received notice. Mr. Jones not having paid the call upon the 500 shares, as indeed it was intended he never should, a resolution was passed that the shares were forfeited, nothing being said as to payment of the calls already made, although by the deed of settlement it was expressly provided that notwithstanding forfeiture, payment of calls might still be enforced. Subsequently to this all the share certificates were called in, and new certificates were issued with different numbers, and shares with the same numbers as those signed for by Mr. Jones, were issued to seven persons named. Mr. Jones ceased to be a director, and then, being anxious about his forfeited shares, wrote to the secretary to have them registered as forfeited; but the directors refused to recognize any such forfeiture, as they considered it questionable. When proceedings were commenced for winding up the company, Mr. Jones managed to introduce to the directors a Mr. Sheridan, for the purpose of assisting them in their difficulties, and it was arranged that Sheridan should obtain a sum of 3,000*l.* and should become the manager, and a resolution was then passed that a sum of 250*l.* should be presented to Mr. Jones for introducing Sheridan to the company, and thus bringing, as it was said, business and capital into the concern; and that, in consideration of the circumstances under which Mr. Jones's signature had been obtained to the deed of settlement in respect of the 500 shares, on payment by him of 250*l.*, that sum should be taken in full discharge of all calls and liabilities in respect of such shares. The particular question now is, as to the validity of the forfeiture of the shares, and it is very difficult to say that there ever was a valid forfeiture. I do not see how the original resolution, declaring the shares forfeited, can be considered valid. The only legitimate ground for it was the benefit of the company. Now the company might clearly have

declared him liable to pay the calls then due, and such calls as might become due, until the shares were disposed of; but they simply passed a resolution that the shares should be forfeited. How could that be for the benefit of the company? The shares were not at a premium; otherwise there might have been some benefit. So there could have been no advantage derived by the company from the forfeiture. No doubt the directors felt that Mr. Jones had taken the shares in his name, to enable them to obtain registration, and perhaps some of the directors who passed these resolutions had taken shares under a similar arrangement, and perhaps they thought it hard to hold him to his bargain; but even supposing the shares had been at a premium, it could not be for the benefit of the company to let Jones escape from paying up the past calls upon his 500 shares. Then the directors passed a resolution, the effect of which was to compromise the transaction for 250*l.*; but still, as between Jones and the general shareholders of the company, it was not competent for the directors to declare this forfeiture, more particularly as it appears that Jones himself, and other directors similarly situated, were parties to the resolution. It appears to me, therefore, that as far as relates to the general shareholders, Jones is not discharged by the forfeiture, and that he remained liable. How far the directors were justified in giving Jones a gratuity for his services in introducing Mr. Sheridan I need not consider, for it is clear that the two transactions formed but one; and, in the best light of viewing the matter, the company got only 250*l.* instead of 500*l.*, which was the sum due from Jones. It has been said, that the shares originally taken by Jones were actually passed to other persons, and that consequently they could not have been delivered to him. One obvious answer is, that there is really no difference between shares by a mere alteration of numbers; but it was actually declared that the shares held by him were forfeited, and upon that the question of the validity of the forfeiture arises. Under all the circumstances, my opinion is, that Mr. Jones's name must be placed upon the list of contributories in respect of these 500 shares.

M.R.	} In re THE NATIONAL AND PROVINCIAL LIVE STOCK INSURANCE SOCIETY.
May 24.	
LORDS JUSTICES. June 22.	

*Winding-up Acts—Test of Insolvency—
Right to the Order—Costs.*

Shareholders alleged that the company was insolvent and unable to meet its debts and liabilities. They also alleged that the acts of the directors were not bona fide, and that a proper contribution could only be obtained through the Court. They supported the allegation by balance-sheets prepared by an accountant, and made an affidavit stating their belief that the allegations were true:—Held, at the Rolls, and affirmed by the Lords Justices, without any affidavit being made by the respondents, that the company could enforce the liabilities arising from the subscription to the deed; that, with these facts, it did not appear that the company was insolvent. The petition and the appeal were dismissed, with costs.

This was the petition of William Porter, John Hayshe, and William Hall, severally holding 100, 500, and 900 shares in the National Live Stock Insurance Company, asking for an order to dissolve and wind up the company, under the Winding-up Acts, 1848, and 1849, and 1857 (1).

The company was formed, in 1853, for insuring the owners of horses, cattle and other live stock, against loss from death or injury from accidental causes, and for insuring farmers and others from pecuniary loss on the live and dead stock belonging to them and insured in the company. The capital proposed was 250,000*l.* in 100,000 shares of 2*l.* 10*s.* each, with a deposit of 10*s.* a share. It was provisionally registered on the 11th of May 1853, under the 7 & 8 Vict. c. 110, and was completely registered on the 14th of September following.

The deed of settlement establishing the company and declaring its rules and regulations was executed by various persons, representing in the whole 60,000 shares. The preliminary expenses of establishing the company amounted to 5,082*l.* 18*s.* 6*d.*;

(1) 11 & 12 Vict. c. 45; 12 & 13 Vict. c. 108; 20 & 21 Vict. c. 78.

this sum, by the practice adopted in the formation of new companies, was divided into tenths and distributed over the successive number of years. The company, however, was carried on at a loss in 1854 of 340*l.* 5*s.* 10*d.*, in 1855 of 1,103*l.* 5*s.* 1*d.*, in 1856 of 4,485*l.* 13*s.* 2*d.*, and in 1857 of 178*l.* 0*s.* 2*d.*, making together 6,507*l.* 4*s.* 3*d.*

The company's deed (sects. 102, 104.) also provided that interest and dividends should be paid only out of profits, and that the profits should be apportioned, one-third to the shareholders, one-third to the policy-holders, and one-third to the reserve fund; but, notwithstanding that, the directors paid a yearly dividend of 5*l.* per cent., in 1854 of 59*l.* 9*s.* 4*d.*, in 1855 of 422*l.* 13*s.* 10*d.*, in 1856 of 604*l.* 12*s.* 8*d.*, in 1857 of 386*l.* 12*s.* 5*d.*, making together 1,473*l.* 8*s.* 3*d.*, and a total loss of 7,980*l.* 12*s.* 6*d.*

The first directors also signed the company's deed for a number of shares—Edward Johnstone, the chairman, for 4,000 shares, and each of the other five directors for 2,000 shares each, making in the whole 14,000, but none of them paid any deposit or any subsequent call on more than 500 shares (the amount necessary to qualify themselves as directors under the deed); and in February and March 1855, after it had been ascertained that the expenses exceeded the income, they cancelled about 24,000 of the shares for which the deed of settlement had been subscribed, including all the shares for which they themselves had subscribed, except the 500 qualifying them as directors. No return of the shares cancelled was made to the Registrar of Joint-Stock Companies until March 1858, so that they appeared registered holders of the shares down to that time.

The petition also alleged generally, that the company was insolvent, and unable to meet either its debts or its liabilities.

A large body of shareholders being dissatisfied, they, upon a resolution passed at a meeting held by them at Exeter, caused the affairs of the company to be investigated by Charles Wescomb, an accountant there, who made a report under three heads:—1. The formation of the company, the amount of shares subscribed for, and the amount paid on account thereof,

together with the cost of registration and preliminary expenses. 2. The amount of business done, and the cost at which it had been transacted. 3. The present assets and liabilities of the company. In summing up, he said—"The losses paid and the expenses incurred to this date have not only absorbed all the premiums received, but also 72*l.* 16*s.* per cent. of the capital. The claims have amounted to 63·7 per cent., commission to 12·72 per cent., law charges to 56 per cent., and general expenses to 30·83 per cent., making together 107·89, or 7·89 per cent. more than the receipts." The amount charged for management, salaries, &c. in the four balance-sheets, exclusive of the amount charged to the preliminary expenses, were—Directors' fees, 2,245*l.* 19*s.*; auditors, 68*l.* 5*s.*; local boards, 836*l.* 11*s.* 2*d.*; salaries, 3,367*l.* 5*s.* 6*d.*; district agents, 2,401*l.* 15*s.*; rent, taxes, &c., 1,571*l.* 9*s.* 7*d.*; travelling expenses, 2,168*l.* 6*s.* 11*d.*; advertisements, 514*l.* 15*s.* 2*d.*; engraving and printing, 1,550*l.* 5*s.* 10*d.*; postages and parcels, &c., 1,036*l.* 9*s.* 10*d.*—making a total of 15,761*l.* 3*s.* 9*d.* The present assets and liabilities of the company he stated in the following balance-sheet:—

	£	s.	d.
To amount received on shares	34,171		
shares
	17,085	10	0

	£	s.	d.
By preliminary expenses	£5,082	18	6
Less written off			
four years	2,033	3	4
Losses on business			6,507 4 3
Dividends paid			1,473 8 3
Balance...			6,055 2 4
	£17,085	10	0

Assets.		£	s.	d.
Balance as above	£6,055	2	4	
Less doubtful debts	300	0	0	
Balance loss of capital...				5,755 2 4
				12,330 7 8
	£18,085	10	0	

Liabilities.		£	s.	d.
Share capital	...	17,085	10	0
Other liabilities*	...	1,000	0	0
		£18,085	10	0

* Sums due for salaries, rent, taxes, printing and legal charges.

Mr. Wescomb then recommended — "First, that all parties who had signed the deed of settlement should be required to pay the deposit on the shares they had subscribed for, which would provide sufficient capital to carry on the affairs of the company, and afford the only chance of preventing a stoppage for want of funds; secondly, that a second auditor be appointed, and that copies of the accounts be sent to each shareholder, at least seven days prior to the annual meeting, and that these accounts consist of not only the balance-sheet, shewing the cash receipts and payments, but also a capital account, and an account of assets and liabilities; thirdly, that no further dividend be paid, except out of actual profits; fourthly, that the expenses be reduced as much as possible until the results shew a profit in the business transacted."

The petitioners then stated that they believed the statements made by Mr. Wescomb to be true, and that they believed that if the accounts of the company were made up, and all liabilities paid in respect of policies, the capital would be found exhausted, and that a large sum was due by the company without means of payment, except by a compulsory process against the shareholders.

On the 19th of March 1858 the dissentient shareholders, at an adjourned meeting resolved that the directors should be required to convene an extraordinary meeting to consider *inter alia* the propriety of winding up the company, and a memorial was presented; but the directors, on the 27th of March, made a call of 5s. per share, and they made it payable on the 28th of April.

On the 29th of March they addressed a letter to the shareholders, noticing the meetings held by the shareholders at Exeter, complaining of the shareholders having admitted reporters, and stating that they must be held morally responsible as regarded the libels published, and that the directors had placed the question in the hands of their solicitor. The directors then, after alluding to the check the meeting had given to the progress of the company, said that they felt it incumbent on them, as the only means of effectually counteracting the evil tendency of such reports, and thus protecting the interests

confided to them, to take immediate and decisive measures for allaying such fears, and accordingly they had determined first to take steps for enforcing present payment of the first instalment of 10s. per share upon all existing shares on which such instalment had not yet been paid; secondly, to make a further call of 5s. per share, in conformity with the notice forwarded therewith; that they were satisfied that these measures would secure ample funds in hand for any probable contingency, and thus restore the wavering confidence of the public, and further, would enable the society's operations to be extended so as to embrace a branch of insurance provided for in the deed of settlement, which the directors had reason to believe would tend greatly to advance the interests of all concerned.

The directors accordingly called an extraordinary general meeting of the shareholders for the 14th of May, sixteen days after the call was made payable, at which shareholders not having paid such call would, according to the deed of settlement, be incapable of voting or taking part in the proceedings.

The petitioners then said that they believed that the company was insolvent and unable to pay its debts and meet its liabilities; that the liabilities on subsisting policies exceeded 500,000*l.*; that several of the subscribers to the deed of settlement had not paid the deposits on the shares allotted to them, and that others had paid in part only, and that proper contributions could only be obtained from the subscribers and shareholders under the Winding-up Act.

This petition was verified by affidavit. The respondents, however, filed no affidavits in reply or explanation.

Mr. R. Palmer and *Mr. Roxburgh*, for the petitioners.—The Court would not allow directors to treat their signatures to a company's deeds as a nullity because it was not convenient afterwards to pay the call. In this case the directors assumed to cancel shares they subscribed for, and that when they had not paid either the deposit or the calls, which were rightly the property of the company. The petition contained a general statement that the company was insol-

vent. To establish insolvency, the 11 & 12 Vict. c. 45. s. 8. had furnished certain tests, and there was also a general clause—"Or if any matter or thing shall be shewn which in the opinion of the Court shall render it just and equitable that the company should be dissolved." The object of this was that it should be used as a test of insolvency, and therefore, if the fact of the insolvency were admitted, it certainly must come within the act. It was never meant to be said that it was not to have any effect, or that the particular defined tests were to limit the Court if it arrived at the same practical result by other means. The petitioners here stated the result of the investigation into the affairs of the company, shewing gross mismanagement, and they also stated the result of the conclusion that the company was in a state of insolvency and unable to pay its debts and liabilities. The directors shrank from answering the statements; they preferred to meet them without being exposed to a cross-examination. It must, therefore, be taken as a fact, that the company was insolvent and unable to pay its debts or meet its liabilities—*In re the Agricultural Insurance Company* (2). In *Ex parte Spackman* (3) there had been no tampering with the capital to make it impossible consistently with the manner in which they acted, to make any call of this description. The directors here had got possession of the funds. If they did not pay, a Chancery suit was the only mode of getting the funds from every person who would be bound to pay. To prevent attendance at the meeting to remove the directors, they made another call upon the existing shares, to be paid directly before the meeting, and they excluded all who had not paid, they themselves not having paid any of the calls on the 11,000 shares from the beginning: that surely would satisfy any one that they were not acting *bond fide*, and were not in a situation to work out a proper mode of meeting liabilities by a legitimate call *bond fide* made. The directors here had forfeited their *locus standi* by an attempt to cancel 24,000

shares, in a number of which they were interested; and until that was set right, no call could be made upon the company. That condition of things they did not meet by any affidavit. The petitioners brought forward these facts, and at the same time stated that the company was actually insolvent, and unable to pay debts and liabilities. The 11 & 12 Vict. c. 45. was evidently intended to meet such a case:—

Williams v. Page, ante, p. 425.

In re the Deposit, &c. Assurance Company, ex parte *Ayre*, ante, p. 579.

Mr. Selwyn and *Mr. W. W. Cooper* said, that although it had been assumed that they appeared for the directors, they did not, but they appeared for the company. It was clear that the directors were liable to pay the 10s. deposit in respect of the shares taken by them, and there was not an allegation in the petition that they were insolvent.

The MASTER OF THE ROLLS, stopping the argument.—If an order is made to wind up the company, the fact of the directors treating their signature to the deed of settlement as a nullity would be material. But it is no ground for winding up the company merely because the directors made various very flourishing statements of the affairs of the company. The petitioners may be entitled to make the directors liable for this call: that would make a great difference in the funds of the company. The extraordinary general meeting was convened just after the call on the shares; it prevented many parties from voting, no doubt, but that does not make this a case for granting a winding-up order. I shall, therefore dismiss this petition, with costs.

This petition was previously presented. It was then not properly advertised, the petitioners therefore gave the respondents notice that they did not intend to prosecute it. The respondents *ex parte* got the petition put into the paper, and on the 8th of May 1858, when leave was asked of this Court to withdraw it, the respondents asked for the costs of that petition. As, however, the same petition was to be presented *verbatim*, the matter was directed

(2) 1 Mac. & G. 170.

(3) 1 Hall & Tw. 229; s. c. 18 Law J. Rep. (N.S.) Chanc. 261; 1 De Gex & Sm. 549.

to stand over, with an intimation from the Court that, in the event of no new petition being presented, two briefs would not be allowed.

Mr. Selwyn now asked for the additional costs incurred in consequence of the first presentation of the petition.

THE MASTER OF THE ROLLS.—I said before that I would not allow the costs of two briefs; the respondents' appearance on the former occasion was not necessary. It is not easy to understand how there can be any additional costs, as the petition asks for the same relief. In giving the additional costs, therefore, I shall except the two briefs, and also any costs of the appearance on the former occasion.

June 22.—From the above decision the petitioners appealed to the Lords Justices.

Mr. Roxburgh (who was with *Mr. R. Palmer*) said, that if the Court should be of opinion, with the Master of the Rolls, that the present was not a case for an immediate present order for absolute winding up, yet still it was one in which, under the 12th section of the Act of 1848 (4), it would direct a reference to the Master to inquire as to the necessity or expediency of a dissolution and winding up. At any rate, it was plain that the misconduct of the directors had brought the company within the 8th article of the 5th section of that act, which enabled a contributory to petition for winding up, if "any other matter or thing shall be shewn, which, in the opinion of the Court, shall render it just and equitable that the company should be dissolved."

Mr. W. W. Cooper (who was with *Mr. Selwyn*), for the company, said, that the society was in a prosperous condition; in the fourth year of its existence its income was upwards of 18,000*l.*, and at the last half-yearly balance, on the 31st of December 1857, it had a large sum to its credit at its bankers. If all calls were paid up, and especially the calls made upon the petitioners, the position of the company would be secure. The recommendations of *Mr. Wescomb's* report had been considered,

and sedulously adopted by the board. There had been no affidavits in contradiction of those filed on the other side, because the company was advised that, upon the facts as they appeared there, no ground existed for winding up the company; to have filed affidavits in contradiction would have occasioned cross-examination and great delay, during which time the petition would have been suspended over the company and seriously damaged its position and prospects.

[**LORD JUSTICE KNIGHT BRUCE.**—Is it true, *Mr. Cooper*, that dividends have been paid not out of profits?]

In answer to that, clause 102. of the deed of settlement is an answer, which allows payment by way of interest on the paid-up capital, at a rate not exceeding 5*l.* per cent.; but even in that respect nothing has been paid since 1856. The case of *Ex parte Spackman, re the Agricultural Cattle Insurance Company* (5), shewed the interpretation put upon the 8th article of the 5th section of the act of 1848. It is clear that the provisions of the act were not intended and could not be used to settle controversies between individual shareholders and the company: as appeared from *Re the Wheal Lovell Mining Company, ex parte Wyld* (6).

Mr. Roxburgh, in reply.—The payment made by the directors under colour of the 102nd clause of the deed of settlement was nothing less than the payment of the dividend when there were no profits, and neither in *Spackman's* nor in *Wyld's case* did such a circumstance exist.

LORD JUSTICE KNIGHT BRUCE.—In the case before the Court there may possibly have been circumstances of incorrect or imprudent conduct on the part of the directors of the company, or some of them, which might possibly justify censure, and which it is to be hoped will not occur again, but that is not the question upon the present petition. The company has not been shewn to be in such a state of insolvency, nor has any other fact been esta-

(5) 2 De Gex & Sm. 11; s. c. 18 Law J. Rep. (N.S.) Chanc. 261; and on appeal, 1 M. & G. 170; s. c. 1 Hall & Tw. 229.

(6) 1 M. & G. 1; s. c. 18 Law J. Rep. (N.S.) Chanc. 139; 1 Hall & Tw. 125; 1 Mac. & G. 1.

(4) 11 & 12 Vict. c. 45.

blished of a nature to authorize these petitioners to seek for the application of the Winding-up Acts, or to entitle them now to retire from the engagements they have entered into, or to dissociate themselves from a company with which it must be taken that they have deliberately chosen to associate themselves. I think they must abide the consequences of it; and unless something much more important shall occur than appears hitherto to have occurred—I mean important for the purpose of winding up the company—the company must go on. I have no inclination to disturb the decision of the Master of the Rolls, and do not see my way to do so.

LORD JUSTICE TURNER. — The case depends upon the 8th article of the 5th section of the original Winding-up Act, and that article has been decided by high authority and settled by that high authority to apply to cases *ejusdem generis* with those mentioned in the seven preceding articles of the section. It would be very dangerous now to unsettle that decision, and open the question again, whether the Court is to exercise its general and unlimited discretion of dissolving partnerships and companies, which purports to have been given by the terms of that section. Besides this, I quite concur that upon the true construction of that article, it must be taken to reach only those cases which were *ejusdem generis* with those of the other articles—cases, therefore, in which there is no reason to suppose the company solvent. It is true that upon this petition there is an allegation of the insolvency of the company, but the report itself perfectly disproves that allegation. The debts are only 1,000*l.*, and the contributions which the company might call up of 2*l.* a share, in respect of which a call has actually been made, would provide abundant assets to discharge the liabilities which the company has to meet. There is no insurance company in the kingdom in which there would be assets sufficient to answer the liabilities, if those liabilities, instead of being contingent, were immediate. Then, it was contended, on behalf of the petitioners, that there had been misconduct on the part of the directors; that they had cancelled shares; that they had paid divi-

dends out of capital, when there had been no profits, and in other particulars also; and that all this is uncontradicted. But even if the facts are so, the directors may be liable, no doubt, to the company; but these circumstances of misconduct do not justify the Court in saying that the company is brought within the provisions of the 5th section of the act, and ordering a winding up. There is no ground for departing from the order which his Honour has made, and the petition must be dismissed, and dismissed with costs.

M.R. }
April 21. }

BELL v. CLARKE.

Settlement—Covenant to bequeath.

A father, on the marriage of his son, covenanted with trustees to bequeath one full fourth part of all his real and personal estate, after payment of his debts, to the trustees of the marriage settlement, who were to sell and convert the same into money and stand possessed of the proceeds upon the trusts of the settlement. After the father's death, in a suit to administer his estate, it was held, that the covenant meant a fourth in value and not a fourth in specie.

John Browne Bell, upon the marriage of his son, Horace James Bell, with Elizabeth Frances Pochin, joined in the marriage settlement, dated the 21st of March 1838, and covenanted with the trustees that in case either H. J. Bell or E. F. Pochin, or any issue of the marriage, should be living at his death, he, J. B. Bell, would, by his will, or by some codicil thereto, but subject to the directions contained therein regarding the management, sale, disposition, getting in, and realization of the same, well and effectually give, devise and bequeath unto the trustees or the survivors or survivor of them, or the heirs, executors, administrators or assigns respectively of such survivor, *one full fourth part of all the real and personal estate whatsoever, of or to which he, the said J. B. Bell, or any person or persons in trust for him, should, at the time of the death of him, J. B. Bell, be seised, possessed or entitled in possession, reversion,*

remainder or expectancy, subject, as to the personal estate, to one full fourth part of the debts of J. B. Bell, and of his funeral and testamentary expenses, and as to the real estates, to one full fourth part of so much of the debts and funeral and testamentary expenses as the personal estate of J. B. Bell should be insufficient to satisfy; and in default thereof, that from and immediately after the death of J. B. Bell, the heirs, devisees, executors or administrators of him, J. B. Bell, should convey, assign and transfer one full fourth part of all his said real and personal estate whatsoever unto and to the use of the trustees of the said settlement. And it was thereby declared that if J. B. Bell should at any time or times give or dispose of any part or parts of his then present or future real or personal estate, exceeding in value in the whole the sum of 100*l.*, to or in trust for, or for the benefit of any of his children, or any of their respective issue, or any other person or persons whomsoever, otherwise than for a full consideration in money or money's worth, to be received by him the said J. B. Bell, and such gift or disposition should take effect in the lifetime of him, J. B. Bell, or after his decease, then and in every such case the value of the real or personal estate which should so have been given or disposed of without a full consideration in money or money's worth, should, for the purposes of the covenant thereinbefore contained, be considered as part of the personal estate of which the said J. B. Bell should die possessed. And it was declared that the trustees should stand seized and possessed of the full fourth part or share of and in the said real and personal estate of J. B. Bell, upon trust, as soon as conveniently might be after the decease of J. B. Bell, and under the covenant and provisions aforesaid, as any of such real or personal estate should come to or be vested in them or him absolutely, to sell and dispose of the same fourth part of the real estate, and of so much of the fourth part of the personal estate of J. B. Bell as should be in its nature saleable in manner therein mentioned; and to call in and convert into money so much of the residue of the fourth part of the personal estate as should not consist of money, and

(subject, nevertheless, as to the monies to arise from the sale of the fourth part of the real estate to the payment of one fourth part of such of the debts, funeral and testamentary expenses of J. B. Bell as his personal estate should be insufficient to satisfy) to invest the money to arise from any such sale, calling in, or conversion, and also so much of the fourth part of the personal estate of J. B. Bell as should consist of money, and stand possessed of the said trust funds upon certain trusts for the benefit of H. J. Bell and Elizabeth Frances his wife and the issue of the marriage. It was also provided, that the trustees for the time being should have full power and authority, with the consent, in writing, of H. J. Bell and E. F. Pochin, or the survivor of them, during their joint lives and the life of the survivor of them, and after the decease of such survivor, at their or his own discretion, to settle and adjust with the real or personal representatives or representative of the said J. B. Bell, or other the person or persons in anywise interested therein, beneficially or otherwise, or any creditor or creditors of J. B. Bell, any account or accounts, valuation or valuations, or other matter or thing whatsoever in respect of the fourth part of the real and personal estate of J. B. Bell, and to make any compromise or arrangement touching the premises, or to refer any dispute or difference concerning the same to arbitration, as should seem to them or him expedient.

H. J. Bell survived his wife E. F. Bell, and afterwards married his second wife, Harriet Bell. There were two children of the first, and three children by the second marriage. H. J. Bell died in January 1855.

J. B. Bell made his will, dated the 23rd of May 1855, and after several specific bequests he gave and bequeathed to the plaintiff, his son John William Bell, and to the defendants, Messrs. Clarke and Barclay, all his interest in two newspapers, called *The News of the World* and *The Magnet*. He however made no devise or bequest in satisfaction of the covenant contained in the indenture of settlement.

The testator died on the 19th of August 1855, and this suit was instituted for the administration of his estate, which consisted of personalty only.

The question raised was, whether the covenant "to give, devise and bequeath one full fourth part of all the real and personal estate," meant one full fourth in specie, or one full fourth in value.

Mr. R. Palmer, Mr. Speed and Mr. Villiers, for the plaintiff.

Mr. Lloyd and Mr. Beales, for Mr. Clarke.

Mr. Teed and Mr. Terrell, for Mrs. Mansel, a daughter of the testator, J. B. Bell.

Mr. Follett and Mr. Haig, for Harriet, the widow of H. J. Bell.

Mr. Greene and Mr. W. Pearson, for the trustees of the settlement.

Mr. F. T. White, for George Barclay Mansel.

The following cases were cited :—

Logan v. Wienholt, 1 Cl. & F. 611.

Alexander v. Brame, 19 Beav. 436.

Stocken v. Stocken, 4 Myl. & Cr. 95 ;
s. c. 7 Law J. Rep. (N.S.) Chanc. 305.

Naylor v. Wetherell, 9 Law J. Rep. Chanc. 125 ; s. c. 4 Sim. 114.

Gregor v. Kemp, 3 Swanst. 404.

Lady E. Thynne v. the Earl of Glengall, 2 H.L. Cas. 131 ; s. c. *nom.*

Lord Glengall v. Barnard, 1 Keen, 769 ; 6 Law J. Rep. (N.S.) Chanc. 25.

Lewis v. Maddox, 8 Ves. 149 ; s. c. 17 Ves. 48.

Jones v. Martin, 5 Ves. 266 ; n. ; s. c. 8 Bro. P.C. Toml. ed. 243.

Randall v. Willis, 5 Ves. 261, 268.

Morgan v. Morgan, 14 Beav. 72 ; s. c. 20 Law J. Rep. (N.S.) Chanc. 109 ;
4 De Gex & Sm. 164 ; 13 Beav. 441.

THE MASTER OF THE ROLLS.—The question is, whether an undivided fourth part of the testator's real and personal estate is to be conveyed in specie, or whether it is to be such a portion as shall be really one full fourth part in value. Undoubtedly there would be extreme inconvenience in holding the covenant to mean that an undivided fourth part of every portion of the property is to be conveyed ; because if that were so, as the testator could not bequeath or part with any of his property except for

value, so as not to be affected by the covenant, the result would have been, he could not have made a specific bequest of anything, such as a watch, or a horse, or a book, but could only have given three undivided fourths. That certainly is a most inconvenient form of covenant ; yet, if it were clearly expressed to be the intention of the parties, the Court would carry that intention into effect ; and the observations of Lord Eldon are very just, that this Court must not speculate on the difficulty of doing it, but must really carry it into effect. But I do not think that this is the proper construction of the covenant. In the first place, it is not a covenant to convey "one undivided fourth part," but a "full fourth part." If it is to be an actual fourth part—an undivided fourth part—it is not necessary to say "full fourth part"; but if you are estimating that portion of the property which is to constitute a fourth part of the whole, there is a doubt about the value : and it must be settled by giving the party "a full fourth part." There are other parts of the settlement which lead to this construction. It is provided that property disposed of by the testator in his lifetime, except for valuable consideration, should, for the purposes of the covenant, be treated as part of the personal estate. That is not consistent with the idea of its being an undivided fourth part. How are you to deal with the property which he had previously given, which is to be carved out of the other three undivided fourth parts ? Again, there is the clause in the settlement giving to the trustees power to compound debts due to the testator : they were to take one full fourth of the property and one full fourth of the debts. If they took one undivided fourth part of the debts, it would be impossible to compound ; they could only compound in conjunction with the other persons. It appears therefore, that the settlor, when he entered into this covenant, contemplated that in the apportionment of the property, which was to be made before it was realized, he was giving to the trustees of the settlement certain debts due to the estate,—complete and entire debts, and not undivided portions, because, in that event, it would have been impossible for them to compound with the creditors. I think, there-

fore, the proper construction of the covenant is, that the trustees are entitled to what at the death of the testator was actually the one full fourth part in value of his real and personal estate; and I am induced to arrive at this conclusion, because, unless that were the construction, the covenantees might be losers, in the event of there being a defalcation by the executors, and property was wasted after the death of the testator, and they would only come in for a portion with the other legatees; but, if they were creditors, they would be entitled to have the amount of their debt paid out of the assets of the testator in the first instance, to whatever amount it extended.

STUART, V.C. { AUSTIN v. THE VESTRY OF
June 23. { THE PARISH OF ST. MARY,
 { LAMBETH.

Metropolis Local Management Act, 18 & 19 Vict. c. 120. ss. 75, 76, Construction of—Vestry Board, Power of—Drainage Pipes—Injunction.

The defendants, in exercise of the powers given to them by the 76th section of the Metropolis Local Management Act, 18 & 19 Vict. c. 120, served the plaintiff with a notice, requiring him in the construction of the drainage to certain houses then building by him in their district, to use pipes of stoneware of the best quality. The plaintiff proposed to use pipes of Aylesford manufacture, as coming within the description of stoneware mentioned in the notice. To this the defendants objected, who required pipes of Lambeth manufacture, or of manufacture similar to that of Lambeth, to be used; and they refused, unless this were complied with, to make an opening into the main sewer for the plaintiff's drainage. The plaintiff thereupon made the opening himself, and completed his drainage by means of Aylesford pipes:—Held, the evidence of scientific men, as to the comparative merits of the two manufactures being conflicting, that the act gave the vestry the right to determine which of the two materials should be used; and the Court, therefore, refused an application

by the plaintiff for a perpetual injunction to restrain the defendants from entering upon the plaintiff's premises for the purpose of taking up the drainage works constructed by him with the Aylesford pipes.

This was an application at the hearing of the cause for a perpetual injunction to restrain the defendants from entering into the premises, consisting of four houses and the land attached of the plaintiff, situate on the eastern side of Spring Grove, in the parish of St. Mary, Lambeth, for the purpose of taking up the drainage-pipes which the plaintiff had laid down for draining such premises into the common sewer.

The litigation arose under the following circumstances:—

The plaintiff applied to the vestry for leave to connect his drainage with the common sewer, and received the usual written authority to do so, provided the drains were constructed in accordance with the following requisition contained in a notice which they had served upon him, viz., "The pipes to be stoneware of the best quality."

Discussions arose between the plaintiff and the vestry-surveyor as to the pipes to be used, the plaintiff stating that he should use the Aylesford pipes, which the surveyor told him he could not approve. The plaintiff, however, persisted in laying down the Aylesford pipes, and connected them with the common sewer.

On the 23rd of December 1857, the surveyor gave the plaintiff written notice to take up and re-construct his drainage, and that otherwise the vestry would, at the expiration of fourteen days, in exercise of the powers given them by the statute, 18 & 19 Vict. c. 120. ss. 75, 76, cause the work to be done, and cause the expenses to be charged to the plaintiff. The plaintiff then filed the bill in this suit, charging that several members of the vestry were manufacturers of Lambeth drainage-pipes, which were the pipes which the vestry wished the plaintiff to use, and that the Aylesford pipes were less brittle than the Lambeth, and more uniformly true in shape, and equally fit for drainage purposes with the pipes made at the Lambeth potteries, and that moreover they were

extensively used in the districts of Belgravia, and Marylebone, and in the city of London, and in Government works, and seeking the injunction above mentioned.

The plaintiff, in January 1858, applied for an injunction by motion, which was refused by this Court, and afterwards, upon appeal, by the Lords Justices—see *ante*, pp. 388, 392.

The cause now coming on for hearing, there was the same conflict of evidence as upon the hearing of the motion, as to which of the two kinds of drainage-pipes was the best. The jurisdiction of the vestry to impose such stringent rules on the occupiers of houses was discussed, and the question was raised, as upon the hearing of the motion, whether, in this particular case, these rules had been capriciously enforced.

Mr. Bacon and *Mr. Schomberg* were heard for the plaintiff.

Mr. Malins and *Mr. Speed* appeared for the defendants, but were not called upon.

STUART, V.C. said, the question was, whether the vestry had jurisdiction under the 18 & 19 Vict. c. 120. ss. 75, 76, to order stoneware pipes to be used. He thought they had. Had the plaintiff, then, complied with the order of the defendants? Had he used "stoneware pipes of the best quality"? Upon the evidence it appeared, according to some testimony, that the Aylesford pipes were stoneware. According to other testimony they were not improperly described as glazed earthenware pipes. On the whole, he thought the vestry had not exercised a capricious discretion, and that the plaintiff had not complied with the regulation of the vestry. He must, therefore, dismiss the bill, and, though not entirely satisfied with the conduct of the defendants in reference to certain overtures for a compromise made by the plaintiff, he on the whole was of opinion that it should be dismissed, with costs.

Bill dismissed, with costs, accordingly.

WOOD, V.C. }
June 5, 23. } BARROW v. BARROW.

Baron and Feme—Specific Performance—Suit by Wife—Election—Jurisdiction.

A married woman having instituted a suit and obtained a decree for specific performance of a contract entered into by her husband, for the settlement of her estate, cannot afterwards repudiate the contract; for, by instituting the suit, she gives the Court jurisdiction to bind her interests, and it is no objection that this has not been done by deed acknowledged under the Fines and Recoveries Act.

By a settlement dated the 10th of December 1834, and made in contemplation of a marriage which was shortly afterwards solemnized between Robert Knapp Barrow and Mary Adams, then a minor, R. K. Barrow covenanted that in case the marriage should take effect, he and his wife would, within a month after she should come of age, at the proper costs and charges of the said R. K. Barrow, surrender certain copyhold premises, of which she was tenant in tail, to the use of the trustees of the settlement, who should stand seised thereof, upon trust, during the joint lives of R. K. Barrow and Mrs. Barrow, to pay the rents to her separate use, without power of anticipation, and after the decease of R. K. Barrow, if she should survive him, to permit her to receive the same during her life, and after the death of the survivor of them, in trust for the children of the marriage as Mrs. Barrow should appoint, and in default of appointment, equally.

Nothing was ever done in performance of the covenant contained in the settlement, and Mrs. Barrow still remained tenant in tail, on the court rolls, by her maiden name.

There were several children of the marriage.

In 1850 Mrs. Barrow joined with her husband in exercising a power of revocation as to part of the premises comprised in the settlement, and in mortgaging them for 2,700*l.*, and the equity of redemption was afterwards conveyed to him.

In September 1853 a separation took

place between R. K. Barrow and Mrs. Barrow, and from that time until the filing of the bill in September 1854, R. K. Barrow received the rents, and refused to take any steps towards the completion of the surrender and admittance contemplated by the settlement. Under these circumstances, a bill was filed by Mrs. Barrow against R. K. Barrow and Thomas Cox Barrow, the surviving trustee of the settlement, for specific performance of the covenant, for the appointment of a new trustee, and an account of the rents received by the defendants; and by the decree made in the cause, on the 4th of December 1855, William Foster was appointed a trustee, jointly with T. C. Barrow, and it was ordered that the defendant R. K. Barrow should, at his own cost, concur with the plaintiff in surrendering the premises to the use of the trustees, who should procure admission thereto, and that R. K. Barrow should pay the costs of the admission other than the fine. An account was also directed to be taken of the rents received by R. K. Barrow, and the fine upon admission and the costs of the suit were directed to be raised by sale or mortgage of a sufficient part of the premises.

R. K. Barrow died on the 1st of January 1856, and on the 12th of January 1857 the suit was revived against Robert Knapp Barrow the younger, his executor. A sum of 162*l.* 3*s.* was certified to be due from him, but he died insolvent, and the accounts were waived against the executor. The total amount of costs to be raised pursuant to the decree, was 572*l.* 5*s.* 11*d.*, in addition to the fines.

The plaintiff now, on being applied to to concur with the trustees in taking the necessary steps for having the amount of the costs and fines raised and applied, and for carrying the decree into effect, declined to do so, being advised that the settlement, the subject of the suit, and the decree made in that suit, were in no way binding upon her, and she claimed the property as her own, free from the settlement and the decree.

Thomas Cox Barrow and the infant children of the marriage, then presented a petition, praying that, notwithstanding the direction for the admission of T. C. Barrow and Foster as trustees, T. C. Barrow alone

might be at liberty to procure himself to be admitted tenant (the custom of the manor only permitting one person at a time to be admitted tenant of the same tenement), and that the plaintiff might be ordered to surrender the premises accordingly, and that all necessary parties might concur in a sale or mortgage, for the purpose of raising the costs and fines.

Mr. Rolt and *Mr. Bagshawe, jun.*, in support of the petition, contended that the plaintiff having instituted the suit, and even revived it after the death of her husband, was bound by the decree, and, having elected to take the benefit of the contract, could not now repudiate it.—

Wake v. Parker, 2 Keen, 59; s. c. 7 Law J. Rep. (N.S.) Chanc. 93.

Wilton v. Hill, 25 Law J. Rep. (N.S.) Chanc. 156.

Derbyshire v. Home, 3 De Gex, M. & G. 80; s. c. 5 De Gex & Sm. 702.

Burke v. Crosbie, 1 Ball & B. 489, 502.

Mallack v. Gallon, 3 P. Wms. 352.

Jordan v. Jones, 2 Ph. 170; s. c. 16 Law J. Rep. (N.S.) Chanc. 93.

Mr. W. M. James and *Mr. Stiffe*, for the plaintiff, argued that there was only one mode by which a married woman could dispose of her real estate, and that not having been pursued here, the Court had no jurisdiction.

[Wood, V.C. referred to *Ardesoife v. Bennet* (1).]

A married woman could not appoint a solicitor or counsel to bind her real estate, nor could she bind it by a deed signed by herself, nor by a bill in Chancery.

Lassence v. Tierney, 1 Mac. & Gor. 551; s. c. 2 Hall & Tw. 115.

Field v. Moore, 25 Law J. Rep. (N.S.) Chanc. 66.

Robinson v. Wheelright, 6 De Gex, M. & G. 535; s. c. 25 Law J. Rep. (N.S.) Chanc. 385.

Savill v. Savill, 2 Coll. 721.

Campbell v. Ingilby, 1 De Gex & Jo. 393; s. c. 26 Law J. Rep. (N.S.) Chanc. 654.

Boughton v. Boughton, 2 Ves. sen. 12.

(1) 2 Dick. 463.

De la Garde v. Lemprière, 6 Beav. 344;
s. c. 12 Law J. Rep. (N.S.) Chanc.
472.

Bateman v. Lady Ross, 1 Dow, 235.

Mr. Cracknall, for the personal representative of R. K. Barrow, referred to—

Lady Elibank v. Montolieu, 5 Ves. 737.

Baldwin v. Baldwin, 5 De Gex & Sm. 319.

Fenner v. Taylor, 2 Russ. & M. 190;
s. c. 2 Law J. Rep. (N.S.) Chanc. 99.

Borton v. Borton, 16 Sim. 552; s. c. 18 Law J. Rep. (N.S.) Chanc. 219.

Mr. Rolit replied.

June 23.—WOOD, V.C., after stating the facts of the case, said—The main point which was argued on the part of Mrs. Barrow was, that she could not pass an interest in real estate otherwise than by deed acknowledged under the Fines and Recoveries Act, and, therefore, was not bound by the decree obtained in a suit instituted by herself; and this argument was founded principally upon the case of *Field v. Moore*, which was cited as an authority that the Court could make no decree binding on a married woman, and that she must be held free from all responsibility arising from a suit instituted on her behalf. If this view were to prevail, there would be no means of providing for the costs directed by the decree to be raised, and all the money which she has received under the decree would have to go for nothing at all. Looking very carefully through *Field v. Moore*, I cannot see anything in that case to justify any such proposition. That was the case of a ward of Court, married without leave, and the Court, in the exercise of its duty, ordered a settlement to be made in such a manner as wholly to exclude the husband from all interest in his wife's property. The settlement directed to be made gave the wife the power to appoint in favour of any one, except the husband. The settlement was not acknowledged pursuant to the statute, and upon the question as to the validity of an appointment made by her under the power, it was held, that no valid settlement of a female infant's real estate could be made upon her marriage, either by virtue of any agreement

by her or her parents or guardians, or by the authority of this Court. On the other hand, there is abundance of authority to shew that this Court does deal with the interests of a married woman, independently of the particular mode prescribed by the Fines and Recoveries Act. There are several cases in which she has been called upon to elect, and a conveyance has been decreed in respect of the election, the ground of these decisions being that no married woman can be allowed to commit a fraud any more than any other person. *Ardesoife v. Bennet* was such a case. A simpler case of fraud than that was *Savage v. Foster* (2), where a married woman having encouraged a purchaser to buy an estate, he was held entitled to hold it against her. In *Jackson v. Hobhouse* (3), money was settled to the separate use of a married woman, without power of anticipation, and she and her husband procured the plaintiff to join them as surety for securing payment of an annuity charged on the fund. It was there said that she was guilty of fraud in concealing the clause against anticipation, and Lord Eldon observed that the question of fraud was in reality immaterial. The case of *Savage v. Foster* was pressed upon him, as was also *Watts v. Cresswell* (4), which was the case of an infant tenant in tail. Sir John Leach, in reply, urged that *Savage v. Foster* did not apply, and Lord Eldon adopted that view. He said, "In the cases referred to of a married woman having a power," (that, of course, should be power to convey) "and of an infant, they are capable by law of conveying; the act of the latter being only voidable on his attaining full age. But the present case is different, the married woman having no power to make a conveyance." For he had previously said, "Supposing the omission to be clearly the wife's personal fraud, the question has reference not only to her interest, but to the intention of the author of the settlement; and it becomes a very material point to determine whether the Court will suffer the fraud of the wife to give her a power of alienation against the intention of the settlor. I am

(2) 9 Mod. 35.

(3) 2 Mer. 483.

(4) 9 Vin. Abr. 415; s. c. 9 Mod. 38, 96, 97.

strongly inclined to think that it never could have this effect." It appears, therefore, that a married woman is entitled to take every possible advantage of her position; but it would go to the very root of the jurisdiction of this Court in matters of fraud, if I were to allow her to retain the benefit of the decree, and to say that she is not now to perform the obligation, because the speculation has not turned out so profitable as she expected. So far was Lord Justice Turner, in *Field v. Moore*, from denying the cases of election, that he said, speaking of the instances in which the equitable interests of married women were held bound by decrees, "All those cases were either cases in which the Court enforced a right which was paramount to that of the married woman, or a right which the married woman herself had duly created, or they were cases of election in which the interests of other persons were concerned. Cases of the first class are wholly different from those of settlements made by the Court upon the marriage of its infant wards And the cases of election are equally inapplicable to a case like the present. If, upon the marriage of the ward, a settlement was made by the husband, it is possible that some case of election might arise, as in the case of *Savill v. Savill*; but in this case,"—and this is the part I particularly wish to notice,—*"there was no settlement by the husband, and the marriage was a gross contempt of Court. The Court deprived the husband of the interest which he took by the marriage in the real estate of the wife, and settled that interest for the benefit of the wife; and the act of the Court in depriving the husband of his interest, certainly could not be made the foundation of a case of election against the wife."* The case before me is of an entirely different character. If the plaintiff has chosen to take the benefit of the contract, she must take it as it stands. The consideration for the settlement was as much the benefit of the children as the life interest of the husband in remainder. For these considerations, he consented to give up his marital rights. She was perfectly free to accept or reject the proposal, but she insisted upon having the covenant performed; she has obtained a decree, and the rents have been paid to

her under the decree, and how can I possibly after that say that the decree is not to be carried into effect? She has taken her choice, and her choice turns out to be a bad one, by the death of her husband within a month after the decree. It was the case of a simple contract by the husband, to be performed or not at the option of the wife. She has exercised that option, and it is too late now to say she will not abide by it. There is no analogy to the cases where there has been a reference to the Master to inquire what is a proper settlement, and the lady has then been allowed to waive her equity. There must be an order that the plaintiff, Mary Barrow, do concur with the trustees, William Foster and T. C. Barrow, in procuring the admission of them or one of them to the copyhold premises in the indenture of the 10th of December 1834 mentioned, in order that the same may be held upon the trusts of the said indenture, with liberty to apply at chambers as to which of the trustees is to be admitted in case of the lord refusing to admit both.

St Aubrey v. Smeat. 3 L.R. Ch. 657.

Riggs v. Rice 57 L.R. Ch. 66-264.

WOOD, V.C. }

April 22, 23; }

May 27. }

Re Bellamy 52 L.R. Ch. 870

BOURDILLON v. ROCHE.

Solicitor and Client—Partnership—Business of Solicitor—Receipt of Money—Liability.

It is well settled that it is not within the ordinary business of a solicitor to receive purchase-money belonging to his client, or money due to him on mortgage, nor to receive money from him for the purpose of investment generally, and one partner is not liable for the misapplication of money so received by another without his privity.

Secus—where the money is received for the purpose of being invested on a particular security.

Under the will of William Benedict Bourdillon, certain trust monies were vested in trustees, now represented by the plaintiffs, upon trusts for investment and to pay the income to Mary Bourdillon, the testator's widow, for life, with remainder

to his daughter Catherine Bourdillon, for life, with remainder over. Garrard Roche and Richard Plowman were the solicitors to the trustees, but Roche was the partner who principally attended to the business of the trust. Part of the trust fund consisted of 2,000*l.* lent on mortgage to one Mist, and in 1828 the mortgagor being about to redeem the mortgage and sell the premises to one Bailey, Roche recommended that the mortgage money, when paid off, should be reinvested in a mortgage of copyhold premises in Tottenham Court Road, and to this the trustees assented. The draft of the conveyance to Bailey was then prepared and submitted to Messrs. Roche & Plowman, who approved thereof, the memorandum of approval being in Plowman's handwriting. On the 9th of February, the purchase was completed at the office of Roche & Plowman, and the mortgage money was paid to Roche, who afterwards represented to the trustees that it had been invested as agreed, and paid the interest to them half-yearly, it being stated in the receipts that the amount received was for interest on 2,000*l.*, lent on mortgage of copyholds of inheritance in Tottenham Court Road. Roche died intestate in 1854, and it was then discovered that the 2,000*l.* had never been invested, but that Roche, whose estate was insolvent, had misapplied the money. The bill was filed against the representative of Roche, and also against Plowman, stating, among other things, that Roche & Plowman received the money by permission of their clients for the purpose of investing it in the new mortgage, and that they, "such co-partners as aforesaid, instead of investing the said sum of 2,000*l.* so received by them as aforesaid, upon the security of a mortgage of such copyhold premises as aforesaid, or otherwise, according to their undertaking and representation in that behalf, for their said clients, have without the privity or consent of the plaintiffs or either of them, applied the same sum so received by them as aforesaid to their own use and purposes." The bill then prayed that it might be declared that Plowman and also the estate of Roche were respectively liable to make good and pay the 2,000*l.* and interest, and that an account might be taken, and the defen-

dants respectively might be ordered to pay what should be found due.

Plowman, by his answer, denied all knowledge of the transaction in question, and stated that a close intimacy had existed, for many years previous to the commencement of the partnership, between Roche and the Bourdillon family; that Francis Bourdillon, one of the trustees, frequently dined at his table, and was in the constant and almost daily habit of calling at the office to converse with him on private matters; that Roche was always consulted by Francis Bourdillon and the other members of the Bourdillon family, and he exclusively attended to their business; they never asked to see Plowman, and they uniformly addressed their letters to Roche personally, and not to the firm; and all letters written by Roche on the business were written in his own individual name, and not in the name of the firm. No charge was made by Roche for any business connected with the payments of interest, and the payments themselves were made by cheques on his private bankers. He further stated, that he never had the least suspicion that the 2,000*l.* had ever come into Roche's hands; and insisted that if the said sum was received by Roche, as appeared by an entry in his private banking book, it was paid to him by Francis Bourdillon, one of the trustees, as his private agent or friend, and not in any way to the firm; that it was not within the scope of the business or partnership to receive money from or on account of any client for the purpose of keeping the same pending any negotiation for investment or purchase, nor did the partnership ever do so, and that it was not till after Roche's death that he had the slightest means of access to his banker's books, they being scrupulously kept by him with other private matters, locked up in a private drawer, to which he alone had access.

Miss Catherine Bourdillon, the present tenant for life, by her affidavit stated (par. 7.) as follows:—"About the end of the year 1827, or beginning of the year 1828, the said J. N. Mist (the mortgagor) sold the premises comprised in the said mortgage security, and as I have understood and believe, to Mr. George Bailey, in the

pleadings named, and thereupon communications took place on the subject of the said mortgage debt being paid off. The said Messrs. Roche & Plowman, such co-partners as aforesaid, as solicitors and on behalf of the said Thomas Bourdillon and Francis Bourdillon, such trustees as aforesaid, attended on their behalf to the said matter, and recommended that the money when received should be invested on the security of a mortgage of copyhold premises, represented by the said co-partners or one of them to be situate in Percy Street, Tottenham Court Road, in the county of Middlesex, and to be the property of a Mr. Perry. The matters hereinbefore in this paragraph stated by me, I know from communications made to me, or to my said mother in my presence by the said trustees, and by the said Messrs. Roche & Plowman, such co-partners as aforesaid, the solicitors of the said trustees or by one of the said co-partners at their office or place of business; and I also understood and believe that the said Mr. Perry was a relative of John Jones, deceased, who had some time previously been a partner of the said G. Roche, or of him and the said defendant Richard Plowman, in the business of solicitors and attorneys.

The eighth paragraph of the same affidavit contained the following passage:—"In the year 1828, I accompanied my said mother to the office of the said Messrs. Roche & Plowman, for the purpose of making inquiry respecting the said proposed investment on the said copyhold property, and the said Garrard Roche on that occasion stated to us that the Rev. T. Bourdillon had also raised questions on the subject, which he the said Garrard Roche had settled and disposed of, and that the said security was a safe and good investment . . . and in consequence of the said G. Roche having represented, as he did, in fact, represent to the said Mary Bourdillon and me, in our communications with him as a partner of the said firm of Roche & Plowman, the solicitors for the aforesaid trustees, that the said sum of 2,000*l.* would be properly invested on such security of the said copyhold property as aforesaid, and that the said security was safe and good, my mother and

I acquiesced, and as I believe the said trustees agreed that the said sum of 2,000*l.* should be so invested."

The Solicitor General, Mr. Bazalgette, and Mr. Wickens appeared for the plaintiff.

Mr. Rolt and Mr. Giffard, for the defendant Plowman.

Mr. Amphlett and Mr. Baggallay, for the administrator of Garrard Roche.

The cases cited were:—

Harman v. Johnson, 2 El. & B. 61; s. c. 22 Law J. Rep. (n.s.) Q.B. 297; 3 Car. & K. 294.

Bishop v. the Countess of Jersey, 2 Drew. 143; s. c. 23 Law J. Rep. (n.s.) Chanc. 483.

Blair v. Bromley, 5 Hare, 542; s. c. 2 Ph. 354; 16 Law J. Rep. (n.s.) Chanc. 105; affirmed 16 Law J. Rep. (n.s.) Chanc. 495; 2 Ph. 354.

Sims v. Brutton, 5 Exch. Rep. 802; s. c. 20 Law J. Rep. (n.s.) Exch. 41.

Sandilands v. Marsh, 2 B. & Ald. 673.

May 27.—WOOD, V.C., after stating the facts, said, it was clear that as to all matters within the ordinary range of partnership business each partner was the agent of the other, and bound by his acts and representations. The first question then was, whether the receipt of money due on mortgage was part of the ordinary business of a solicitor, as no doubt the receipt of money to be laid out on mortgage was. It was settled that the receipt of purchase-money was not within such ordinary business, as appeared by the case of *Viney v. Chaplin* (1), where Turner, L.J. said, "I take it to be settled that a solicitor is not by virtue of his office entitled to receive purchase-moneys, even though he may have possession of the deed of conveyance; and it would be strange if he were, for it is no part of the ordinary duty of a solicitor to receive money belonging to his client, and the deed of conveyance comes into his hands for a wholly different purpose." And the principle which was adopted in that case seemed to apply very strongly in the present. Unques-

H. Lodge
Dec. 3. 18
Ch. 457.

(1) *Ante*, p. 434.

tionably it was a very common practice for a solicitor to receive his client's money, but it would be a large addition to the responsibility of a partner if he were held liable for all the receipts of his co-partners. It appeared clear, therefore, to his Honour that it was no part of the ordinary business of a solicitor to receive purchase-money, and he could not fix Plowman with the consequences of Roche's receipt, being unable to draw any distinction between purchase-money and money due on mortgage. In *Wilkinson v. Candlish* (2) the solicitor received money of his principal in order to invest it on mortgage, and with the consent of the mortgagor retained the mortgage-deed in his own hands, and from time to time received the interest and paid it over; and it was held that this did not amount to an authority to receive the principal, an attorney as such not being actually a scrivener. The next question was, did the money go into the partnership fund? That question was answered by the nature of the account. In *Blair v. Bromley* the case was different. There, though the senior partner had the principal controul of the partnership funds, it was stated in one report that the younger partner did occasionally draw cheques. They agreed that one partner alone should draw cheques, but that was merely a private arrangement between themselves; but in this case nobody could suppose that if he paid money to Roche he was putting it under the controul of Roche & Plowman. In *Sandilands v. Marsh* it was contended, that though the transaction was not within the ordinary course of business, yet it was a matter which the partnership could undertake; and there the innocent partner was held bound, but not on that ground: it was left to the jury, and they found that he was cognizant of the transaction, and he was therefore held liable on the general principles of agency. In that case one of two co-partners made a contract as to the terms on which certain business, not in their usual course of dealing, and even contrary to their arrangement with each other, should be transacted, but the business was afterwards transacted with the knowledge of the other partner, and it

(2) 5 Exch. Rep. 91; s.c. 19 Law J. Rep. (N.S.) Exch. 166.

was held, that he was bound by his partner's contract. On the motion for a nonsuit, Holroyd, J. made this observation (p. 681), "By his knowledge of it being found by the jury, it becomes for this purpose part of the partnership business as much as any transaction in the ordinary course of dealing." Abbott, C.J. went into the matter at great length, but it was put in the clearest and neatest manner in that observation of Mr. Justice Holroyd. In this case it was true that Plowman knew the sale was about to be made and the mortgage paid off, but there was nothing to lead him to the knowledge that the money would be paid to Roche, that not being any part of the ordinary business of the partnership. His Honour then referred to *Blair v. Bromley, Es parte Dufaur* (3), and *Harman v. Johnson*, where Lord Campbell said, "An attorney *quod* attorney is not a scrivener; it is part of his business to prepare conveyances and negotiate mortgages, and see that the deeds are executed and the transaction completed. A scrivener is a person who receives money to lay out upon security, and to hold the money in his hands until an opportunity offers for laying it out; and the question is, whether the defendant's partner was acting within the scope of the partnership authority in receiving money to lay it out indefinitely upon security, which he might find and offer to the plaintiff. If he received the money indefinitely for that purpose, I think he was not acting within the general partnership authority, and there was no evidence to shew that Smith and the defendant had ever acted as partners upon such terms. There was strong evidence to shew that the money was received to answer three particular mortgages; and that it was in consequence of a representation by Smith that those particular mortgages were ready that the plaintiff was induced to advance the money; still I cannot say that the evidence in that respect was sufficient, and when I look to the terms of the direction to the jury I think it was too large. If it were to be taken as a direction, that the jury were to find for the plaintiff if they thought the money had been left with

(3) 2 De Gex, M. & G. 246; s.c. 21 Law J. Rep. (N.S.) Bankr. 38.

Smith generally to be invested upon mortgage, then I think the question was left too widely. If it had been more pointedly left to the jury to say, whether the money had been left with Smith and received by him for the purpose of being paid over on three particular mortgages, which he represented he was then preparing for the plaintiff, and if so, to find for the plaintiff, possibly the jury might have come to a different conclusion upon the evidence." And the other Judges concurred in that. It therefore became exceedingly important to look at Miss Bourdillon's affidavit. There was nothing whatever in the partnership books relating to the transaction, nor anything by which Plowman was bound to know of the receipt of the money by Roche as a matter of business. Then, as to the affidavit of Miss Bourdillon, the lady now entitled to the interest of the money, the seventh paragraph contained not a single word of evidence that could be used at the hearing. There was a great difference between an affidavit to be used at the hearing and one to be used on an interlocutory application. On an interlocutory application the general belief of a witness might have some weight with the Court, but there could be no use whatever in putting into an affidavit to be used at the hearing anything which was founded merely on belief, and the practice was much to be regretted.—[His Honour read the seventh paragraph of the affidavit.]—The only piece of evidence throughout the whole transaction was contained in the eighth paragraph.—[His Honour read the passage as above.]—If the money were received by Roche for the purpose of being invested in this specific security, then according to *Blair v. Bromley* and that class of cases, if those authorities were to prevail, the partner would be bound, but until the matter was brought to an agreement to invest the money on the representation of a specific security, it did not come within the ordinary business of the partnership—*Harman v. Johnson*. But this case could not be put so high as that. It was perfectly consistent with the statements in the affidavit that this specific mortgage was not pointed out for months after the money was received, and it could not, upon the recollection of this witness as to

what took place thirty years ago, be said that the money was received by Roche on the representation that it was a specific mortgage ready for the investment. The case of *The Marchioness De Ribeyre v. Barclay* (4) had no bearing on the case, because there the securities were in the custody of the firm in the usual course of dealing. The result was, that as against Plowman the bill must be dismissed, with costs; and as to the other defendants, there must be a declaration that the estate of Garrard Roche was liable to make good the loss.

LORDS JUSTICES. { BRYON v. THE METRO-
July 21, 29. { POLITAN SALOON OMNIBUS
COMPANY (LIMITED).

Company—Joint-Stock Companies Act, 1856—Issue of Debentures for Payment of Debts—Increase of Capital.

A joint-stock company was registered and incorporated under the 19 & 20 Vict. c. 47. It had a memorandum, but no articles, of association. It was empowered to raise money at interest on debentures for payment of debts contracted in the due working of the company. A bill was filed, by shareholders, to restrain the directors from issuing debentures or other securities whereby the stock and assets of the company might be charged or made liable for the payment of any money borrowed for the use of the company, and also from borrowing money on debentures. A motion for an injunction was refused, by one of the Vice Chancellors, on the ground that the directors had power to do what they proposed, and on appeal the decision was affirmed, and a demurrer, which had been put in pending the appeal, was ordered to stand over, without prejudice, all questions being reserved to the hearing of the cause.

This case came before the Court, upon an appeal from an order of Vice Chancellor Kindersley, and upon a demurrer, which had been filed pending the appeal.

The above-named company commenced business in 1856, and was registered as

(4) 23 Beav. 107; a. c. 26 Law J. Rep. (n.s.) Chanc. 747.

an association on the principle of limited liability, under the provisions of the 19 & 20 Vict. c. 47. (the Joint-Stock Companies Act, 1856), and duly incorporated under it, with a memorandum of association, but without articles of association.

The nominal capital of the company was 20,000*l.*, in shares of 1*l.* each, and about 14,000 shares had been subscribed for.

In September 1857 the balance-sheet of the company shewed a deficiency of 2,829*l.* 14*s.* 9*d.*

On the 9th of March 1858 a general meeting of the shareholders was held, at which a resolution was passed by the majority of the shareholders present, that the directors should forthwith raise 5,000*l.* upon debentures, at interest, to pay the debts of the company; and that resolution was subsequently confirmed at another general meeting of the shareholders. The plaintiffs, Messrs. Henry Richard Bryon and Thomas Hawkins, shareholders in the company, were in the minority at both meetings. They filed this bill, and on the 21st of July moved, before the Vice Chancellor, for an injunction to restrain the directors of the company from issuing any debentures or other securities whereby the stock and assets of the company might be charged or made liable for the payment of any sum or sums of money borrowed for the use of the company, and from borrowing any sums of money on the security of such debentures.

By the 7th section of the above-mentioned act, it is enacted, that the memorandum of association should be in the form marked (A.) in the Schedule thereto, or as near thereto as circumstances admitted, and it should, when registered, bind the company and the shareholders therein to the same extent as if each shareholder had subscribed his name and affixed his seal thereto, or otherwise duly executed the same; and there was in such memorandum contained on the part of himself, his heirs, executors and administrators, a covenant to conform to all the regulations of such memorandum, subject to the provisions of that act.

By section 9, where there are no articles of association, the regulations contained in Table B. in the Schedule to the act are made binding on the company.

By the 33rd section, any company registered under that act may, in general meeting, from time to time, by such special resolution as thereafter mentioned, alter and make new provisions in lieu of or in addition to any regulations of the company contained in the articles of association, or the table marked (B.) in the Schedule.

By the 37th section the company may increase its capital, if authorized so to do by the regulations. And the table marked (B.) in the Schedule contains regulations for the management of the company.

By rule 20. it is provided that the company may, with the sanction of the company previously given in general meeting, increase the capital; and by rule 21, any capital raised by the creation of new shares shall be considered as part of the original capital, and be subject to the same provisions in all respects, whether with reference to the payment of calls, or the forfeiture of shares, or non-payment of calls, or otherwise, as if it had been part of the original capital.

The above are the only parts of the statute at present necessary to be set out. Other clauses are referred to in the judgments both below and on appeal.

The motion was made before the Vice Chancellor, who, as before stated, refused it (1), whereupon the plaintiffs appealed,

(1) The judgment of His Honour was as follows:—As I understand this Joint-Stock Companies Amendment Act, 1856, it prescribes that, in the case of the formation of any company under that act, there shall be a memorandum of association or articles of association, and that the memorandum of association shall be in the form marked (A.) in the Schedule to the act. That form contains certain directions as to the name of the company, its offices, objects, and liability of the shareholders and the nominal capital of the company. The form then concludes with a declaration by the subscribers to it that they are desirous of being formed into a company, in pursuance of a memorandum of association; and the names and addresses of the subscribers, and the number of shares taken by each subscriber are appended. That is the form of the memorandum of association—from which it is not competent for the shareholders to depart. That is, I mean, you may vary, of course, the details as to the name or capital of the proposed company, or whether it shall be on the principle of limited or unlimited liability. But the general constitution of every company under the act must be the same. Now, that memorandum of association may also be accompanied by articles

and the company had, in the mean time, filed a general demurrer, which was put down to be disposed of at the same time as the appeal.

of association, which are quite different instruments; but in this case there were none such. By the 9th section of the act, if there are no articles of association specifying particular regulations, the regulations contained in Table B. are to be binding on the company so soon as the memorandum is duly registered. The 33rd section enables the company at a general meeting of the shareholders to alter the regulations of the company. By the 37th section the company may, on due notice, increase its capital, if authorized so to do by its regulations; and by the 20th and 21st rules of this company I find it may make that increase with the sanction of the company previously obtained in general meeting. There is then in the act of parliament express authority to any company to increase its capital, if authorized so to do by its regulations, and the regulations contain such an authority. But it was contended in the argument in this case, that the raising of money at interest on debentures was an improper increase of the capital of the company. Now, in that argument it is assumed that what is sought to be done is an increase of capital. It is assumed that the borrowing of money is an increase of capital. But is that really so? What is capital? And we must not be misled by terms. What is capital, and what is the capital intended by this act? Capital is, in a popular sense, money that you have in hand to work with. The capital mentioned in the act is the nominal capital of the company—in this case, 20,000*l.*, divided into shares of 1*l.* each. Now when you talk of increasing your capital simpliciter by borrowing money, in one sense you may be said to increase it, that is, you get into your hands more actual money to work with; but that is not really increasing your capital. If a man has 20,000*l.* in hand, he does not increase that 20,000*l.* by borrowing another 20,000*l.* which he must be liable to refund or repay. The whole fallacy of the argument in this case lies in confounding the use of the word "capital" in its popular sense of money in hand, with the words "nominal capital" in the act. Now I am clearly of opinion that the directors by raising money on debentures are not increasing, either really or nominally, the nominal capital of the company, which is the only capital contemplated or referred to in the act. But it was said to be an improper increase of capital. It is certainly not an increase of capital, as I have said; but is it otherwise improper? There is no suggestion whatever that the objects for which the 5,000*l.* are to be raised are improper, or for any purpose inconsistent with the legitimate purposes of the company. Of course, if this or any other company is specially precluded by act of parliament or otherwise from borrowing money at all, *cadet questio*—there is an end of all question. Or if the proposed application of the money sought to be raised was for any object foreign to the purposes of the company, there would be just ground of complaint; but, as I have said, nothing of that sort appears. But what is the

Mr. Glasse, Mr. Wordsworth and Mr. T. H. Terrell, for the appellants, contended that the raising of money by the company by debentures, as they proposed to do was not warranted by the act of parliament, as being an improper increase of the capital of the company.—They cited—

Smith v. Goldsworthy, 11 Law J. Rep. (N.S.) Q.B. 151; s. c. 12 Law J. Rep. (N.S.) Q.B. 192; 3 G. & D. 448; 1 Dowl. P.C. (N.S.) 288.

Pulsford v. Richards, 17 Beav. 87; s. c. 22 Law J. Rep. (N.S.) Chanc. 559.

object proposed to be met by this loan? Why, the payment of the debts of the company. Now every company, every joint-stock company for any purpose, must incur some debts; I do not mean of necessity debts they cannot pay, but debts. How can this company procure the necessary supply of omnibuses, horses, or other stock for their business, without incurring debts? The incurring of debts is a necessary incident, so to say, to all companies, and especially to this one, from its very nature. Then it was suggested, you cannot borrow money in a gross sum to pay them; or if you can, the attempt to do so in this instance was improperly made. It was endeavoured to shew that there was no difference between this partnership and an ordinary one between ordinary partners; that no ordinary partnership can borrow money if one or more of a large number of partners object; and that as the majority of shareholders only sanctioned the proposed loan in this case, it is not authorized or consented to by all the shareholders. But there is a very distinct difference between joint-stock and ordinary partnerships, between all corporate partnerships and those between individuals. The management of the company and its concerns must *ex necessitate* cease and utterly fail if it be not carried on by the voice of the majority of the shareholders at general or otherwise prescribed meetings. Here, about 14,000 out of 20,000 shares were subscribed for. I do not say there were 14,000 shareholders, as some shareholders might have had several shares; but 14,000 shares were taken and subscribed for. How would it be practicable, or even possible, to get the consent of so many individual shareholders to any resolution, but by the voice of the majority? The majority must in such cases bind the minority, or the company cannot possibly go on. No allegation was attempted as to any impropriety at the meetings when the resolution was passed and confirmed; and that being so, we have a majority of the shareholders in this company, at meetings duly convened, sanctioning, as required by the act, a loan proposed to be made by the directors of the company, for the legitimate purposes of the act. I am of opinion that there is nothing whatever in the Joint-Stock Companies Amendment Act, 1856, or the constitution of this association, to prevent the directors raising this loan of 5,000*l.* as proposed.

Re Vale of Neath Brewery, 21 Law J. Rep. (N.S.) Chanc. 688; s.c. 20 Law J. Rep. (N.S.) Chanc. 295; 1 De Gex, M. & G. 421.
Ernest v. Nichols, 6 H.L. Cas. 401.

Mr. Lewis and *Mr. Eddis*, for the directors; and

Mr. Roxburgh and *Mr. Graham Hastings*, for the company, were not called upon.

LORD JUSTICE TURNER. — This case comes before us upon demurrer and upon a motion for an injunction, by way of appeal from a judgment of the Court below. It will be unnecessary to give a detailed opinion upon the question of the demurrer now, but upon the motion my opinion concurring with the Vice Chancellor's, the effect will be that the injunction must be refused. The grounds for so refusing are the same as are involved in the demurrer. It seems to me, upon the true construction of the act, three-fourths of the shareholders in a company are enabled by their decision to controul the remaining fourth in all matters having relation to the conduct of the business of the company which are not matters affecting the constitution of the company, as laid down by its constitution in Table B. in the statute. If there had been a partnership, and a provision had been introduced into the partnership-deed, that the opinion of the three-fourths of the partners was not to bind the remaining fourth for business purposes, then that provision would not bring the dissentients within the scope of the provisions of this act. According to Table B., which prescribes the way in which the company is to be carried on and its affairs managed, there is nothing to say that if any such majority of the shareholders pass a special resolution, it shall not be binding on the remainder. Sections 33. and 34. give power by themselves that special resolutions may be passed to regulate how the business of the company shall be carried on. It says, "any company"—the words are clear—"any company registered under this act may in general meeting from time to time by such special resolution as is hereinafter mentioned, alter and make new provisions in

lieu of or in addition to any regulations of the company contained in the articles of association or the table marked B. in the schedule." Section 34. expressly lays it down that a special resolution shall be binding if passed by a majority of three-fourths of the shareholders in number and value, when such resolution is for the purpose of carrying on the business of the company. "A resolution shall be deemed to be a special resolution whenever the same has been passed by three-fourths in number and value of such shareholders of the company for the time being, entitled to vote, as may be present in person or by proxy (in cases where, by the regulations of the company, proxies are allowed) at any meeting of which notice specifying the intention to propose such resolution has been duly given, and such resolution has been confirmed by a majority of such shareholders for the time being," &c. Now, here we find general words commanding things to be done. By referring back to the table marked B. we find that the articles of association and the regulations marked in Table B. are two different things. One says in what manner the company is to be carried on, how its proceedings are to be disposed of, the regulations for the management of the company's shares, how its meetings are to be held, the appointment of directors, powers, &c.; whilst the memorandum of association states the object for which the company has been established. I think, therefore, that three-fourths of the shareholders of the company are empowered to alter regulations for working the business of the company, and that their doing so is not altering its constitution. It appears to me that in the act of parliament it is laid down in general words that these things may be done. What may be done by partners for the better working of their business may be done by a joint-stock company, provided it is in compliance with its constitution. I do not think that raising money by debentures is a contravention of the constitution of the company. Upon these grounds, and the view which I take of the construction of the act of parliament, I am of opinion that the reasons upon which the Vice Chancellor refused the injunction were correct and well founded, and that the motion must be

refused. The demurrer raising questions more proper to be decided at the hearing, and upon which my learned Brother entertains more strength of opinion than myself, I think it would be better disposed of at the hearing of the cause, and that the course not unusual with the Court should be adopted, namely, to reserve the consideration of it to the hearing, and that all questions should stand over without prejudice.

LORD JUSTICE KNIGHT BRUCE.—I hardly think it incumbent on me to express any opinion upon the motion, except to say that I fully agree with the view of the law which has been taken by my learned Brother, in concurring with the decision of the Vice Chancellor. With regard to the demurrer, I must say that I entertain so much doubt upon it, whether raising money upon debentures is authorized by the 33rd section, or article 46, of Table B, that I am of opinion the demurrer ought not to be allowed. An order will be made by the Court, namely, that the motion be dismissed, and the demurrer stand over until the hearing, but without prejudice to any question, and with liberty to amend.

The costs both of the motion and the demurrer were ordered to be reserved, to be dealt with as the Court before whom the cause should be heard should direct.

M.R. }
March 11, 12. } PAYN v. HORNBY.

Partnership — Dissolution by Death — Executors — Stock in Trade — Renewal — Trade Debts.

Upon the decease of a partner in trade, the firm was indebted to him for money advanced. The business was continued by the surviving partner, who, with the money of the firm, made additions to the stock in trade: — Held, as the executors of the deceased partner had permitted the continuance of the business, that they had no lien upon the subsequently acquired stock in trade for the money advanced to the firm by their testator.

Henry Bourne, for some time previous to the year 1852, carried on the business of

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a wholesale grocer at Birmingham; he also carried on a separate business of a wholesale grocer, in partnership with William Alderton, of Wolverhampton, in the county of Stafford. There was no deed or written agreement of partnership; but the terms understood between them were, that each was to be entitled to an equal share of the profits; and that if either partner advanced money to the partnership he was to be allowed interest upon the money advanced at 5*l.* per cent. per annum.

H. Bourne died on the 2nd of November 1852, having made a will the day before his death, by which he appointed John Brearley Payn and Robert Howson, the plaintiffs, his executors.

At the time of his decease the partnership was indebted to him in considerable sums of money, for advances made on account of the partnership. The partnership business was continued by W. Alderton, who sold some of the partnership stock in trade. He also got in some of the debts due to the firm, and he paid 13*5l.* 5*s.* 11*d.* to the plaintiffs, in part discharge of the advances made by H. Bourne to the firm. He also applied other parts of the money so received by him in the renewal of the stock in trade, which he in like manner sold and replaced. He also sold parts, both of the original and of the substituted stock in trade, upon credit. He also applied some of the monies received on account of the partnership, and on account of the original and renewed stock in trade, to his own use.

In May 1853 the plaintiffs and W. Alderton came to an account. It then appeared that the partnership was indebted to Henry Bourne at his decease in the sum of 3,482*l.* 16*s.* 10*d.*, and that it had been reduced by payments on account to 3,329*l.* 10*s.* 11*d.* The plaintiffs then pressed W. Alderton, either to pay the balance, or to come to an arrangement for winding up the partnership.

By an indenture, dated the 16th of May 1853, and made between W. Alderton of the one part, and the plaintiffs of the other part, the said W. Alderton conveyed and assigned all his share and interest in the partnership premises and the real estate, and all the stock in trade, debts, credits and effects, unto the plaintiffs, their

heirs, executors, administrators and assigns, upon trust to convert the same into money; and out of the proceeds, in the first place, after payment of the expenses, upon trust to pay or retain to themselves as trustees and executors of the will of H. Bourne, the principal sum of 3,329*l.* 10*s.* 11*d.*, with interest, and then to appropriate and divide the residue of the monies so to be received unto and between W. Alderton, and the trustees and executors for the time being of the will of H. Bourne, in equal shares and proportions.

The plaintiffs, upon the execution of this deed, took possession of the premises, and of the stock in trade, debts and effects, which they proceeded to realize; but they had been unable to sell the real estate. They also paid all the debts due from the partnership, and they applied the balance towards payment of the amount due from the partnership to the estate of H. Bourne; but it was alleged to have been insufficient to satisfy the amount due.

On the 31st of August 1853 a petition was filed in bankruptcy against W. Alderton, and under this he was declared a bankrupt; and the defendant Frederick Whitmore was appointed the official assignee, and William Hornby, the creditors' assignee.

When the assignment of the 16th of May 1853 was made, the plaintiffs had no notice that W. Alderton had committed any act of bankruptcy; and it was alleged that none had been committed, unless it was by making the assignment to them.

The assignees, however, disputed the validity of the deed of the 16th of May 1853, and they brought an action against the plaintiffs to recover all that the plaintiffs had received in respect of the partnership assets.

The plaintiffs then filed the bill in this cause to obtain a declaration that they were entitled to apply the balance in their hands arising from the partnership estate and effects, in payment of the sum of 3,329*l.* 10*s.* 11*d.*, and to prove against the separate estate of W. Alderton for the balance of the same. They also asked for a declaration that the estate, effects and credits of the partnership, including any effects or credits which might have been purchased or received in place of any such partnership

estate, effects or credits, were, at the time of the execution of the deed and of the act of bankruptcy respectively, subject to a lien and trust in favour of the estate of H. Bourne to the amount of the balance due, and that the sums received and to be received, by the plaintiffs on account of such partnership estate, ought to be applied in payment of what should appear due from W. Alderton to the estate of H. Bourne. The bill also prayed that the action at law might be restrained.

Mr. R. Palmer and *Mr. De Gez*, for the plaintiffs.—The plaintiffs are entitled to a lien upon the whole partnership estate for the advances made by H. Bourne to the partnership.

Mr. Follett and *Mr. Smythe*, for the defendants.—The deed which Mr. Alderton executed in favour of the plaintiffs is void; and while it stands it is impossible to administer the estate of the bankrupt.—

Ex parte Williams, 11 Ves. 5.

Pennell v. Deffell, 4 De Gez, M. & G. 372; s. c. 20 Law J. Rep. (N.S.) Chanc. 115.

Dutton v. Morrison, 17 Ves. 193.

Collyer on Partnership, 77.

Mr. R. Palmer, in reply.

THE MASTER OF THE ROLLS.—The property acquired by W. Alderton between the death of the testator and the execution of the deed of May 1853 does not form part of the property of the partnership. I, however, entertain no doubt as to the validity of the deed. The executors would have been at liberty to enter into that deed immediately upon the death of the testator, or at any time subsequently, but it must be confined to the property of the late co-partnership. The rights of partners upon the dissolution of a partnership by the death of any of the partners, or otherwise, are quite distinct from those which are created by a lien or mortgage in the ordinary sense of the term. Undoubtedly there may be conditions and rights attaching to the partnership, which may give a partner particular rights and liens on the partnership property, and which would only raise a question between him and the joint creditors of what was in the order

and disposition at the time of the bankruptcy in case there were a bankruptcy. The distinction is, that in the case of a lien or mortgage the lien continues on the stock in trade through all its variations and changes; and if a person in business, who is constantly renewing and changing his stock in trade, gives a mortgage on all his stock in trade, it does not prevent him from selling portions of it and acquiring fresh stock, but the mortgage continues on the stock in trade, as it exists from time to time. But on the death of a partner the case is altogether different. There is only "a quasi lien"; there is only a right to the specific property then in existence. The executors of the deceased partner are joint tenants with the surviving partners, and they are entitled to say to the surviving partners, "You cannot sell the stock in trade without our leave; you must do one of two things, either wind up the partnership business at once, or settle what is the value of the testator's share, and secure the payment of the amount." This is exemplified by what constantly takes place in the cases of dissolution of a partnership, either by contract between the parties, or by death, by lunacy, by effluxion of time, or by any other cause which may cause a dissolution of the partnership. If the executors require the surviving partner to wind up immediately, and the surviving partner holds them at arm's length and continues to carry on the business, the executors have no remedy but to come to this Court; it will then appoint a receiver to get in the property, and wind up the partnership under the direction of the Court. The principle is not at all affected by the fact that the Court frequently in such cases appoints one of the partners to be the receiver;—it merely makes him the officer of the Court, because he understands the matter better than a stranger. If the executors do not apply for a receiver, though they file a bill to wind up the partnership, the new stock which has been acquired during the time that the business has been carried on by the surviving partner belongs first to the creditors in respect of such subsequent dealings, and not to the creditors of the old partnership; and it is the duty of the executors, if they wish to prevent any

dealings with the stock by the surviving partner, to come at once to this court for the appointment of a receiver, otherwise they may be sanctioning the commission of a fraud by inducing the subsequent creditors to believe that they are dealing with one who, out of his stock in trade, would be able to discharge their debts. Considering, therefore, the course adopted by the executors, an inquiry must be made in chambers, to ascertain whether, under the deed of the 16th of May 1853, the plaintiffs took possession of any and what goods, stock in trade, monies and effects, not belonging to or forming part of the co-partnership; and if they did, an account must be taken of the same, and of what sums of money have been received by the plaintiffs in respect thereof, or by their order or for their use.

LORDS JUSTICES. { WILLIAMS v. THE ST.
 May 27, 29. { GEORGE'S HARBOUR
 COMPANY.

Company—Agreement by Promoters—Adoption by Company.

A bill was applied for to parliament to enable an intended company to do certain works interfering with lands. A landowner, Colonel W., opposed the bill, but on a promoter of the bill agreeing to pay him a certain sum before commencing the works, he withdrew his opposition, and the bill passed. Colonel W. commenced legal proceedings against the promoter who signed the agreement, and the company consented to a Judge's order, against themselves, for the amount claimed in the action, and then proceeded with the works before the whole money due on the agreement was paid. Thereupon Colonel W. filed a bill to enforce payment of the remainder:—Held, that the company had adopted the agreement by submitting to the Judge's order, and were precluded from objecting that the promoter had no authority to bind the company, or that the consideration for the agreement was partly illegal.

This was a motion for a decree made, by agreement and by the permission of the Court, before the Lords Justices. The

case was originally before the Court, on appeal from a decision at the Rolls. In 1853, application was made to parliament for an act authorizing the construction of a harbour in Llandudno Bay, in the county of Carnarvon, and also a branch line of railway along the eastern bank of the river Conway, from the proposed harbour to the main line of the Chester and Holyhead Railway. The projected line was intended to pass either along the beach, between the estate of Colonel Williams, and the estuary of the Conway, or else over part of the estate itself, the proposed limit of deviation being sufficient to include either line. Colonel Williams opposed the bill in parliament on the ground that the railway would intercept his communication with the sea, and so deteriorate his estate. Ultimately, Mr. Mott, the chairman of the provisional board, entered into an agreement in writing with the agent of Colonel Williams as follows :—"Memorandum of the 22nd of July 1853. On Colonel Williams withdrawing his opposition to the St. George's Harbour Railway Bill, it is agreed by Mr. Mott, on behalf of himself and the other promoters, first, that Colonel Williams's costs of opposition as between solicitor and client, shall be at once paid by the promoters; that within one month from the passing of the act, a sum of 250*l.*, and before any ground of Colonel Williams is taken, and before the formation of the railway is commenced, a further sum of 1,750*l.* shall be paid to him as for ascertained consequential damages to his Marle estate; that the payment for such land as is taken or severance of the estate affected, shall in addition be assessed as under the Railway Acts, and paid for." Colonel Williams accordingly withdrew his opposition to the bill, which received the royal assent in August 1853. Afterwards he brought an action against the company for 122*l.* 11*s.* 8*d.*, being the costs of opposition, and 250*l.*, the first instalment of the sum agreed to be paid. He afterwards abandoned this action, and brought another against Mr. Mott for the same sums. The company then consented to a Judge's order being made against themselves, under which judgment was signed for the same sums on the 1st of July 1854. In the beginning of 1857, the

company commenced their works without paying any part of the 1,750*l.* remaining due under the agreement. The Colonel then filed a bill for an injunction to restrain them from proceeding with the works until payment. On the 23rd of June 1857, the plaintiff moved for an injunction, which was refused by the Master of the Rolls, and in February 1858, the motion was renewed before the Lords Justices; but as the petition of appeal was not presented until the 25th of July, a month after the motion had been refused, their Lordships thought there had been unnecessary delay, and directed the motion to stand over until the hearing, with liberty to the plaintiff to amend his bill. The defendants accordingly completed their railway, and the plaintiff having amended his bill, and prayed payment of the money due, the case came on on motion for a decree.

For the plaintiff, it was insisted, that the company having had the benefit of the agreement were bound to pay the money, and that they had fully adopted the act of the promoters by submitting to judgment being signed against them in an action brought by the plaintiff, not against themselves, but against Mr. Mott.

The company contended that the promoter had no power to bind them, that they had not adopted the agreement, and that inasmuch as the agreement to pay money for the withdrawal of opposition in parliament was illegal, the plaintiff had no title to come to a Court of equity to enforce any part of the agreement.

The case having been decided on the single point of the adoption of the agreement, no further notice of the long and elaborate arguments which were addressed to the Court are necessary. The following is a list of the cases cited for the plaintiff, many of which were relied upon by the defendants, in addition to *Simpson v. Lord Howden* (1) :—

Wilks v. the Hungerford Market Company, 2 Bing. N.C. 281; s. c. 2 Sc. 446; 5 Law J. Rep. (N.S.) C.P. 23.

(1) 9 Cl. & Fin. 61; s. c. in the court below, 6 Law J. Rep. (N.S.) Chanc. 315; 1 Keen, 583; 3 M. & Cr. 97.

Edwards v. the Grand Junction Railway Company, 1 Myl. & Cr. 650; s. c. 6 Law J. Rep. (n.s.) Chanc. 47.

Stanley v. the Chester and Birkenhead Railway Company, 3 Ibid. 773.

Gooday v. the Colchester Railway Company, 17 Beav. 132.

Lord Lindsey v. the Great Northern Railway Company, 10 Hare, 664; s. c. 22 Law J. Rep. (n.s.) Chanc. 995.

Hawkes v. the Eastern Counties Railway Company, 1 De Gex, M. & G. 737; s. c. 20 Law J. Rep. (n.s.) Chanc. 243; 22 Ibid. 77; 24 Ibid. 601; 5 H.L. Cas. 331.

Preston v. the Liverpool, &c. Railway Company, 1 Sim. N.S. 586; s. c. 21 Law J. Rep. (n.s.) Chanc. 61; 5 H.L. Cas. 605; 25 Law J. Rep. (n.s.) Chanc. 421.

Greenhalgh v. the Manchester and Birmingham Railway Company, 3 M. & Cr. 784; s. c. 8 Law J. Rep. (n.s.) Chanc. 75.

Lord James Stuart v. the London and North-Western Railway Company, 1 De Gex, M. & G. 721; s. c. 21 Law J. Rep. (n.s.) Chanc. 450.

Leominster Canal Company v. Shrewsbury and Hereford Railway Company, 3 K. & J. 654; s. c. 26 Law J. Rep. (n.s.) Chanc. 764.

Caledonian Railway Company v. St. Helensburgh Harbour Trustees, 2 Macq. 391.

Vauxhall Bridge Company v. the Earl Spencer, Jac. 64; s. c. 2 Madd. 356.

Mr. Roundell Palmer and Mr. Osborne Morgan, for the plaintiff.

Mr. Selwyn and Mr. Hetherington, for the defendants.

LORD JUSTICE KNIGHT BRUCE said, the defendants were in this position, that, independently of the agreement, the plaintiff would be entitled to contend before a jury that the promoters had done them an injury by means of the construction of the works; and on proving it to ask for compensation. The effect of the agreement (so far as it was material) was to admit the damage and to assess the amount of compensation. Nor

could it be denied that he had sustained permanent damage, though, perhaps, benefit also. Therefore, even if no proceedings had been taken at law, his Lordship might perhaps have decided in favour of the plaintiff's claim. But if without proceedings at law there would have been difficulties in the plaintiff's way, his Lordship was of opinion that these proceedings had removed them. The present bill was filed in June 1857; but in 1854 the plaintiff had commenced an action, on the footing that the sum due to him was due from the company, the writ of summons being indorsed as follows:—"Costs under agreement, 122l. 11s. 8d. Instalment of consequential damages, 250l. Total, 372l. 11s. 8d." The defendants' attorney undertook to appear for the defendants on the 21st of June 1854. In the action final judgment was signed on the 1st of July 1854, in pursuance of a Judge's order made on the 29th of June. This order directed that the plaintiff be at liberty to sign final judgment, and that the debt as agreed on be paid on the 31st of December (thus giving several months for the payment); and in default, the plaintiff to be at liberty to issue execution. That judgment bound the defendants equitably as well as legally, and it did so from the time of signing it, which was more than two years before the filing of the bill. The judgment, obtained by consent, seemed to his Lordship to amount to a recognition of the agreement as binding on the defendants. It would have been binding upon them if made after the passing of their act; and it must be now treated by this Court as binding upon them: and he thought that if the plaintiff allowed time to the defendants to appeal against their Lordships' judgment, he ought not to be driven to seek relief in an action in which he might possibly fail. For the plaintiff did not seek any relief here, except the payment of the money, without interest, but with the costs of the suit.

LORD JUSTICE TURNER would, if it had appeared necessary to him to decide the important questions which had been raised, have desired further time to consider them. But it seemed to him that the simple question was, whether the company had or had not adopted the agreement. By the terms of

their act the company had the option either to agree with the plaintiff as to the amount of compensation, or to have the amount settled by a jury. An agreement had been made by Mr. Mott, one of the promoters, ascertaining the amount of consequential damage; and the directors having power to make an agreement, had, of course, power to adopt that which was made. The question was, had they so adopted it? He felt no doubt that they had. How did the case stand? First, there was an action as to the amount of damages. That action was abandoned, and another commenced against Mr. Mott to recover the costs, and the first instalment of compensation which had then become due. Upon that action the company agreed to pay the costs and the instalment; and to effectuate the agreement, a third action was brought for recovery of both amounts; and in that action the company confessed judgment for the costs, as fixed by the agreement of 1853, and for 250*l.* as compensation money, being the sum then due under the same agreement. That was a plain acknowledgment that the sum was due under the agreement. There could, therefore, be no doubt that they had adopted the agreement. It was urged, however, that the agreement was partly illegal, because part of the consideration was the withdrawal of opposition in parliament. But the agreement must be taken as a whole. And if there were any doubt on the question, the defendants, as was well put by Mr. Morgan, had removed that doubt by confessing judgment. They had precluded themselves from setting up any such defence. The order, therefore, would be to declare the defendants liable for the payment of 1,750*l.*; and, the plaintiff consenting to allow time for such payment, order payment on or before the 29th of November next, with interest at 4*l.* per cent. from this day, and such interest on the judgment debt as the law allows; the plaintiff not to proceed on the judgment till the 29th of November, with liberty to the plaintiff, in default of payment, to apply for an injunction or otherwise, and the defendants to pay the costs of the suit.

LORDS JUSTICES. }
July 13, 14. }

TASSELL v. SMITH.

Mortgagor and Mortgagee—Redemption—Mortgage of two Estates.

W. R., in 1832, mortgaged an estate to three persons, trustees of an insurance company, as a security for 1,700*l.* and interest, and in April 1856 he joined as surety with *W. N.*, in a mortgage, by which he assigned a policy of assurance on his own life to trustees of the same office to secure 2,000*l.* and interest. *W. R.* knew that both advances were made by the insurance company, though it did not appear upon the deeds. In 1841 *W. R.* mortgaged the equity of redemption of the property in the deed of 1832, and in 1847 he further charged it in favour of *S.* and *E.* for securing in all 2,563*l.* and interest. No notice was given to the company. *W. R.* became bankrupt in July 1857, owing on the securities of 1841 and 1847 1,150*l.* The estates were sold, and the produce of that of 1832 was more than enough to pay the 1,700*l.* and interest, but that of 1856 was not enough to pay the 2,000*l.* and interest, or not sufficient to pay all the money lent:—Held, that, inasmuch as the mortgages named in the deeds of 1832 and 1856 were, though different persons, trustees for the same company, that fact was immaterial, and that the company were entitled to be paid the deficiency on the 1856 mortgage out of the surplus arising from the 1832 mortgage, in preference to the mortgages of 1841 and 1847, and to the assignees of *W. R.*

This was a special case set down to be heard before their Lordships, at the request of Vice Chancellor Wood, setting forth as follows:—

By an indenture of mortgage, bearing date the 18th of August 1832, made between William Randall, of the one part, and Dean John Parker, Richard Smith, Bedingfield Wise and Samuel Baker, of the other part, certain freehold and leasehold hereditaments were conveyed and assigned to the parties thereto of the second part, to secure repayment of a sum of 1,700*l.* and interest. The usual power of sale was given to the mortgagees, or the survivors or survivor of them, &c., upon default being made in payment of the sum

of 1,700*l.* and interest; and the mortgagees were to stand possessed of the proceeds of sale upon trust to pay the costs of sale, then to repay to themselves the principal and interest, and finally to pay the surplus (if any) to the same person or persons as would have been entitled to the same money in case such sale or sales had been made by the said W. Randall, his heirs, executors, administrators or assigns.

By another indenture of mortgage, bearing date the 28th of April 1856, made between William Newman of the first part, the said W. Randall, of the second part, and the plaintiffs of the third part, a brewery and other freehold hereditaments and certain other property, all belonging exclusively to the said W. Newman, and also a policy of assurance upon the life of the said W. Randall for the sum of 1,000*l.*, which belonged to him the said W. Randall, were conveyed and assigned by Newman and Randall respectively to the plaintiffs, their heirs, executors, administrators and assigns, to secure the repayment to them of 2,000*l.* and interest. This indenture contained a joint and several covenant by Newman and Randall to pay principal and interest, and also the usual power of sale by the mortgagees upon default in payment.

Randall joined in this indenture only as a security for Newman, and the property belonging to Newman was, as between him and Randall, declared to be primarily liable to the payment of the 2,000*l.* and interest.

Both advances were, and were known to Randall at the time to be, from the Kent Fire Insurance Company, the mortgagees in both cases being auditors of that company, as the plaintiffs still were. Neither deed, however, disclosed the fact, that the mortgagees were only interested as trustees.

Richard Smith survived his co-mortgagees, and died on the 2nd of December 1847, and the defendant Charles Augustin Smith was his sole legal personal representative and devisee of estates vested in him as trustee or mortgagee.

Newman carried on business as a brewer at the mortgaged brewery, and had executed the customary bond to secure the

payment of malt duties. That bond was registered on the 28th of February 1855, and on the 28th of April 1856 the Kent Fire Insurance Company had notice thereof. In the month of June 1857 an arrear of 798*l.* 2*s.* 8*d.* was due to the crown for malt duties. In the month of July of that year Randall became bankrupt, and Messrs. Gifford & Pennell, the assignees, were made defendants to this special case.

By an indenture of mortgage, bearing date the 18th of January 1841, made between the said W. Randall of the one part, and the defendant James Lys Seager and William Evans deceased, and the defendant Robert Stafford, of the other part, the premises comprised in the mortgage of the 18th of August 1832 were mortgaged to J. L. Seager and the other parties of the second part, to secure 1,500*l.* and interest; and by an indenture of further charge made between the same parties, and dated the 29th of November 1847, the same premises were mortgaged for a further sum of 1,063*l.* No notice was given to the Kent Fire Insurance Company. At the date of the bankruptcy of W. Randall a sum of about 1,143*l.* 2*s.* 6*d.* was due under these two mortgages.

In June 1857 W. Newman executed a conveyance and assignment of all his estate and effects for the benefit of his creditors.

In that month a writ of extent was issued against the estate of Newman to satisfy the debt due to the Crown, but no part of his personal estate was seized by virtue of the extent.

By arrangement among all parties, it was agreed in August 1857 that the powers of sale in the first and second of the above indentures should be exercised without prejudice to the rights of any of the parties interested, and accordingly the property comprised in the second indenture was sold, but it fell short of the amount required to redeem by 458*l.* 2*s.* 11*d.* The plaintiffs out of the proceeds paid the Crown debt of 798*l.* 2*s.* 8*d.* The property in the first mortgage, after paying all expenses, and satisfying the 1,700*l.* secured upon it, produced a surplus of 1,389*l.* 7*s.*, which was put out at interest until the decision of the Court on this special case.

The plaintiffs, on behalf of the insurance company, claimed to be entitled to be paid

the 458*l.* 2*s.* 11*d.*, the deficiency upon the second mortgage, with interest, out of the surplus arising from the sale of the property comprised in the first mortgage, in priority to the claims of Messrs. Seager & Co., and of the assignees of the estate of William Randall.

Messrs. Seager claimed out of the surplus of 1,389*l.* 7*s.* to be entitled to be paid in full their mortgage debt and interest in priority to any payment to the plaintiffs; and the assignees of William Randall claimed to be entitled to the residue of that sum, after satisfying the claim of Messrs. Seager. The questions submitted to the Court for its opinion were, therefore:—

First, whether under the circumstances stated the plaintiffs, as such trustees for the Kent Fire Insurance Company as aforesaid, were entitled to any and what parts of the said sum of 1,389*l.* 7*s.* and interest in priority to the claim of the defendants, Messrs. Seager & Co., as such mortgagees as aforesaid. Secondly, whether the plaintiffs were so entitled to any and what part of the same sum in priority to the claim of the defendants, Gifford and Pennell, the assignees of William Randall. Thirdly, what were the rights of the plaintiffs as such trustees as aforesaid, and of the defendants, the assignees, and of the defendants, Messrs. Seager & Co., in respect of the said sum of 1,389*l.* 7*s.* and interest.

Mr. A. E. Miller (with the *Solicitor General*), for the plaintiffs.

Mr. Daniel and *Mr. L. Mackeson*, for Seager & Co.

Mr. Willcock and *Mr. Beales*, for the assignees.

Mr. Bardswell, for the representative of Richard Smith.

Mr. A. E. Miller was heard in reply.

The following cases were cited:—

Jones v. Smith, 2 Ves. jun. 372.

Ireson v. Denn, 2 Cox, 425.

Ex parte Berridge, 3 Mont. D. & D. 464.

Lacey v. Ingle, 2 Phill. 413.

Farebrother v. Wodehouse, 23 Beav. 18; s. c. 26 Law J. Rep. (N.S.) Chanc. 81, 240.

Vint v. Padgett, post.

LORD JUSTICE KNIGHT BRUCE.—The circumstance of the Kent Fire Insurance Company having been represented upon different occasions by different persons in the course of the transactions in question in this case, is wholly immaterial in deciding it. It was known throughout that their interest in the company was the same. That being so, I for myself feel no difficulty, because the Court is, upon the statements which the case contains, to treat the matter as if no sale had ever taken place; and the effect of that is, to put things in the same position as if Messrs. Seager & Co. or Mr. Randall had commenced a suit to redeem the Kent Fire Insurance Company in respect of their first mortgage alone. To such a suit the company would have replied that they were willing to be redeemed, but that they required that both the securities should be redeemed at the same time. They would have answered in effect, "You must redeem both mortgages, or neither." That is indeed the only question in the case. It appears to me that the insurance company is right, both as against the assignees of the bankrupt Randall and also as against the Messrs. Seager, who took their security with notice of the mortgage of 1832; and I am of opinion that the company is entitled to add their costs of these proceedings to their securities in the usual manner.

LORD JUSTICE TURNER considered that this case was governed entirely by the authorities. The decision must depend on that obligation which attached to every person coming into this court to obtain relief—namely, that he who seeks equity must do equity. A person who sought to redeem a security could not take it out of the hands of the mortgagee, without at the same time redeeming another security which the mortgagee held against the same mortgagor. It could make no possible difference whether the securities were held by the same persons, or in trust for the same persons. To both cases the same principle applied. As he had already said, the case was governed by established authorities. The costs of the Kent Fire Insurance Company must be added to their securities, as if in a suit for redemption.

LORDS JUSTICES. }

May 4, 5, 7; }

June 27. }

FREME v. BRADE.

Post-obit Bond — Policies of Assurance — Debtor and Creditor.

*R. P. H. J., the eldest son and heir apparent of Sir R. P. J., on his marriage effected insurances on his life for 10,000*l.*, and settled them for the benefit of his wife. In 1853 he made his will, leaving his real and personal estate to B. and T., in trust to pay his debts, and then in trust for his wife; and appointed B. and T. executors. In 1854, being unable to keep up the premiums on the policies, he arranged with B. and T., and afterwards with T. alone, to pay the premiums due and to become due, and that he, R. P. H. J., should give T. a bond for 14,000*l.*, payable, if R. P. H. J. should survive his father, Sir R. P. J. T. paid the premiums, and then he insured the whole life of R. P. H. J. for 14,000*l.* R. P. H. J. died in 1855, in the lifetime of his father, having had pecuniary transactions with B. and T. A suit was instituted by the widow of R. P. H. J. (who had subsequently married again) for the purpose of administering the estate of her late husband, for an account of all dealings and transactions between him and B. and T., and for a declaration that the 14,000*l.* policies formed part of his personal estate, and for other purposes. The bill charged fraud in the transaction of the 14,000*l.* insurance; and at the hearing of the cause it was argued, that there was a contract between R. P. H. J. and T. that the latter was to effect the insurance. Stuart, V.C. decided that the 14,000*l.* formed no part of the personal estate of R. P. H. J.:—Held, on appeal, affirming so much of that decision, that there was no evidence of express contract to insure; that the insurance was effected by T. for his own protection, and not as a trustee for R. P. H. J., and that, therefore, the 14,000*l.* formed no part of the personal estate of R. P. H. J.; and that if there had been fraud in effecting the policy, it was a fraud on the office, and the benefit of the policy would belong to the office, and not to the estate of R. P. H. J.*

This was an appeal, from a part of a decree of Vice Chancellor Stuart, the chief

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point of which consisted of the question, whether a sum of 14,000*l.*, the amount of insurances on the life of Mr. Richard Paul Hase Jodrell, formed part of his personal estate, or belonged to Mr. Thomas Trulock, who had effected the policies.

The bill was filed, by the Lady Anna Maria Isabella Freme, wife of the defendant, Capt. James Herbert Freme, and the trustees of her marriage settlement, against Mr. James Brade and Mr. T. Trulock and Capt. Freme and another person, for an account of the personal estate of Mr. R. P. H. Jodrell, a declaration that the 14,000*l.* formed part of that estate, and other purposes.

The facts necessary to be stated are as follows (Lady Anna Maria Isabella Freme being spoken of as the plaintiff):—

R. P. H. Jodrell (herein called the testator) was the eldest son of Sir Richard Jodrell, and if he had survived his father, would, upon his death, have come into possession of considerable real estates; the plaintiff, Lady Anna Maria Isabella Freme, was the testator's widow, and soon after his death married the defendant, Capt. Freme, and claimed to be interested in the residue of the testator's estate under the trusts of his will, of which the defendants, Brade and Trulock, were the executors.

By indentures, dated the 12th of March 1853 and the 8th of February 1854, the testator settled upon trust, for the benefit of the plaintiff, two policies of insurance for 5,000*l.* each, which had been effected on his life in "The Medical, Invalid, and General Insurance Society," payable as to one of them upon his death, whenever it should happen; and as to the other of them upon his death, if he should die in the lifetime of his father.

By his will, dated the 11th of November 1853, the testator devised and bequeathed his real and personal estate to Brade and Trulock, upon trust for conversion and payment of debts, and to hold the residue in trust for his wife, for her separate use for life, and after her death as she should by deed or will appoint; and in default for testator's next-of-kin.

In the latter end of the year 1853, or early in the year 1854, the testator, being unable to pay the premiums on these poli-

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cies, came to an arrangement with the defendants Brade and Trulock for the payment by them of what had accrued and should accrue due in respect of the premiums upon these policies, upon the terms of his giving them a bond for 14,000*l.* payable in the event of his surviving his father. Accordingly, in the month of February 1854, the testator executed a bond on the following terms. The bond was in the penalty of 28,000*l.*; it recited a policy of the 19th of January 1853, one of the policies settled on the plaintiff; it recited also the other policy settled on the plaintiff, and then it recited—"And whereas the said Richard Paul Hase Jodrell has requested the said Thomas Trulock to pay the premiums and premium which shall from time to time become due in respect of the said policies of insurance, and all the costs and expenses incidental to such payments, and to the receiving of any sum or sums of money ultimately to be recovered and raised by virtue thereof, and incidental to the trusts thereof; and the said Thomas Trulock has consented and agreed so to do, and has already paid the last premiums due in respect of the said policies respectively: and whereas it hath been agreed between the said parties that Richard Paul Hase Jodrell should execute and give unto the said James Brade and Thomas Trulock a *post-obit* bond for the payment of such a sum of money to James Brade and Thomas Trulock by Richard Paul Hase Jodrell, in the event of his surviving his father, Sir Richard Paul Jodrell, Baronet, to whom Richard Paul Hase Jodrell is now heir apparent, as ought to be paid on such event, calculated on supposing that the sums so paid by the said James Brade and Thomas Trulock would be lost by them, James Brade and Thomas Trulock, by the death of Richard Paul Hase Jodrell in the lifetime of Sir R. Paul Jodrell; and whereas it hath been calculated by Mr. Edmund Docker, the actuary of the London Life Assurance Society Office, that the sum of 14,000*l.* ought to be paid to James Brade and Thomas Trulock in the event aforesaid." The condition in the bond was, that "if the said Sir Richard Paul Jodrell, Baronet, shall depart this life in the lifetime of the above bounden Richard Paul Hase Jod-

rell, and the said Richard Paul Hase Jodrell, his heirs, executors or administrators, do and shall, within the space of seven days next after the decease of the said Sir Richard Paul Jodrell, Baronet, well and truly pay or cause to be paid unto Thomas Trulock, his executors, administrators or assigns, the sum of 14,000*l.* of lawful money of Great Britain, with interest for the same, after the rate of 5*l.* per cent. per annum, from the day of the death of Sir Richard Paul Jodrell, Baronet, without any deduction or abatement whatsoever, and Thomas Trulock shall in the mean time, and until the happening of such event, have kept up the two policies, and paid all the premiums due in respect thereof, then the above-written bond or obligation shall be void, and otherwise shall remain in full force and virtue." That was the bond which was first executed to the defendants Brade and Trulock. Then, shortly after the execution of that bond, the defendant Brade being unable to pay the half of the premiums which under the arrangement was to be paid by him, and also to pay his share of premiums upon policies which the defendant Trulock proposed to effect for securing the 14,000*l.*, a further arrangement was come to between the testator and the defendants Brade and Trulock, under which the first-mentioned bond was cancelled, and a new bond was executed by the testator in favour of the defendant Trulock alone. That bond was in these terms. It was in the same penalty of 28,000*l.*; it contained the same recitals of the policies, and then it recited, "That Richard Paul Hase Jodrell, being unable to keep the policies on foot, has requested Thomas Trulock to do so for him; and he, Thomas Trulock, has consented and agreed so to do, upon the conditions hereinafter contained, to which he, Richard Paul Hase Jodrell, has also consented and agreed." Then the condition of the bond was, "That if Sir Richard Paul Jodrell, Baronet, shall depart this life in the lifetime of the above-bounden Richard Paul Hase Jodrell, and Richard Paul Hase Jodrell, his heirs or administrators, do and shall within the space of seven days next after the decease of Sir Richard Paul Jodrell, Baronet, well and truly pay or cause to be paid unto

Thomas Trulock, his executors, administrators or assigns, the sum of 14,000*l.* of lawful money of Great Britain, with interest for the same after the rate of 5*l.* per cent. per annum, from the day of the death of the said Sir Richard Paul Jodrell, Baronet, without any deduction or abatement whatsoever; and Thomas Trulock shall, in the mean time, and until the happening of such event, have kept up the two policies and paid all the premiums due in respect thereof, then the above-written bond or obligation shall be void." Interposed between the recital of the request to Trulock to pay the policies and the condition in the bond there was the following recital (which it was alleged by the bill had been struck out, but was denied by the answer of Trulock to have been so):—"And whereas Richard Paul Hase Jodrell has requested Thomas Trulock to pay the premiums and premium which shall from time to time become due in respect of the policies of assurance, and all the costs and expenses incidental to such payment, and to the recovery of any sum or sums of money ultimately to be recovered and raised by virtue thereof and incidental to the trusts thereof; and Thomas Trulock has consented and agreed so to do, and has already paid the last premiums due in respect of the policies respectively." At the same time with the execution of this bond, a mortgage was also given by the testator to the defendant Trulock, for securing the sum of 14,000*l.* upon the same event as is mentioned in the bond, subject, however, to a prior mortgage which had been made by the testator in favour of the Norwich Insurance Company, the mortgage being of the testator's expectant interest in the family estate. Afterwards, and in the months of August and September 1854, the defendant Trulock effected policies of insurance on the whole life of the testator for the sum of 14,000*l.*, one of which policies was a policy for 7,000*l.* These were the policies which the bill alleged to have formed part of the estate of the testator, and it was as to these policies the bill had been dismissed and this appeal was brought. Some of these policies had been the subject of litigation in the common law courts between the defendant Trulock and the

insurance offices, and the defendant Trulock had recovered at law upon the policy for 7,000*l.*, and also upon one of the other policies for 2,000*l.* The rest of the policies were still disputed. R. P. H. Jodrell died in 1855 in the lifetime of his father. Some parts of the pleadings may be usefully referred to. The bill alleged that there had been numerous pecuniary transactions between the testator in his lifetime and the defendants Brade and Trulock, and that the accounts were still unsettled, but that both of the defendants were indebted to the testator. This was, however, denied by both defendants, who on the contrary alleged that the testator was indebted to them. The bill alleged that the testator was frequently in a state of pecuniary embarrassment, and that the defendants Brade and Trulock put themselves forward to him as persons able and willing to raise monies for him; that they thus obtained complete controul over him; that they had by undue influence induced the testator to execute a mortgage of certain property to which he was entitled in reversion to secure payment to him, Trulock, of 14,000*l.*, and had also procured several policies of assurance on the life of the testator to be granted to him as collateral security with the bond, whereas the defendant had not any insurable interest in the life of the testator, except such interest (if any) as was constituted by the execution by the said testator of the said *post-obit* bond and mortgage; and charged that the bond and mortgage were improperly obtained from the testator, and that the testator never received any consideration for the same respectively, and that the monies payable on the several policies ought to be deemed and taken as part of the testator's personal estate.

By the joint answer of Brade and Trulock they said that the testator, being much pressed for money, and indebted to the defendant Trulock as a trustee for his wife Anne Catherine Trulock in a sum of 500*l.*, requested the said defendant, as such trustee, to advance him an additional sum of 1,000*l.*, in consideration of a mortgage of 4,500*l.*, in case the said Sir R. P. Jodrell should die in the testator's lifetime, and the defendant swore that he thereupon gave the testator 500*l.* in bank-notes, and

a promissory note for 500*l.*, which had never been presented, and that he paid in small sums for his use a further amount of 146*l.* 10*s.* 6*d.* They denied being indebted to the testator at the time of his decease.

In another answer the defendant Trulock denied all collusion or undue influence. He swore that he kept up the two settled policies, paying annual premiums to the amount of 330*l.* out of his own proper monies, and he admitted that he gave no other consideration than that above mentioned; he also admitted that the second bond was not stamped, and that it originally contained the recital mentioned in the bill, but he denied that the same was struck out. He admitted having obtained policies on the life of the testator, and also that he had no other insurable interest except in respect of the *post-obit* bond.

There was also a letter put in evidence, dated the 11th of August 1854, informing the testator that Trulock intended to insure his life. This letter is commented on in the judgment of Lord Justice Turner.

VICE CHANCELLOR STUART, at the hearing of the cause on motion for a decree, held that the 14,000*l.* policies did not form part of the testator's estate, and made a decree accordingly. There were other parts of the decree appealed against, but the principal point was that involved in these policies, the appeal being presented by the plaintiffs.

Mr. Rolt, *Mr. Bilton* and *Mr. Neale*, for the appellants, relied upon three points: first, that Trulock had no insurable interest in the life of *Mr. Jodrell*; secondly, that fraud had been practised upon him; and, thirdly, that there had been a contract between Brade and Trulock on the one hand and the testator on the other (as shewn from the recital in the first bond and one of the letters in evidence) that the insurances should be effected; and that, therefore, the produce of the policies would belong to the testator's estate. The argument is considered in the judgment of Lord Justice Turner. They cited and relied upon *Lea v. Hinton* (1),

Gottlieb v. Cranch (2) and *Drysdale v. Piggott* (3).

Mr. W. Pearson, for Brade and Trulock, cited the following authorities:—

Evans v. Peacock, 16 Ves. 512.

Gowland v. De Faria, 17 Ibid. 20.

Potts v. Curtis, Younge, 543.

Triston v. Hardey, 14 Beav. 232.

Mr. Rolt was heard in reply.

June 27.—LORD JUSTICE TURNER, after a statement from which the foregoing detail is principally taken, proceeded to say, —This bill is so loosely framed that it is difficult to collect from it the precise grounds upon which the plaintiffs claim to have the policies in question considered as part of the testator's estate, but in the course of the argument before us the claim was rested alternately upon the ground of fraud or of contract. As to the case of fraud, one part of the argument was, that the whole transaction as to the security for the 14,000*l.* was fraudulent and void as against the testator; that Trulock had no insurable interest in the life of the testator, otherwise than by virtue of that transaction; and that the insurable interest having been acquired by fraud, the benefit resulting from it would belong to the person on whom that fraud was committed. The first step in this argument is, that there was fraud in the transaction as to the security for the 14,000*l.*, but upon the evidence before us I am not satisfied that this was the case. I think, however, that if the question had been material, we could not have parted with it without further inquiry upon the subject, and we have to consider therefore whether, if the transaction as to the 14,000*l.* was found to be a fraud upon the testator, the result contended for by the appellants would follow. I am of opinion that it would not. If there was fraud upon the testator in the transaction as to the 14,000*l.*, the defendant Trulock could acquire by it no insurable interest in the testator's life, and the policies effected by him were frauds on the offices in which

(2) 4 De Gex, M. & G. 440; s. c. 22 Law J. Rep. (N.S.) Chanc. 912.

(3) 22 Beav. 238; s. c. 25 Law J. Rep. (N.S.) Chanc. 878.

(1) 19 Beav. 324; s. c. 5 De Gex, M. & G. 823.

they were effected. The offices would not be liable on the policies. These policies either formed part of the original transaction as to the 14,000*l.*, or they did not. If, as I think was the case, they did not form part of the original transaction as to the 14,000*l.*, I can see no ground on which the testator's estate can claim the benefit of them upon the footing of fraud. If, on the other hand, they did form part of the original transaction, and we give the testator's estate the benefit of them upon this ground of fraud, we should, as it seems to me, be permitting the appellants to affirm the transaction as to the offices and to disaffirm it as to the estate, which cannot, I think, be done. It is true that some of the policies have been recovered upon at law, but this does not seem to me to aid the appellants' case. If fraud be established, and it is the case of fraud we are now considering, what has been recovered could not, as I apprehend, be retained. It is, I think, to the offices and not to the testator's estate the money recovered would, in this view of the case, belong. There is, I think, a fallacy in the appellants' argument on this part of the case. It throws out of view all consideration of there having been a fraud upon the offices as well as upon the testator. Then, as to the case of contract, I find no proof of any express contract by Brade and Trulock, or either of them, for the insurance of the testator's life. The recital contained in the first of the bonds (that is, that he had agreed to pay the premiums) was relied on in proof of such a contract; but it seems to me to prove no more than that the premiums which would be payable for insurance were, as of course they would be, taken into account in determining the sum for which the bond was to be given. The letter of the 11th of August, 1854, was also relied upon as evidence of such a contract; but again, this letter shews, as I think, no more than that the testator was informed that Trulock intended to insure, and that the amount of the bond was calculated on the rate at which the insurances were expected to be effected. There is, indeed, language in this letter which might be important on the question of fraud, had that question been material, but I do not think it at all supports the case of con-

tract. It is not, I think, couched in terms at all indicating that Trulock was under any obligation to insure, and if contract was to be inferred from such a letter as this there would hardly, I think, be any case in which the debtor would not be entitled to the benefit of the policies effected by the creditor. The recital and the letter to which I have referred constitute, as I believe, the only evidence which at all brings the testator in connexion with these policies, and I think they are wholly insufficient to support the supposed case of contract. It was also attempted on the part of the appellants to establish a right to these policies upon these grounds. It was said that the policies were effected upon the whole life of the testator, and not to meet the contingency mentioned in the bond; that they were collateral securities for the 14,000*l.* and insured the payment of it in any event, and that it was a fraud to charge the testator with the 14,000*l.* for the risk of his dying in his father's lifetime, and at the same time to secure the payment of the 14,000*l.* in any event. But if there was no contract between the testator and Trulock, in respect of the insurance, Trulock was surely at liberty to effect any insurance which he might think fit, and it is not to be wondered at that he insured the payment of the 14,000*l.* in any event, when it is remembered how large an incumbrance the testator had already created upon his expectant property in favour of the Norwich Insurance Office. Another ground which was relied on, upon the part of the appellants, was that these premiums were paid out of the testator's own monies, but the policies, the benefit of which is claimed by this bill, were effected by Trulock alone; and it does not appear that Trulock ever had any monies of the testator in his hands, except the 500*l.* which was due upon his promissory note, and which was due on a wholly separate and distinct transaction. This note the testator continued to hold until the time of his death, and I think it would be going much too far to ascribe the payment of the premiums to the debt which was thus due upon the note from Trulock. Upon the whole, therefore, I think the appellants' case altogether fails, whether it is considered as depending upon

fraud or upon contract. . . . The case of *Lea v. Hinton*, which was attempted to be drawn into the argument on the part of the appellants, has not, I think, any bearing upon the point before us. In that case, as we thought, not only had the policy been effected with the privity of the testator, but it had been effected and the monies due upon it had been received for the purpose of indemnity merely; and the estate having been charged with part at least of the debt for which the indemnity was provided, was, of course, entitled to be credited with the indemnity fund.

LORD JUSTICE KNIGHT BRUCE, after referring to various points of informality in the decree, said—The appellants' alleged ground of complaint involved the questions, whether Trulock was a trustee absolutely or contingently of the whole or any part of the beneficial interest in the policy, of which the proceeds are in dispute, for the testator; and whether there was a contract, expressly or otherwise, between them, that absolutely or contingently the testator or his estate should have or be entitled to a portion of that interest. I have expressed myself thus because the payment or non-payment by the testator, or with his money, or the charge or absence of charge against him of the whole or any part of the expense of effecting or keeping up the policy, is only material as evidence, more or less strong, on one or both of the two questions that I have mentioned, of which neither can, on the materials at present before the Court, I agree with the Vice Chancellor and the Lord Justice in thinking, be answered in favour of the plaintiffs; and the impression which for some time I had, that it would have been better not to decide either of the two questions against them, at least without an endeavour to obtain, by means of inquiries to be directed, more information than we have as to the facts and circumstances of the dealings between the testator and the defendant, Mr. Trulock, relating to the policy or connected directly or indirectly with it, does not remain. Upon consideration, I have become convinced that there is not good ground for thinking that more information bearing materially upon the title to the policy than we have is likely to be obtained or should be endeavoured to be so.

. . . . With regard to *Lea v. Hinton*, the Master of the Rolls, if I may take the liberty of saying so, seems to me to have dealt ably and well with the matter, but certainly I might and ought to have expressed myself better than I did on the appeal. According to my recollection the evidence satisfied me that the effecting of the insurance then in dispute was, as between Mr. Lea and his solicitor, surety and executor, Mr. Hinton, their joint act, an act which the circumstances rendered it impossible to ascribe to any intention upon the part of either more favourable to Mr. Hinton than that of benefiting both, but as to Mr. Hinton primarily, yet by way only of protection and indemnity; I think that it was right to charge him with the money with which at the Rolls as well as here he was charged. From his case that of Mr. Trulock now before us is widely and importantly different, as was that of the policy holder in *Gottleib v. Cranck*.

The appeal upon the above-mentioned point regarding the right to the 14,000*l.* policies was dismissed.

KINDERSLEY, V.C. } GRAY v. DOWMAN.
May 24.

Baron and Feme—Separate Estate—Mortgage by Husband and Wife—Exoneration of Husband's Estate—Parol Evidence.

A husband and wife joined in mortgaging the wife's separate estate, and the husband covenanted to secure the repayment of the debt,—Held, that parol evidence might be admitted to shew that the money so borrowed was for the benefit of the wife; that the husband's joining in the mortgage deed was only by way of suretyship; and that his estate would be indemnified by the separate estate of his wife.

The bill stated that by a settlement made upon the marriage of Thomas Dickerson and Ann his wife certain estates therein mentioned (including an estate at Sudbury, in Suffolk,) were vested in trustees upon trust for Ann Dickerson until the marriage, and after the solemnization thereof, for such uses and trusts as the

said Ann Dickerson should by deed or will appoint, and in default of appointment for the said Ann Dickerson for life, the proceeds not to be subject to the debts, controul or engagements of T. Dickerson, but for her sole and separate use, with remainder to the trustees to preserve contingent remainders, and with the ultimate remainder to the heirs and assigns of the said A. Dickerson for ever. In October 1848, Ann Dickerson, in execution of her power, mortgaged her property at Sudbury to Charlotte Collett to secure a sum of 400*l.* and interest. To that indenture T. Dickerson was made a party, and he covenanted that he and Ann Dickerson, or one of them, their or one of their executors, administrators or assigns, would pay to Charlotte Collett, her executors, administrators or assigns, the money so advanced by her, with interest thereon. The bill stated that the said 400*l.* was in fact borrowed by the said Ann Dickerson for the use of her sister Mary Lake, to enable her to pay off a mortgage effected by her late husband, and that 340*l.*, part thereof, was advanced to Mary Lake, who thereupon signed a memorandum acknowledging that she had received that sum from her sister. The remainder of the 400*l.* was expended in costs which had accrued during the transaction.

Mrs. Lake also charged certain property belonging to her, which was already mortgaged for 500*l.* with the before-mentioned sum of 340*l.*, subject to the prior mortgage.

On the 22nd of March, Ann Dickerson made her will, whereby she devised her estate at Sudbury, (the subject of the mortgage) to Mrs. Lake and other persons, and the defendant was her only surviving executor.

The testatrix died in November 1851.

Mary Lake died in December 1853, and her estate was represented by Stephen Alston. The property, mortgaged by Mrs. Lake, was sold by the first mortgagee under a power of sale, but it did not realize sufficient to pay off that mortgage.

T. Dickerson, by his will, dated the 10th of November 1855, appointed his wife and the plaintiff Mrs. Gray executrixes of his will; and he died in December 1855. A suit was then insti-

tuted to administer T. Dickerson's estate, and Charlotte Collett, the mortgagee of the Sudbury estate, came in under the decree, and established her debt as a specialty debt, under the covenant in the mortgage, against T. Dickerson's estate. It further appeared upon the bill, that by an arrangement between T. Dickerson and the representatives of Mrs. Lake, the amount of the debt due from Mr. Dickerson was to be taken at the sum of 299*l.* 16*s.* 8*d.*, and 60*l.* for interest due in respect thereof, and the bill now prayed a declaration that the real estate of Ann Dickerson settled to her separate use was liable to exonerate and discharge the estate of T. Dickerson for the debt of 400*l.* and interest to the extent of the said sums of 299*l.* 16*s.* 8*d.* and 60*l.*, and it asked that such sums might be raised out of such separate estate.

Mr. Glasse and *Mr. Grenside* appeared for the plaintiffs, and

Mr. Baily and *Mr. Humphrey* for the heirs and devisees of Mrs. Dickerson.

The following cases were cited :—

Clinton v. Hooper, 1 Ves. jun. 172.

Lewis v. Nangle, 1 Amb. 150.

Bagot v. Oughton, 1 P. Wms. 347.

Earl of Kinnoul v. Money, 3 Swanst. 202.

Thomas v. Thomas, 2 K. & J. 79;
s. c. 25 Law J. Rep. (N.S.) Chanc. 159.

Hudson v. Carmichael, Kay, 613;
s. c. 23 Law J. Rep. (N.S.) Chanc. 893.

KINDERSLEY, V.C.—My opinion is, that the plaintiffs are entitled to what they ask. The effect of the limitations in the settlement is, that Mrs. Dickerson had an absolute power of appointment, and in default of her exercising such power, then she had a life estate in the property for her separate use, with the ultimate remainder to herself, her heirs and assigns. She had, in effect, an estate which amounted to a fee simple. It appears from the evidence that Ann Dickerson's sister, Mrs. Lake, was embarrassed for the want of a sum of money to pay off a mortgage, and the 400*l.* was raised and ad-

vanced to the sister for the purpose of enabling her to discharge her obligations. Mrs. Dickerson having communicated with her solicitor, the mortgage was prepared, and the money was raised upon the security of this part of Mrs. Dickerson's separate property. By that mortgage, Mrs. Dickerson exercised her power of appointment. On the face of the deed, the mortgage purported to have been made by Mr. and Mrs. Dickerson, and the form of the deed was just such as any conveyancer would have prepared, and it contained a covenant in the usual manner, on the part of the husband, for payment of the money, together with interest thereon. I think it clear that parol evidence may be admitted in such a case as this to shew for whose benefit the money was really advanced; and upon the evidence I am satisfied that the money was obtained for the use of the wife in order that she might be able to benefit her sister, and the covenant to pay entered into by the husband was in the nature of a suretyship. Moreover, it appears that upon lending the money to her sister Mrs. Lake, a security was given by Mrs. Lake (subject to a prior mortgage) to Mr. and Mrs. Dickerson for the sum which she had borrowed from them. If that security had realized the full amount, there would have been no question or difficulty in the matter, for the money would then have been repaid. If it had been repaid by Mrs. Lake, it would have been received by Mr. Dickerson as the legal hand to take it, and he would have been bound in equity to have exonerated and discharged his wife's estate. The husband was the surety on his covenant for the wife, and there was nothing in the security given by Mrs. Lake which affected the question in favour of the wife's estate. The question then is, whether anything that took place subsequently has changed the state of the case? It appears that an arrangement was made between Mr. Dickerson and the representatives of Mrs. Lake, that 299*l.* 16*s.* 8*d.* and 60*l.* should be considered as the amount remaining due upon the mortgage. Whether Mrs. Lake actually paid off the remaining portion of the money advanced to her, thereby reducing the mortgage to that amount, does not appear; but, in some

way or other, satisfaction was received to a certain extent, leaving only the two sums of 299*l.* 13*s.* 8*d.* and 60*l.* due. The bill is right in not asking for more. Mrs. Lake's property, after satisfying the first mortgage, turns out to be worthless, and I think that the husband is therefore entitled to be indemnified in respect of so much as he is liable to pay, and the plaintiffs are entitled to the relief sought.

LORDS JUSTICES. { *In re* ARROWSMITH'S TRUSTS.
 June 11. { *In re* THOMPSON.

Lunacy—Trustee—Infant—Jurisdiction—Trustee Act, 1850.

A. B. gave all his real and personal estate and effects of what nature or kind soever, to C. D. upon trust to pay to his wife for her life, the rents of his real estate and the interest on all sums due to him on mortgages, bond, note or other security, and after her death to get in all debts owing to him on any security, and pay the same over to other persons. C. D. died intestate, leaving E. F. his eldest son and heir-at-law, a person of unsound mind and an infant:—Held, that the legal estate in the mortgaged property passed to C. D. and that he was a trustee, and persons were appointed to convey the property comprised in the mortgages to the purchasers thereof, under sections 3. and 20. of the Trustee Act, 1850.

It is not necessary to resort to the jurisdiction in lunacy for such an order, but it may be made in the jurisdiction in Chancery.

This was an original petition entitled in lunacy, and, under the Trustee Act, 1850, presented by the trustees of the will of a mortgagee. The petition was that of Robert Arrowsmith and William Arrowsmith, and it prayed that Mr. George Wilson Thompson, a person of unsound mind, though not found a lunatic by inquisition, might be declared to be a trustee, within the meaning of the Trustee Act, 1850, of certain messuages and hereditaments at Barnard Castle, which were then under mortgage, and that the petitioners might be

appointed to convey and assure the same to certain purchasers, or as they should direct. The petition set forth that by indenture of mortgage dated the 2nd of September 1852, the hereditaments were conveyed and assured to William Arrowsmith, the father of the petitioners, his heirs and assigns, in fee, to secure the repayment of 400*l.* and interest. The security contained a power of sale to William Arrowsmith, his heirs, executors, administrators and assigns, in case of default. William Arrowsmith, by his will, dated the 6th of August 1852, gave and devised to Joseph Thompson all his real and personal estate and effects whatsoever and wheresoever, and of what nature or kind soever, upon trust, after payment of his just debts and funeral and testamentary expenses, to permit and suffer his wife, Grace Arrowsmith, to receive the rents of his real estate, and the interest of all sums of money that might be due and owing to him upon mortgage, bond, note or other security, for her life, and at her death to get in all debts owing to him on any security, or on simple contract, and to pay to his son, the petitioner Robert Arrowsmith, the sum of 300*l.*; and on the decease of Grace Arrowsmith, the testator gave and devised his dwelling-house wherein he resided to his other son, the petitioner William Arrowsmith, and gave him the residue of his real and personal estate. He appointed Joseph Thompson and the two petitioners executors of his will. The testator died on the 17th of July 1853, and the will was proved by the petitioners alone. The petitioner Robert Arrowsmith, the heir-at-law of the testator, admitted the validity of the will.

On the 30th of July 1855 Joseph Thompson died intestate, leaving George Wilson Thompson, his eldest son and heir-at-law, then an infant, and now of the age of nineteen years, of unsound mind, although not found a lunatic by inquisition.

The petitioners, as executors, sold the hereditaments comprised in the mortgage in lots, but by reason of the incapacity of George Wilson Thompson, they were unable to make conveyances to the several purchasers.

Mr. Prendergast, for the petitioners, said

NEW SERIES, XXVII.—CHANC.

that a doubt had existed how far the words of the will of Mr. Arrowsmith the testator were sufficient to carry the legal estate in the mortgaged property to the devisee, Joseph Thompson. The cases, however, of *Doe d. Guest v. Bennett* (1), *Knight v. Robinson* (2), *Re Field* (3), and *Mather v. Thomas* (4), seem clearly to shew that they did. Indeed *Doe d. Guest v. Bennett* was quite conclusive, for there a mortgagee, by his will, devised thus:—"I leave my wife, Rebecca Hayes, to receive all monies upon mortgages and notes out at interest"; and Mr. Baron Parke, in delivering the judgment of the Court, said, "We are all of opinion that the words 'to receive all monies upon mortgages,' are sufficient to pass, not only the money on mortgage, but the securities also, that is, the legal estate upon which the money is secured." With respect to the other point of the petition, it was to be observed that in the 3rd section of the Trustee Act, 1850 (13 & 14 Vict. c. 60.), it was enacted as follows:—"When any lunatic or person of unsound mind shall be seised or possessed of any lands upon any trust or by way of mortgage, it shall be lawful for the Lord Chancellor, intrusted by virtue of the Queen's sign manual with the care of the persons and estates of lunatics, to make an order that such lands be vested in such person or persons in such manner and for such estate as he shall direct; and the order shall have the same effect as if the trustee or mortgagee had been sane, and had duly executed a conveyance or assignment of the lands in the same manner for the same estate." And then the 20th section of the act enabled the Court to appoint a person to convey in certain cases, instead of making a vesting order.

[LORD JUSTICE KNIGHT BRUCE.—Why has this petition been presented in Lunacy?]

Mr. Prendergast.—In a case similar in its circumstances Vice Chancellor Kindersley expressed an opinion that where lunacy

(1) 6 Exch. Rep. 892; a.c. 20 Law J. Rep. (N.S.) Exch. 323.

(2) 2 Kay & J. 503.

(3) 9 Hare, 414; a.c. 21 Law J. Rep. (N.S.) Chanc. 175.

(4) 6 Sim. 115; a.c. 2 Law J. Rep. (N.S.) C.P. 284; 10 Bing. 44; 3 M. & S. 634.

co-existed with infancy, the Court of Chancery alone had not jurisdiction.

LORD JUSTICE KNIGHT BRUCE.—With the greatest respect for the opinion of the Vice Chancellor, my learned Brother and myself are both of opinion that there is no necessity to resort to the jurisdiction in Lunacy, but that the case comes within the ordinary jurisdiction of the Court of Chancery. It appears to me that we may make an order, declaring that under the will of the testator William Arrowsmith, the legal estate in the mortgaged property passed to Joseph Thompson, the trustee named, inasmuch as that construction is necessary in order to give full dominion over the mortgaged estate for the purpose of carrying into execution the trusts of the will. I take occasion to express my entire concurrence in the judgment of Mr. Baron Parke in *Doe d. Guest v. Bennett*.

LORD JUSTICE TURNER concurred, observing that they should direct the order to be entitled in Chancery as well as in Lunacy, in order that it might form no precedent adverse to the jurisdiction of the Court of Chancery.

LOARDS JUSTICES. } *In re JONES'S SETTLED*
 July 9. } **ESTATES.**

Practice—Costs of Reinvestment—Costs of Private Conveyancing Counsel and Conveyancing Counsel of the Court—Taxation.

Where settled estates had been purchased by a corporation under the powers in their act and the purchase-money paid into court, the tenant for life of the land taken petitioned for payment out of court of part of the money to be invested in purchase of another estate. She laid the abstract before her own counsel, who approved of the title, and, subsequently, it was laid before one of the conveyancing counsel of the Court, who also approved the title. The taxing Master disallowed the fees of the private counsel, but his decision was overruled by one of the Vice Chancellors:—Held, on appeal, that so much of the costs as consisted of fees for consultation between the two counsel were reasonable charges, but that the whole cost

of the investigation of the title by the private counsel was too much, and the Court sanctioned a compromise of the claim, and varied the order of the Vice Chancellor.

This was an appeal from an order of Vice Chancellor Stuart, directing the Master to review his taxation of bills of costs in a case of reinvestment of money paid into court. The following narrative will disclose the facts:—

The corporation of the Trinity-house had, under their parliamentary powers conferred by the statute 6 & 7 Will. 4. c. 79, relating to the purchase of lighthouses, purchased estates on the coast of Pembrokeshire, called "The Skerries," which were comprised in a settlement, under which Miss Jones, the present respondent, was tenant for life. The purchase-money, 484,984*l.*, was paid into court by the Trinity-house, until an opportunity for its reinvestment. Miss Jones entered into a contract to purchase a large estate in Yorkshire for the sum of 122,000*l.*, the greater part of which sum was intended to be paid out of court. Upon the contract being entered into, the title of the Yorkshire estate was submitted, on Miss Jones's behalf, to Mr. Dart, the conveyancer, and it was ultimately approved of by him. A petition was then presented, praying that so much of the purchase-money paid into court by the Trinity-house as was wanted for the purchase of the Yorkshire estate, might be paid out to the vendors of that estate; but upon the hearing of the petition, Vice Chancellor Stuart, for the protection of infants interested under the limitations of the settlement, directed that the title should be laid before one of the conveyancing counsel of the Court, and directed, if the title should be approved by him, that it should be referred to the taxing Master to tax the costs of the reinvestment, the same to be paid by the Trinity-house. Upon the investigation, the conveyancer of the court made numerous requisitions which led to considerable expense, and it was thought advisable that the private conveyancer of Miss Jones should have consultations with him. The title was ultimately approved of, and the taxing Master certified that he had taxed Miss Jones's costs at a sum of 2,153*l.*,

which included the fees of the conveyancing counsel of the court in respect of perusing and advising upon the abstract of title, but he disallowed the whole of the fees paid to the private counsel, and all costs consequent on his perusal of the abstract. It appeared that the Master was willing to allow the fees of certain consultations and consequent charges, considering that difficulties had been thereby cleared away, and that the fees to the conveyancing counsel of the Court had been to that extent diminished. Miss Jones then presented a petition praying that the certificate of the taxing Master might be varied, by introducing the items which he had so struck out, and Vice Chancellor Stuart considered that the act which empowered the corporation to purchase lighthouses, provided that costs reasonably incurred relating to reinvestment of money in land should be borne by the Trinity-house. His Honour, in giving judgment, proceeded to say, that he did not think that the taxing Master had taken a correct view of the principle upon which the taxation of costs should proceed in such cases as that now in question. The Act enabling the corporation of the Trinity-house to purchase lighthouses said, that costs reasonably incurred relating to the reinvestment in land of the purchase-money of lighthouses taken by the corporation, should be paid by that body. The question was, whether it was right and prudent and reasonable that the purchaser, before coming to the Court for an order for the investment of the sum of 122,000*l.* in the lands which had been purchased, should have laid the abstract of the title to those lands before his private counsel for approval, instead of incurring the risk of costs by an application to the Court for an investment in lands to which a proper title might possibly not be made. Not only did he think that such conduct on the part of the purchaser was reasonable, but that, even as regarded the Trinity-house, it was for the benefit of that corporation that there should be a preliminary investigation, which might save them from the expense which they would have fruitlessly incurred if the title had been disapproved. He thought that the taxing Master had taken a narrow view of the case, and that the fees in question should be allowed. He

would add, that when lands were taken compulsorily by a public body, and there was any question as to the costs relating to the reinvestment of the purchase-money of such lands, the purchaser should have the benefit of the doubt; for these costs were occasioned not by his act, but by that of the public body. The taxation must, consequently, be reviewed, and the costs of this petition borne by the Trinity-house.

The items in dispute amounted to 356*l.*, which, besides the fees before referred to, comprised the expenses of preparing an additional abstract for the purpose of identifying the parcels, which was suggested by the conveyancer.

Mr. Bacon and *Mr. Cotton* supported the petition of appeal of the corporation of the Trinity-house, who appealed from the above decision.—They cited the 40th section of the Masters in Chancery Abolition Act (15 & 16 Vict. c. 80.), which enacts as follows:—"That it shall be lawful for the Court, or for any Judge thereof, when sitting at chambers, to receive and act upon the opinion of conveyancing counsel in actual practice, to be nominated as hereafter mentioned, in all cases in which, according to the present practice of the Court and of the Master's office, it has been usual for the Master to require and receive the opinion of conveyancing counsel, for his aid and assistance in the investigation of the title to an estate, with a view to an investment of money in the purchase or on mortgage thereof." They contended that, if parties knowing that the Court had this power—and in a case of such magnitude, they must have known that the assistance of the conveyancer of the court would be called into requisition,—thought fit to employ their own counsel, the corporation ought not to be charged with such expenses, and the order of the Vice Chancellor ought to be discharged. They cited —*In re the Southampton Railway Company, ex parte King's College, Cambridge* (1). Lands had been taken from the college by the company, and the purchase-money was paid into court. The college applied that the amount, with other monies supplied by themselves, might be laid out in purchase

of other lands. The Vice Chancellor considered that the proper order to be made was, that the company should pay all the costs according to the Lands Clauses Consolidation Act, but that the college should pay all the extra costs of the money laid out being greater than that paid into court.

Mr. Malins and *Mr. Besir* said, that the practice before the Master had always been for parties to employ their own counsel, and for the Master, if he were not satisfied, to call in the assistance of a conveyancer of his own selection. The Masters in Chancery Abolition Act left that practice untouched, and was never intended to deprive parties of the advice of those in whom they placed confidence.

The LORDS JUSTICES considered that it was reasonable that Miss Jones should have the advice and assistance of her own counsel on any points of difficulty which might arise, consultations held between whom and the conveyancing counsel of the court would naturally facilitate the investigation of the title, and thus ultimately tend to diminish the expense; but, on the other hand, what she claimed was the expense of two separate conveyancing counsel going through the whole title, and this in their Lordships' opinion was too much. They considered also that the additional abstract was not necessary in the circumstances of this case, and they recommended the parties to come to some arrangement between themselves.

It was agreed that Miss Jones should receive, instead of 356*l.* claimed, a sum of 200*l.*, in full satisfaction of all the items disputed.

The order of the Vice Chancellor was varied accordingly.

STUART, V.C. }
July 8, 5. } RAYNER v. HARFORD.

Floating Cargo—Delivery Order—Equitable Lien—Bankruptcy by Arrangement.

On the 20th of August 1857, B, the senior partner of a firm of Bristol mer-

chants and shipowners, being then in London, wrote and delivered to the plaintiff for valuable consideration a delivery order, directing D, one of the partners of B, then at Bristol, in whose name the wharfage business of B's firm at Bristol was carried on, to deliver to the order of the plaintiff "fifty tons of palm-oil out of the first of our ships which shall arrive, whether it be the Glenelg, Arab, Mary Ann B, or Victory." On the day following, the Bristol firm suspended payment, and their affairs were wound up under the provisions of the arrangement clauses of the Bankrupt Act, by deed of assignment, dated the 8th of September 1857, of which the defendants were trustees. The deed provided that no creditor having a specific lien or security for his debt, who executed the deed, should be prejudiced as to his security. Notice of the delivery order was given to the defendants at latest on the 5th of September. The first of the ships named in the order which came to port arrived at Bristol on the 23rd of October 1857, but of her cargo only twenty-seven tons of palm-oil remained unaffected by contracts for sale, entered into by B's firm before the date of the delivery order:—Held, that the delivery order was an assignment of and a valid security upon fifty tons of palm-oil, the first that should arrive belonging to the firm of B. & Co., in the ships named in the order.

The plaintiff in this case was the surviving partner of the firm of Rayner & Andrew, carrying on business as Russia brokers, in London.

The firm of Rayner & Andrew, and the plaintiff Rayner after he had, by the death of the partner Andrew, become the sole surviving partner and representative of the firm, had extensive dealings with the partnership firm of Bruford, Dyer & Co., who carried on the business of merchants and shipowners at Bristol, and were largely engaged in the African trade.

On the result of such dealings, a balance of 15,000*l.* and upwards was, at the commencement of 1857, due to the firm of Rayner & Andrew, part of which balance, amounting to 11,700*l.*, was secured by certain bills of exchange, which had been accepted by the Bristol firm. On the 21st of August 1857, two of these bills of ex-

change, being for sums amounting in the whole to 2,347*l.* 6*s.*, became due.

Being unable to provide for payment of these bills, the firm of Bruford, Dyer & Co., on the 20th of August 1857, through their senior partner Mr. Francis Bruford, then in London, applied to the firm of Rayner & Andrew to take them up. The plaintiff agreed to do so on Bruford & Co. giving to him, as security for the amount of the bills, an order for the delivery to the plaintiff of fifty tons of palm-oil out of the first of certain ships belonging to the firm of Bruford, Dyer & Co., and then engaged in trading for palm-oil on the coast of Africa, which should arrive and contain a cargo of palm-oil belonging to the firm of Bruford, Dyer & Co.

Accordingly, Mr. Francis Bruford, on the 20th of August 1857, being then at the office of the plaintiff in London, wrote and signed, and delivered to the clerk of the firm of Rayner & Andrew, who was managing the plaintiff's business in his absence, the following delivery order:—

“Bristol, August 20, 1857.

“Mr. Samuel Dyer. Penner Wharf.—Sir, — Deliver to the order of Messrs. Rayner & Co. fifty tons of palm-oil out of the first of our ships which shall arrive, whether it be the *Glenelg*, *Arab*, *Mary Ann Bruford*, or *Victory*.—Bruford, Dyer & Co.”

In consideration of this delivery order, the two bills were taken up and provided for by the plaintiff on the following day. Mr. Samuel Dyer, to whom the delivery order was addressed, was the partner in the firm of Bruford, Dyer & Co., in whose sole name the wharfage business of the firm was carried on at Penner Wharf, Bristol.

On the 21st of August 1857, the firm of Bruford, Dyer & Co. suspended payment; and at the filing of the bill in this suit, its affairs were being wound up under the provisions of an indenture or deed of assignment for the benefit of their creditors, duly executed in compliance with the provisions of the Bankrupt Law Consolidation Act, 1849, with respect to arrangements by deed between a trader and his creditors.

By this indenture of assignment, which bore date the 8th of September 1857, all

the assets real and personal of the firm were assigned to trustees, to be by them administered according to the provisions in that behalf of the said act; and it was also provided thereby, that any creditor or creditors having any specific lien or security for his or their debt or debts, demand or demands, or any part thereof, might execute the indenture without prejudice to the said security or securities, and might, with the consent of the trustees or trustee named in the indenture, convert the same into money, and receive a dividend rateably with the other creditors on so much of the said debts and demands respectively as should not be paid out of the produce of the same.

On the 23rd of August 1857, the solicitor of the plaintiff went to Bristol, and gave notice to Samuel Dyer of the said delivery order, and of its nature and effect. On the 1st of September 1857, a Mr. Harris, acting as agent of the firm of Rayner & Andrew, formally presented the delivery order to Samuel Dyer, and required him to recognize it, which, however, he declined to do. On the 4th of September 1857, the solicitor of the plaintiff wrote and sent to the solicitors of the trustees of the above-mentioned deed of assignment for the benefit of the creditors of the firm of Bruford, Dyer & Co., a letter, setting out a copy of the said delivery order, and the circumstances under which it was given. On the 23rd of October 1857, the *Mary Ann Bruford*, being one of the ships mentioned in the delivery order of the 20th of August 1857, arrived at Bristol, and on the following day the plaintiff forwarded to the trustees of the deed of assignment of the 8th of September 1857, a notice of the said delivery order, and of the circumstances under which it had been given, and requiring them to deliver to him or to his order fifty tons of palm-oil out of the first of the four ships named in the order, which had arrived or should arrive. The trustees, however, declined to recognize or act on or admit the validity of the order. The bill in this suit was filed against the trustees of the deed of assignment of the 8th of September 1857, and it prayed that the plaintiff might, under the circumstances above stated, be declared entitled to the

benefit of an equitable lien on any palm-oil constituting the cargoes or part of the cargoes of either of the four ships mentioned in the said delivery order of the 20th of August 1857, which should have arrived at Bristol after the date of the said delivery order, to the extent of fifty tons of the said palm-oil; or, if all such palm-oil should have been sold, to the value of such fifty tons, out of the produce of the sale thereof. It appeared, from the answer of the defendants, that all the palm-oil which arrived in the *Mary Ann Bruford* had been sold by the firm of Bruford, Dyer & Co. previous to its arrival, except twenty-seven tons, and that all the palm-oil which came in the second ship that arrived was also sold by them prior to its arrival, and to the date of the delivery order above mentioned, but that by the *Victory*, the third vessel named in the delivery order, there were brought home 116 tons of palm-oil which had not been contracted to be sold.

The whole of the palm-oil brought home by the three ships (not previously contracted to be sold,) had been sold subsequently to the arrival of the ships, by the defendants, the trustees, the oil brought by the *Mary Ann Bruford* realizing 37l. 8s. per ton, and that brought by the *Victory* 38l. 4s. per ton.

The cause now came on to be heard, on motion for decree.

Mr. Malins and *Mr. T. H. Terrell*, for the plaintiff, in support of the motion, contended that the delivery order of the 20th of August 1857, operated to confer upon the plaintiff an equitable right by assignment to that property, which it expressed should be held deliverable to or for the benefit of the plaintiff; and that upon the true construction of the said delivery order the plaintiff, as surviving partner of the firm of Rayner & Andrew, was entitled thereunder to the fifty tons of palm-oil therein mentioned out of the first of the four ships named in the order which should arrive in the country with a cargo consisting partly or entirely of palm-oil belonging to the firm of Bruford, Dyer & Co., and not validly or effectually mortgaged, charged, incumbered or otherwise disposed of, previously to the date of the

said delivery order, and to receive or have delivered to him such fifty tons of palm-oil out of any or either of the cargoes of the several ships named in the said order which had not been previously validly and effectually assigned and disposed of. They cited *Burn v. Carvalho* (1).

Mr. Bacon and *Mr. Karslake*, for the defendants, submitted that the delivery order had conferred no right upon the plaintiff: first, because it was directed by a firm to one of its members, and not to a third person; secondly, because notice of the order had not been given to the several captains of the vessels named in the order, with all possible despatch; thirdly, because the plaintiff, never having obtained possession of the fifty tons of palm-oil, had not perfected his title, and, moreover, because he had acquiesced in the deed of assignment of the 8th of September 1857. They contended also, that, even if it were held that the order conferred an equitable title upon the plaintiff, it was only to the extent of the twenty-seven tons of oil undisposed of, which arrived by the *Mary Ann Bruford*, which came first to port. They cited—

Powles v. Hargreaves, 3 De Gex, M. & G. 430; s. c. 23 Law J. Rep. (N.S.) Chanc. 1.

Ex parte Wilkes, in re Wilkes, 5 De Gex, M. & G. 418; s. c. 24 Law J. Rep. (N.S.) Bankr. 6.

Langton v. Horton, 1 Hare, 549; s. c. 11 Law J. Rep. (N.S.) Chanc. 233, 292; 3 Beav. 464; 5 Ibid. 9.

Rodick v. Gandell, 1 De Gex, M. & G. 763.

Row v. Dawson, 1 Ves. sen. 331.

In re Acraman, 3 Mont. D. & De Gex, 117.

Ex parte Kelsall, 1 De Gex, 352.

Ex parte Flower, 4 Dea. & C. 449; s. c. 2 Mont. & Ayr. 224.

Lett v. Morris, 4 Sim. 607; s. c. 1 Law J. Rep. (N.S.) Chanc. 17.

Morrell v. Wootten, 16 Beav. 197; s. c. 20 Law J. Rep. (N.S.) Chanc. 81; 13 Beav. 105.

STUART, V.C. said that the plaintiff seemed to him to have established his right

(1) 4 M. & Cr. 690.

to the relief which he prayed by his bill. The document or order upon which the claim in the suit was founded must be held, he thought, to confer upon the plaintiff an equitable right to the property, for the delivery of which it purported to be an order. Such an order addressed to a third party, not a partner of the person giving the order, but holding the goods for him or for his firm, would clearly have conferred upon the person to whom it was given an equitable right to have the oil delivered to him; and it appeared to be well-established law, that this right would not be varied or affected, where, as in the present case, the person to whom the order was addressed happened to be a partner at a distance of the person giving the order, and both members of the firm to which the goods belonged. This title, which the plaintiff would clearly have had if Mr. Samuel Dyer had been in possession of the oil when the order was shewn to him, he (the Vice Chancellor) could not consider as lost or weakened by the circumstances peculiar to this case, that the oil was at that time at sea, and that no notice of the order had been given or sent to the masters of the ships named in it, or either of them. The goods were expressed in the order to be on board certain ships, which were expected to arrive at a particular wharf; and he was of opinion that it was not necessary that any notice should have been sent to the masters of the ships, because there appeared to be no reasonable ground for believing that any notice could have been directed by the plaintiff, so as to afford him any well-grounded expectation of its ever reaching the masters, or either of them. There being then a clear equitable title in the plaintiff to have delivered to him the goods affected by the order in question, the next point was to how much of the oil belonging to Messrs. Bruford, Dyer & Co., and then on board the vessels named in the order, did the operation of such order extend? The answer to this depended upon the construction to be put upon the language of the order. As to this question of construction, he was of opinion that at the date of the order there was not any palm-oil in any one of these ships that was not affected by the operation of the order;

and that the words "out of the first of our ships," were introduced into the order for the purpose merely of putting the plaintiff upon the earliest opportunity in the possession of his security of fifty tons of palm-oil, acquired by him under the order. It had been argued, however, that, assuming the order to have conferred a valid title upon the plaintiff to the fifty tons of palm-oil, the plaintiff by signing the deed of the 8th of September 1857, had been party to a contract to submit the whole assets of Messrs. Bruford, Dyer & Co., including the property bound by the order of delivery in question to the operation of the Bankrupt Act, and that the clause in that act as to order and disposition had the effect of depriving the plaintiff of the benefit of the lien or equitable assignment to which he would otherwise have been entitled under the order. Now, this contract or assignment was executed a considerable time after the date and production to the person, to whom it was addressed, of the order for delivery of the goods, and a considerable time before the arrival of any part of those goods in England—at a time therefore when the order was unquestionably in operation as a valid security upon part of the property of the firm of Dyer, Bruford & Co. That being so, the contract or assignment, purporting as it did to pass all the property, estate and effects of the firm, could only operate to assign their goods in the ships in question, subject to that security; unless the language of the contract or assignment, signed as it was by the plaintiff, went to invalidate or waive that security. The contrary, however, was the fact, for it was an integral part of such contract or assignment, that no security previously granted to any creditor was to be invalidated by such contract or assignment. This contract or assignment, therefore, could not be held to pass to the trustees in trust therein named, the fifty tons of palm-oil affected by the order in question.

His Honour then made the following order:—

Declare that the delivery order of the 20th of August 1857 was a valid assignment in equity of the first palm-oil belonging to Bruford & Co. which should

arrive by any of the four ships therein named, and that the defendants could only take the oil, subject to the equitable right of the plaintiff under such order; and, it appearing that twenty-seven tons of oil belonging to Messrs. Bruford & Co. has been sold by the defendants for 37*l.* 8*s.* per ton, and that sufficient oil arrived by the *Victory* belonging to the firm of Bruford & Co. to make up the fifty tons, and that such oil has been sold by the defendants for 38*l.* 4*s.* per ton, let the defendants pay the plaintiff the sum of 1,862*l.* 2*s.*, the aggregate amount produced by the fifty tons upon which the plaintiff had a lien, and also interest on such sum at 4*l.* per cent. from the time of the oil being sold, (such interest to be stated by affidavit). The defendants to pay the plaintiff the costs of the suit.

LORDS JUSTICES. { *In re* DAVIES'S ESTATE,
 July 27. } *and in re* THE CRYSTAL
 PALACE AND WEST-END
 RAILWAY COMPANY.

Lands Clauses Consolidation Act, Application of Money paid into Court under—Substantial Repairs—Metropolitan Buildings Act.

A railway company took lands settled to uses, and paid the purchase-money into Court under the Lands Clauses Consolidation Act (8 & 9 Vict. c. 18). Certain houses, which were settled to the same uses, were condemned by the Commissioners acting under the Metropolitan Buildings Act (18 & 19 Vict. c. 122. s. 74.), and the houses were rebuilt by the tenant for life, more money being expended than the money paid in by the company. A petition was presented by the tenant for life, under the 69th section of the Lands Clauses Act, for payment of the money paid in, in part payment of the expenses of rebuilding:—Held, on appeal from a refusal of the Master of the Rolls to make any order, that the case came within the spirit of the 69th section, and the Lords Justices made the order.

This was a petition of appeal, presented against a decision of the Master of the Rolls, who refused to make any order for

payment out of court of a sum of money paid in by a railway company. By the 69th section of the Lands Clauses Consolidation Act (8 & 9 Vict. c. 18.) it is enacted, that the purchase-money of land taken from a tenant for life, or other person having a partial interest, shall be paid into the Court of Chancery, and shall remain so deposited until the same be applied to (among other purposes) "the discharge of any debt or incumbrance affecting the land in respect of which such money shall have been paid, or affecting other lands settled therewith to the same or the like uses, trusts or purposes." The petition, supported by affidavits, was presented under the above section of the act, by the widow of the late Mr. Hammond Davies, who by his will gave houses in Frying-pan Alley, Lambeth, in Tooley Street, Southwark, and also at Norwood, to his wife for life, and after her decease to his children, with remainders over. Part of the Norwood property was taken by the Crystal Palace and West-End Railway Company, under the compulsory powers of their act, and the purchase-money had been paid into court under the provisions of the Lands Clauses Consolidation Act. After this sale had been made, the houses in Frying-pan Alley and Tooley Street were found to be in a very dilapidated condition, and the Commissioners of Police, under the powers conferred by the Metropolitan Buildings Act (18 & 19 Vict. c. 122.) condemned them as dangerous structures, and in pursuance of their order the front walls had been taken down and the roofs removed. They had further caused notices to be printed and posted upon the premises, that unless the fees of the Commissioners for their survey, and the costs otherwise incurred by them were paid by a day named, the property would be sold under the 74th section of the same act, to pay those fees and charges. In order to prevent further mischief, the tenant for life, the widow of Mr. Hammond Davies, paid the fees and charges, and took down and rebuilt the houses, expending altogether more than the money paid into court for the Norwood property. Her petition now prayed that the money so paid into court might be paid out to her in part payment of these expenses. The Master

of the Rolls declined to make such an order, being of opinion that, inasmuch as the fees and expenses referred to were by the Metropolitan Buildings Act only made charges on the property in default of the owner paying them, they were not in the present case a charge on the property within the meaning of the 69th section of the Lands Clauses Consolidation Act, which authorizes the application of money paid into court in discharge of any debt affecting the land in respect of which such money shall have been paid, or "affecting other lands settled therewith to the same or the like uses, trusts or purposes."

The 74th section of the 18 & 19 Vict. c. 122. is as follows:—"If such owner cannot be found, or if on demand he neglects or refuses to pay the assessed expenses, the said Commissioners, after giving three months' notice of their intention to do so, by posting a printed or written notice in a conspicuous place on the structure, in respect of which or of part of which they have incurred expense, or on the land whereon it stands, may sell such structure, and they shall, after deducting from the proceeds of such sale the amount of all expenses incurred by them, restore the surplus (if any) to the owner."

The Master of the Rolls, however, although he refused to make any order on the petition as to the payment out of the money, directed it to be invested, and the dividends to be paid to the petitioner, Mrs. Hammond Davies, for her life, and she now appealed from the order.

Mr. Selwyn and *Mr. Field*, for the appellant, argued that, although the Master of the Rolls considered that the present case was not within the terms of the 69th section of the Lands Clauses Act, it was plainly within the spirit and intention of the act. In a case of *Wight's Devised Estates* (1), a tenant for life was allowed by Vice Chancellor Wood to receive out of court a sum of 220*l.*, which had been paid in in respect of a portion of the estate which had been purchased by a railway company, upon her giving an undertaking to lay out the money, in addition to 80*l.* of her own, in building labourers' cottages upon the estate. The money was

ordered to be paid out on the chief clerk's certificate that the cottages had been built. The material difference there was, that the tenant for life was called upon to lay out the money, and add some of her own, as a condition of the payment out of the money; while here the tenant for life, Mrs. Hammond Davies, had already expended more money than that standing in court, and asked that she might be permitted to receive it in discharge of her outlay on the Southwark property. They stated that *Ex parte Wight's Devised Estates* was not cited before the Court below, and they referred also to *Ex parte Lockwood* (2) and *Ex parte Shaw* (3).

LORD JUSTICE KNIGHT BRUCE. — As the Court is satisfied, upon the affidavits which have been filed in this matter, that the expenses which have been incurred have been incurred in the necessary and substantial repairs of the property, and that if the tenant for life had not herself paid the money, the settled property must have been sold, I am of opinion that the case comes within the 69th section of the Lands Clauses Act, and that an order ought to be made for payment of the fund in court to the petitioner.

LORD JUSTICE TURNER. — Whether the case is within the actual words of the act or not, I think that it is plainly within its equity and spirit. I very well remember a decision of Lord Eldon, in a case before him many years ago, which has never been reported, where, on the construction of a new road, the vicarage-house of the parish of Camberwell had been cut through, leaving only half the vicar's kitchen standing, and that half exposed, and his Lordship, though he expressed some doubt on the point, ordered that part of the money paid into court, which under the act was directed to be laid out to similar uses to those to which the land taken was liable, should be applied in the restoration of the damage done to the vicarage-house. I entirely concur in the order proposed by my learned Brother.

Mr. Selwyn. — If the case alluded to by

(2) 14 Beav. 158.

(3) 4 You. & C. 506; s. c. 10 Law J. Rep. (N.S.) Ex. Eq. 92.

(1) 6 Weekly Reporter, 718.

your Lordship had been reported, or had it been brought to the notice of his Honour the Master of the Rolls, he would not have entertained any doubt as to his jurisdiction to make the order asked for by the present petitioner.

*Leave given to Master of the Rolls 44.4.1.23
C.P. 287*

L.C.
May 29; }
June 2, 9, 12, 23. } AUSTEN & BOYS.

Partnership—Solicitors—Retiring Partner—Goodwill—Estimated Value.

F. H. & B. carried on the business of solicitors in partnership. A. was afterwards admitted as a partner, and in 1838 F. retired; he reserved to himself the right of introducing T. as a partner in the firm. In 1846, H. B. & A. entered into new articles of partnership, the term of which was extended to 1853, and articles were inserted for the valuation and purchase of the share of any retiring or deceased partner during the term; these articles were made subject to the right reserved by F. of introducing T. In 1848 H. died, and his widow was paid the value of his share. In 1849 F. introduced T. as a partner. A memorandum was then drawn up, without reference to the articles of 1846, declaring that from September 1850 T. should have one-fifth of the profits until September 1853, from which date he was to take an equal share in the partnership profits; the partnership to continue for ten years from the 1st of September 1850. A clause was afterwards added, that in the event of the death or retirement of either of the senior partners before the 1st of September 1853, his two-fifths should be divided into thirds, two-thirds to be taken by the surviving senior partner, and one-third by T. A, in connexion with his signature to this memorandum, wrote that it was not to annul or prejudice the articles of 1846. In August 1853, A. signified his intention of retiring from the business, and he claimed the value of his share of the partnership and of the goodwill. Upon a bill filed by A. to have the value of his share in the business and the goodwill thereof ascertained, — Held (affirming the decision of the Master of the Rolls), that A, by his notice, had dissolved the partnership; that the two days

intervening between the notice and the determination of the partnership under the articles of 1846, could give no marketable value to the goodwill in the business, and that A. was only entitled to the profits during the continuance of the partnership.

Where a trade is established in a particular place, the goodwill of that trade means nothing more than the sum of money which any person would be willing to give for the chance of being able to keep the trade connected with the place where it has been carried on. Goodwill is something distinct from the profits of a business, although in determining its value, the profits are necessarily taken into account, and it is usually estimated at so many years' purchase upon the amount of those profits.

The term "goodwill" seems wholly inapplicable to the business of a solicitor, which has no local existence, but is entirely personal, depending upon the trust and confidence which persons may repose in his integrity and ability to conduct their legal affairs.

This was an appeal, by the plaintiff, from the decision of the Master of the Rolls, reported *ante*, p. 243.

The Solicitor General, Mr. Bovill (of the common-law bar), and Mr. Burdon, appeared for the plaintiff.

Mr. Lloyd, Mr. Selwyn, and Mr. Hislop Clarke, for the defendant Boys.

Mr. Rolt, Mr. Follett, and Mr. Rasch, for the defendant Tweedie.

The Solicitor General, in reply.

The following cases, in addition to those cited in the court below, were referred to:—

Cooper v. Watson, 3 Dougl. 413; s. c. nom. *Cooper v. Watlington*, 2 Chit. 451.

Kennedy v. Lee, 3 Mer. 441, 452.

Bunn v. Guy, 4 East, 190.

Hitchcock v. Coker, 6 Ad. & E. 438, 454; s. c. 6 Law J. Rep. (N.S.) Chanc. 266.

Elves v. Crofts, 10 Com. B. Rep. 241; s. c. 19 Law J. Rep. (N.S.) C.P. 385.

M'Neill v. Reid, 9 Bing. 68; s. c. 1 Law J. Rep. (N.S.) C.P. 162.

Kemble v. Kean, 6 Sim. 333.

Lumley v. Wagner, 1 De Gex, M. & G. 604; a. c. 21 Law J. Rep. (N.S.) Chanc. 898.

Const v. Harris, Turn. & R. 496, 523.

Peacock v. Peacock, 16 Ves. 49.

Essex v. Essex, 20 Beav. 442.

Darbey v. Whitaker, 4 Drew. 134, 139.

Geddes v. Wallace, 2 Bligh, 270.

June 23.—The LORD CHANCELLOR.—

In this case the bill has been filed against the defendants, who had been in partnership with the plaintiff, as attorneys and solicitors, praying to have the usual accounts of the partnership taken upon its dissolution; that the value of the plaintiff's share in the business and the goodwill thereof might be ascertained and declared pursuant to certain articles of agreement of the 24th of July 1846, reckoning the same as a continuing business, and not as terminating on the 1st of September 1853; that the defendants might be decreed to pay to the plaintiff whatever sum should be found due on taking such accounts, together with interest thereon from the 1st of September 1853; and that all proper directions might be given for winding up the concerns of the co-partnership. The partnership in question had been preceded by other partnerships, under which first Mr. Hale, now deceased, and afterwards the defendant Mr. Boys, and then Mr. Austen, the plaintiff, were successively introduced into the business by Mr. John Hopton Forbes, who was the founder of the connexion between these parties. At the time when the plaintiff became a partner, the firm consisted of Messrs. Forbes, Hale & Boys; and by articles of agreement between them and himself of the date of the 15th of August 1838, reciting that Forbes proposed to retire from the business, and to withdraw his name from the same on the 1st of September 1839, and to introduce his relation Austen as a partner with Hale & Boys from that day; it was agreed that the name of Austen should be introduced into the firm from the 1st of September 1838; but that he should not be considered as a partner until the 1st of September 1839; and from that day Hale, Boys & Austen agreed to become partners for the term of seven years. The eighth clause of this agreement, which is important upon

the present question, was in these words:—

"That the said Hale, Boys & Austen hereby severally agree with the said Forbes at any future time to article A. F. Tweedie, the grandson of J. H. Forbes, if requested, before he attains twenty-one, and to admit him when out of his articles, if competent and well conducted, to such a share of the business as shall be agreed upon between his guardians and the then continuing or surviving partner or partners, and in case of difference, to such a share as shall be settled by arbitration to be fair, relation being had to the terms upon which the said several partners have been admitted to the business, and the obligations all are under to J. H. Forbes, who laid the foundation of the business." This clause bound all the parties, during the subsistence of the partnership, to admit Mr. Tweedie to a share of the business, subject, of course, to the various stipulations contained in the partnership agreement. The power reserved to Forbes to introduce Tweedie to a share in this partnership was not exercised during its continuance down to the 1st of September 1846, but on the 24th of July 1846, fresh articles of partnership were entered into by all the partners for a further term of seven years from the 1st of September then next. This agreement contained two clauses as follows:—

The 10th was, "In case of the death of any partner, the partnership is to go on till the 1st of September then next following, and the partnership to be determined as to that partner; and the partnership property, such as the house, books, furniture, &c., to be valued; and the surviving partners or partner to pay off to the representatives of the deceased partner his share of such valuation on such 1st day of September, or else pay interest thereon, till paid, at the rate of 5l. per cent. The surviving partners are also to pay to such representatives on such 1st of September a sum equal to half what a retiring partner would be entitled to as the value of his share of the business on such 1st day of September, with interest till paid at 5l. per cent., upon the same principle as is laid down in the 11th article of this agreement. The surviving partners must also open fresh accounts from such 1st day of September succeeding the date of the death,

and wind up the partnership business and accounts and pay over to the representatives of such deceased partner his share of the outstanding profits and assets as quickly as possible, without injuring the business or interest of the surviving partners or partner, and all deeds and papers, &c., to belong to the surviving partners or partner, and the style of the firm to remain the same, if desired, notwithstanding the death of any partner or partners."

By the 11th clause any partner or partners had power to retire, "and in that case the continuing partners or partner to pay such retiring partner or partners for his or their interest and share and goodwill in the business, the fair marketable value thereof, by four equal annual instalments, with interest at 5 $\frac{1}{2}$ per cent. from the time of such retirement till paid; but such retiring partner or partners not to practise, either directly or indirectly, within 100 miles from the General Post Office, and use his best endeavours to promote the interests of the remaining partners."

By the 18th clause this agreement was to be subject to the 8th article of the then existing partnership agreement with reference to Mr. A. F. Tweedie. It was insisted in the present suit on the part of the defendant Boys, that the effect of this clause was to bring every stipulation in the articles into subordination to the 8th article of the agreement of the 15th of August 1838. On the part of the plaintiff it was contended, that it merely provided for the introduction of Mr. Tweedie to the partnership, subject to all the provisions contained in the articles, which would be found applicable to the new state of things, consequent upon his becoming a partner. All that it is necessary for me to observe in passing upon these different views is, that the partnership of 1846 was subject to the provisions contained in this 8th article, precisely in the same manner as the agreement of the 15th of August 1838 was. If nothing more had taken place than the admission of Mr. Tweedie to the partnership, on the terms of this article, merely by agreeing to the share of the business he was to have, or having it settled by arbitration, and the question had been confined to the agreement of the 24th of July 1846, whatever difficulties might have arisen in

adjusting the rights of the parties, under the 10th and 11th clauses, they would have been bound by the contract into which they had deliberately entered. This observation may be found to have some effect upon the argument arising out of the state of things produced by a memorandum of September 1849, referred to hereafter. The partnership having been thus formed, continued to be carried on until the death of Mr. Hale on the 21st of September 1848, and upon that event happening it was alleged by the bill that "the value of his one-third share was calculated, pursuant to the principle of the said 11th article, at half a retiring partner's share in perpetuity and at two years' purchase, and the plaintiff and the defendant Boys paid to or secured to the said J. H. Forbes and Mrs. Catherine Hale, as the executors of the said Matthew Hale, the sum of 3,000*l.* in respect of his share in the said business, which sum was fixed upon as due to the said M. Hale upon the basis of such calculation, in addition to one whole year's estimated profits from the 1st of September 1848, to the 1st of September 1849, although he died after some weeks' absence in the country, and when only fourteen days of that year had run out, and therefore had contributed by his labours in no way towards that year's profits so paid to his representatives." It was argued on the part of the plaintiff that by this adjustment of the value of Mr. Hale's share, the parties had agreed upon a construction of the articles in question, by which the Court would be bound, and *Geddes v. Wallace* was cited to shew that whatever may be the language of the partnership deed, the dealings and transactions among the partners may be such as to amount to distinct evidence that some of the articles in that partnership deed were waived by all parties, and that some of the articles in the deed were not to be considered as rules which should regulate the rights and duties of the partners. But the Court has no evidence before it of the principle on which the adjustment of the value of Mr. Hale's share took place: and even if it had been proved that it had been calculated in the manner alleged by the plaintiff, a single instance would hardly justify a construction contrary to the obvious meaning of

an agreement, much less a conclusion that the parties had waived its terms, and had agreed to substitute for it a different one. In September 1849, Mr. Forbes was desirous of exercising the rights reserved to him by the 8th clause of the agreement of the 15th of August 1838, incorporated as it was in the agreement of the 24th of July 1846: accordingly a memorandum of terms, proposed expressly with reference to the articles of agreement of the 15th of August 1838, was prepared. By that memorandum, it was stipulated that Mr. Tweedie was to come to the office on the 1st of November; "to be allowed in the nature of salary at the rate of 500*l.* per annum, until the 1st of September 1850. On that day, his name to be introduced into the firm after Mr. Austen's. From the 1st of September 1850, Mr. Tweedie to take one-fifth of profit and loss of the business until the 1st of September 1853, from which date he is to share equally with the other partners. . . . In case of the death or retirement, before the 1st of September 1853, of either of the senior partners, his two-fifths to be divided into thirds, of which the surviving senior partner is to take two-thirds, and Mr. Tweedie one-third." It also stated that "on the 1st of September 1850, it will be necessary to open a new account and new books, and Mr. Tweedie must bring in his proportion of capital to the new firm. That the partnership shall continue for ten years from the 1st of September 1850." This memorandum was signed by Mr. Boys and Mr. Tweedie; it being admitted that Mr. Tweedie at the time of signing had no knowledge of the articles 10. and 11. in the agreement of 1846; and although Forbes knew of them, yet it appears that they were not present to his mind at the time of the arrangement. All this, however, is immaterial, as it is conceded that these articles are not binding upon Tweedie. The plaintiff would not sign the memorandum *simpliciter*, but, in connexion with his signature, he wrote—"N.B. The above memorandum fixing the share and position of Mr. Tweedie in the business, is not to annul or prejudice the existing articles of partnership between Mr. Boys and me of the 24th of July 1846, the stipulations of which are still to remain

in force between us, except so far as the above memorandum affects Mr. Tweedie's interests." Pausing here, the question arises, what are the rights of the parties under the circumstances thus detailed? The counsel for Mr. Boys insist that every stipulation and clause of the agreement of 1846 is subject to the controul of the 8th article of the agreement of 1838, that the agreement of 1849 and that of 1846 cannot stand together, and that therefore, the one is completely superseded by the other. On the part of the plaintiff, it is argued that the agreement of 1846 could only be got rid of by an express subsequent agreement, and that so far from consenting to waive the agreement of 1846, he signed the memorandum of 1849 with an express reservation of his rights under it; and the conclusion at which I have arrived, after a careful consideration of the whole case, is in favour of this view of the plaintiff. When the parties made the 8th article a provision of the agreement of 1846, they did it with reference to the stipulations contained in it, and they might at once have brought Mr. Tweedie into the partnership formed by the agreement, by arranging the share he was to have, without anything more. The memorandum of 1849, though placing Mr. Tweedie on a different footing from what he had been under the agreement of 1846, has reference to that agreement, and even to the 10th and 11th articles of it, which though unknown to Mr. Tweedie, must have been perfectly well understood by Mr. Boys, for it makes provisions for the events of death or retirement to which those articles refer, and confines it within the period of the 1st of September 1853, beyond which those articles had no operation. This obviates, in a great measure, the objection which has been urged on the part of Mr. Boys, that he would have to purchase the whole of the plaintiff's share, and would only have the benefit of a portion, as Mr. Tweedie would be entitled to one-third of it, because the answer would be, You had the agreement in your mind and you chose to consent to terms which imposed those consequences upon you. If the understanding of the parties could be made available to the construction of the agree-

ment, Mr. Boys, in his answer, distinctly states the existence of the agreement of 1846, after the memorandum of 1849; for he says in his answer, "The plaintiff and the said A. F. Tweedie and myself, from the 1st of September 1850 down to the time of the plaintiff's withdrawal from the said business, carried on the said business in co-partnership together on the premises 5 and 6, Ely Place, Holborn, under the style or firm of Hale, Boys, Austen & Tweedie, in conformity with, and under and by virtue of, the provisions contained in the said agreement or articles of the 24th of July 1846, modified by such of the terms contained in the said memorandum of September 1849, as regarded the admission of the said A. F. Tweedie as a partner, and the proportion or share of profits of the business to be received by, and the capital to be brought in by him." I entertain no doubt that as between the plaintiff and the defendant Boys the articles 10. and 11. are operative, notwithstanding the memorandum of September 1849. It therefore becomes necessary to ascertain the meaning and effect of these articles. Austen continued to be a partner down to the 29th of August 1853, when he gave notice of dissolving the partnership. The notice was dated the 30th of August 1853, and addressed to Messrs. Daniel Boys and Alexander Forbes Tweedie, and was in these terms:—"Gentlemen, I hereby give you notice that as from the 30th day of this instant month of August, I hereby dissolve the partnership hitherto existing between us as attorneys and solicitors. This I do under the power reserved to me by the 11th article of our existing articles of partnership of the 24th of July 1846." The plaintiff now claims the full marketable value of his interest and share and goodwill in the business, contending that the term "goodwill" is not confined to the limits of the partnership of 1846, but is a value attaching to the business and incident to it, without reference to any term which may be created between the parties engaged in it. It is very difficult to give any intelligible meaning to the word "goodwill," as applicable to the professional practice of a solicitor, in this abstract sense. Where a trade is estab-

lished in a particular place, the goodwill of that trade means nothing more than the sum of money which any person would be willing to give for the chance of being able to keep the trade connected with the place where it has been carried on. It was truly said in argument that "goodwill" is something distinct from the profits of a business, although, in determining its value, the profits are necessarily taken into account, and it is usually estimated at so many years' purchase upon the amount of those profits. But the term "goodwill" seems wholly inapplicable to the business of a solicitor, which has no local existence, but is entirely personal, depending upon the trust and confidence which persons may repose in his integrity and ability to conduct their legal affairs. I can perfectly understand a solicitor agreeing to relinquish business in favour of another, and to use his best endeavours to recommend his clients, and engaging not to interfere with his successor, by a stipulation not to carry on business within a certain distance: but to sell the goodwill without anything more and without arranging any price, would be an agreement incapable of being enforced by specific performance. This term, however, as used in the agreement of 1846, appears to me to be capable of a definite meaning, and if confined within the limits of the agreement, and as between the parties themselves, it becomes perfectly intelligible. It seems to have been intended to describe that interest which the retiring partner would have had if he had remained in the partnership, and which, by his retirement before its termination, he was willing to relinquish to the continuing partner. The notice of retirement might have been given when the partnership had still several years to run, and then the estimate of the share of the retiring partner would have been made upon a calculation of the value of it for the remaining years, taking into account all the contingencies which must necessarily attach to any business, however long established or well conducted. The plaintiff chose to wait until the partnership was within a day of its expiration. If he had given no notice, and the agreement of 1846 had been allowed to expire by effluxion

of time, I do not understand it to be contended that there would have been any claim to goodwill; and yet, according to the definition of the term which was pressed upon me in the argument, the business with its ideal value would still remain. It is impossible for the plaintiff to extend the application of the 10th and 11th articles to the partnership which was to continue from 1853 until 1860, as the note which he signed at the foot of the memorandum of 1849 is not to prejudice or annul the articles of 1846. But it is said that the stipulation as to not practising within 100 miles of the Post Office, being indefinite, and therefore extending to the whole period of the life of the retiring partner, is inconsistent with the notion of the term "goodwill" having such a narrow and contracted meaning as would be thus assigned to it. But this argument is founded upon an entire disregard of the different offices of the two stipulations. The one is intended to provide for the sale of the interest in the partnership whenever either partner chooses to retire. The other is a general engagement, the consideration of which is not merely the benefit obtained on retirement, but the whole of the partnership agreement. No question arises in these cases on the adequacy of the consideration unless it is merely illusory, but solely whether the restraint is confined within reasonable limits of space or time. The plaintiff might have secured a real value for his interest in the partnership by giving an earlier notice of retirement, and his not having done so, but having refrained until his interest had become merely nominal, cannot be a reason for varying the construction of the agreement. I am satisfied that the term "goodwill," associated as it is with the words "share and interest," and being a matter of valuation between the partners themselves, must be confined within the limits of the partnership, and that the plaintiff is not entitled to any supposed value of his share beyond it. I agree entirely with the decree of the Master of the Rolls. I see no reason to vary it in any respect; and with regard to this appeal, I think it ought to be dismissed, with costs.

LORDS JUSTICES. }

July 9, 10. }

DAVIES v. NICOLSON.

Specific Legacy—Assent of Executor—Liability to Testator's Debt—Rights of Creditors.

Leasehold property was specifically bequeathed to F. R. The residue was bequeathed to J. R., and in the residue were included other leasehold houses. The executor handed over the residue to J. R., and when F. R. attained twenty-one, the executor assented to the specific bequest, and assigned the same to F. R. A creditor, in respect of unpaid rent and repairs to the leaseholds included in the residue, obtained judgments against the executor, and these remaining unpaid, he filed a bill for the general administration of the testator's estate. The chief clerk of one of the Vice Chancellors certified that the specifically bequeathed leaseholds were liable to the plaintiff's debt, but His Honour varied the certificate:—Held, on appeal (reversing the latter decision), that, notwithstanding the assent and assignment, the specifically bequeathed leaseholds were liable to the debt; that creditors were entitled to pursue their remedies against all the assets; and that, therefore, if there were no assets in the hands of the executor, there must be a decree against the leaseholds specifically bequeathed, for payment of the plaintiff's debt.

The mere circumstance that the personal estate of a testator not specifically bequeathed is more than sufficient to pay all his debts, funeral and testamentary expenses, and discharge all his liabilities, even with the added fact, that the property specifically bequeathed has been, in consequence, by the executor assigned and delivered to the specific legatee, is not sufficient to discharge the specifically bequeathed property from the demands of the creditors of the testator.

This was an appeal from a decision of Vice Chancellor Stuart. The facts of the case will be most conveniently stated in chronological order, as follows:—

By an indenture of lease, dated the 6th of August 1839, a certain piece of ground, occupied as a stable-yard, with the stables, coach-houses and buildings thereon erected, situate on the east side of Bond Street,

were demised, by Thomas Gullan, to Henry Rimell, his executors, administrators and assigns, for the term of twenty-five years from thence next ensuing, at the yearly rent of 262*l.* 10*s.* The indenture contained covenants by Henry Rimell to pay the rent and keep the premises in repair.

By another indenture, of the 20th of January 1851, the said piece of ground, stables and premises were assigned by Thomas Gullan to Richard Thomas Davies, his executors, administrators and assigns, subject to the said indenture of lease of the 6th of August 1839.

Henry Rimell, by his will, dated the 8th of January 1841, gave and bequeathed to Thomas Nicolson and Thomas William Willett, his executors thereinafter named, the sum of 25*l.* each, and, after giving another legacy, he gave and bequeathed his leasehold premises, No. 56, New Bond Street, and the dwelling-house and furniture therein and thereon, and also the stable and premises whereon the business of hackneyman and job-master was then carried on by him, and all his other leasehold premises whatsoever and wheresoever (except his leasehold premises called the Bedford Yard, and in South Bruton Mews, in the parish of St. George, Hanover Square), and also his stock-in-trade, bonds, book and other debts, bills, notes and other securities for money whatsoever that might be due and owing to him at the time of his decease, and all other his personal estate and effects, whatsoever and wheresoever not thereinbefore or thereafter specifically disposed of, unto his said executors, or the survivor of them, his executors, administrators and assigns, upon trust that they or the survivor of them, or the executors or administrators of such survivor, should make sale of a sufficient part of the same respectively, or otherwise get in, collect and receive all such and so much of his said estate and effects as should be necessary and sufficient for the payment of his just debts, funeral and testamentary expenses; and after full payment of the same respectively, and every part thereof, and a full release and indemnity given or secured to the satisfaction of the said trustees and executors, or the survivor of them, his executors or administrators, then the said testator

thereby directed, that they or he should, as soon as conveniently might be thereafter, pay, assign or deliver unto his son, John Rimell, absolutely and without further controul, all the aforesaid leasehold premises in New Bond Street, and the dwelling-house and furniture therein or thereon, and the business then carried on, and all other his leasehold property (except the Bedford Yard and those in Bruton Mews aforesaid), and also all his stock-in-trade, bonds, book and other debts, bills, notes and securities, and all other his personal estate and effects whatsoever, subject nevertheless to the aforesaid legacy. And he thereby gave and bequeathed all his leasehold premises, called the Bedford Yard, and the two leasehold houses and premises in South Bruton Mews aforesaid, demised to him by William Fitzsharding Lord Segrave, unto his said executors, their executors, administrators and assigns, upon trust to receive the rents thereof and pay the ground-rents and other outgoings, and to apply a sufficient sum for the maintenance and education of Frederick Rimell, until he should attain the age of twenty-one years, and to lay out and invest the residue and remainder, and all accumulations and savings of such rents, in their or his own names or name, if Frederick Rimell should not have attained the age of twenty-one years at the time of the decease of the said testator; and when and so soon as Frederick Rimell should attain the age of twenty-one years, then upon trust to pay, assign and transfer the aforesaid premises and every part thereof to him, his executors, administrators and assigns, and also to pay, assign and transfer all accumulations or savings as aforesaid, if any, subject nevertheless to the payment of the said legacy, and subject to any specific lien, charge or incumbrance there might be on the said premises.

By a codicil, dated the 23rd of August 1841, the testator gave an annuity of 25*l.* to a person since deceased, to be paid from the estate called Bedford Yard, in Bruton Street, Bond Street.

Henry Rimell died on the 6th of February 1844, and his will was proved by Nicolson alone, who took upon himself the execution of the trusts of the will, and possessed himself of the personal estate

and effects of the testator to a considerable amount. He paid the testator's debts, and, as appeared from the evidence in the cause after mentioned, handed over the residue of the estate and effects to John Rimell. Part of this residue consisted of outstanding debts to the amount of 4,566*l.* 6*s.* 10*d.*; some of which were bad debts and irrecoverable, and few, if any, of them were, in fact, recovered. John Rimell afterwards became insolvent.

The specific legatee, Frederick Rimell, was seventeen years of age at the time of the testator's death. The executor Nicolson not only assented to the bequest of the Bedford Yard and Bruton Mews property to Frederick Rimell, but when the latter had attained twenty-one, he permitted him to take possession, and executed to him an assignment of the premises, in which was contained the usual covenant against incumbrances on his (the executor's) part.

Afterwards the rent of the premises demised by the indentures of the 6th of August 1839 became in arrear, and an action was brought by the landlord Davies against Nicolson for the arrears. Judgment was recovered, and the debt and costs were afterwards paid.

The rent having again fallen into arrear, and the premises having become out of repair, on the 15th of May 1856, the landlord commenced another action against Nicolson for the fresh arrears of rent, and for damages for breach of the covenants in the lease. On the 23rd of December 1856 final judgment in such action was signed for the sum of 601*l.* 13*s.* 4*d.* for damages (including rent), and 34*l.* 8*s.* 4*d.* costs, making together 636*l.* 1*s.* 8*d.* On the 6th of August 1857 another action was commenced by the landlord against Nicolson for rent due in respect of the same premises, and judgment was signed for 65*l.* 12*s.* 6*d.* for debt, and 7*l.* 0*s.* 6*d.* costs, making together 72*l.* 13*s.* Writs of *fi. fa.* were issued upon these judgments, but they were returned by the sheriff with an indorsement that there were not any goods and chattels in his bailiwick which were of Henry Rimell, deceased, at the time of his death, in the hands of Thomas Nicolson to be administered, whereof he

could cause to be levied the said debt or any part thereof.

The landlord Richard Thomas Davies thereupon filed a bill, to which Nicolson, the executor, John Rimell, the residuary legatee, and Frederick Rimell, the specific legatee, were made defendants, praying an account of what was due to him and the other creditors of Henry Rimell, deceased, and that the amount so due might be paid in a due course of administration, and that the leasehold premises called the Bedford Yard and in South Bruton Mews might be administered as part of the personal assets of the said Henry Rimell; and that the said leasehold premises might be sold, and the proceeds thereof applied accordingly; and for a receiver.

At the hearing of the cause a decree was made for the administration of the estate and a reference sent by Vice Chancellor Stuart to chambers, and among other things it was directed that inquiries should be made whether certain leasehold premises to which the testator was entitled for the residue of a term of twenty-five years, commencing on the 6th of August 1839, ought to bear the whole or any or what part of the debts due from the testator to the plaintiff and other persons. There was no inquiry directed as to wilful default by the executor. The chief clerk, by his certificate, found, amongst other things, that there was due to the plaintiff, under certain judgments, certain sums of money, which, together with interest, after deducting income-tax, amounted to the sum of 737*l.* 15*s.* 4*d.*; and also that no person had come in and proved any debt against the estate, except the plaintiff. He also found in the fourth paragraph of the certificate that "no part of the personal estate of the said testator is now outstanding or undisposed of," and in the fifth paragraph that, "having regard to the state of the assets of the testator's estate, the leasehold premises called the Bedford Yard, and in South Bruton Mews, in the said decree mentioned, being the leaseholds above referred to, ought to bear the whole of the debt due to the plaintiff." A motion was made before Vice Chancellor Stuart to vary the certificate as follows, "That part of the personal estate of the said testator, consisting of book debts,

amounting in the whole to 4,566*l.* 6*s.* 10*d.*, or to a very large amount, is now outstanding, and having regard thereto, the leasehold premises called the Bedford Yard and in South Bruton Mews in the said decree mentioned, ought not to bear any part of the debt due to the plaintiff, or, if any, only a proportionate part thereof."

It did not appear on the certificate that by the accounts taken in the chambers of the Vice Chancellor the executor had discharged himself by payments made to the residuary legatee. The plaintiff appealed (1).

The case occupied a considerable time; but as the report has extended to such a

(1) His Honour, at the hearing of the motion delivered judgment as follows:—"This is a suit by a creditor seeking to make a specific legatee of leasehold estate liable to payment of his debt, and, if necessary, to have the leaseholds specifically bequeathed sold for payment of his debt. The testator died in February 1844. At that time the specific legatee was an infant. More than four years afterwards, on the legatee coming of age, the executor not only assented to the specific legacy, and gave possession of it to the legatee, but executed an assignment of it, in which there was the usual covenant that it was free from any incumbrance created by the executor. It appears by the chief clerk's certificate that the plaintiff was the only unpaid creditor. All the other creditors seem to have been paid very soon after the testator's death. The plaintiff's debt is in respect of a breach of the covenants in a lease which was part of the testator's general assets. This breach of covenant has occurred many years after the testator's death, and long after the assent to the specific bequest, and the possession and assignment of it to the specific legatee. In order to succeed in a suit of this kind, it is essential that the plaintiff should establish the fact, that the general assets of the testator were insufficient for the payment of all the debts and liabilities of the testator. The result of the evidence before the Court is, that the executor, almost immediately after the death of the testator, put the residuary legatee in possession of the whole of the general assets, and allowed him to deal with them without any material controul being exercised by the executor over his acts. A great part of the assets thus handed over to the residuary legatee consisted of the goodwill of a valuable business, and of outstanding debts to the amount of above 4,000*l.* Of these outstanding debts it appears that a large proportion were bad debts and irrecoverable. The amount of bad debts it is now impossible exactly to ascertain, and this impossibility arises from the conduct of the executor in handing over and entrusting the collection of them to the testator's eldest son, who was residuary legatee. But upon the result of the evidence, it appears reasonably clear that the general personal estate applicable to the payment of debts was more than sufficient for the payment of all the

length, and especially as one of the main points urged in support of the appellant's case is referred to and dealt with in the judgment, the arguments are here omitted.

Mr. Bacon and Mr. Taylor, cited Ewer v. Corbet (2), March v. Russell (3), and Williams on Executors, pp. 1115, 1245.

Mr. Elmsley and Mr. H. Stevens, for Frederick Rimell, supported the decision of the Vice Chancellor, relying upon Gil-

debs, and for the payment and indemnity of the executor against the debt of the plaintiff. It is the insolvency of the residuary legatee, and the imprudence of the executor in abandoning to so great an extent his own duties, and entrusting the assets to the residuary legatee, which has occasioned the demand now made against the specific legatee. But the bill does not even aver that the general assets, applicable for payment of the testator's debts, including the plaintiff's, were insufficient; and upon the evidence as to the state of the assets, it appears that, even if there had been that necessary averment, there is no sufficient evidence to support it. The plaintiff's case, therefore, as against the specific legatee, wholly fails. Where an executor assents to a specific legacy of leaseholds, and puts a legatee in possession, the assent must, generally speaking, be considered as amounting to a release by the executor of his right to call upon the specific legatee for contribution or indemnity. The certificate of the chief clerk on the fifth inquiry is founded upon a misconception of the language of the decree. The inquiry was directed to the state of the testator's assets at the time of his death, and not at the date of the certificate. The decree will be as follows:—"Declare that the leasehold estate specifically bequeathed to the defendant F. Rimell is not liable to the payment of the debt certified to be due to the plaintiff, unless the other personal estate of or to which the defendant J. Rimell is possessed or entitled is insufficient to pay what has been certified to be due to the plaintiff and the other creditors of the testator; the chief clerk's certificate to be varied by striking out the fifth paragraph; that this Court having regard to the matters stated in the affidavit of the defendant T. Nicolson, and the two affidavits of G. Waller and J. Rimell, it does not appear, nor does the bill allege, that the assets of the testator bequeathed to the defendant T. Nicolson, in trust for the defendant J. Rimell, were insufficient to pay the debt certified to be due to the plaintiff, or any other debts of the testator; that, therefore, the plaintiff is not entitled to resort to the leasehold estate specifically bequeathed to the defendant F. Rimell for payment of his debt; the costs of the defendant F. Rimell to be paid by the plaintiff; and all further proceedings in the cause to be stayed."

(2) 2 P. Wms. 148.

(3) 3 Myl. & Cr. 81; s. c. 6 Law J. Rep. (N.S.) Chanc. 303.

lespie v. Alexander (4), *Spode v. Smith* (5), and *Greig v. Somerville* (6).

Mr. Malins and Mr. H. Waller, for the executor.

Mr. Bacon was heard in reply.

LORD JUSTICE KNIGHT BRUCE.—The mere circumstance that the personal estate of a testator not specifically bequeathed, is more than sufficient to pay all his debts, funeral and testamentary expenses, and discharge all his remaining liabilities, even with the additional fact, that the property specifically bequeathed has been in consequence assigned and delivered by the executor to the specific legatee, is not sufficient to discharge the specifically bequeathed property from the demands of the creditors of the testator. In the absence, therefore, of any special circumstances affecting the general rights, the plaintiff, a creditor of the testator, would have, and has a right of proceeding against the specifically bequeathed property assigned and delivered by the executor to the defendant Frederick Rimell, whatever the rights between the executor and the creditor, or between the executor and the residuary legatee, may be. It is said, however, that the rule laid down in *Gillespie v. Alexander*, and afterwards followed in *Greig v. Somerville*, ought to be applied in this case, namely, that when property applicable in the first place to the debt has been parted with by the executor to the residuary legatee, the specific legatee ought to be charged only with a portion or none of the debt, according to the state of the accounts. But in this case no such fact appears, because, as I understand, the accounts taken in the Judge's chambers, and stated in the certificate, do not shew in the discharge of the executor any delivery or payment by him to the residuary legatee. Therefore, that circumstance is out of the case, and there is no inquiry as to wilful default on the part of the executor; so that the Court is unable to enter into the question whether the executor has impru-

dently or improperly stood by and permitted the residuary legatee to receive any of the assets primarily liable to the debt. But let it be assumed that the fact is otherwise, and that a part of the assets have been paid to the residuary legatee, leaving this debt outstanding; still it was not done under the authority of this Court, but was a private act done in the private administration of the estate, and therefore without the rule in *Gillespie v. Alexander* and *Greig v. Somerville*, and it left the creditor with full liberty to prosecute his rights—which have never been affected or diminished—as against the specific legatee. I will repeat, that what were the rights between the creditors and the executor, or between the specific legatee and the executor, or between the specific and residuary legatees, or between the executor and the residuary legatee, is a different consideration, with which the Court has now no concern. It has only now to deal with the rights of the creditor against the assets; and I can see nothing to affect the rights of the creditor to pursue the assets, however specifically bequeathed. The order must, therefore, be discharged, and the leaseholds in question declared liable to the plaintiff's debt. It may be necessary to make other consequential declarations, and the order may be expressed to be without prejudice to any question between the defendants or any of them. I will, however, abstain now from making any such further declarations. It is sufficient to lay down the basis upon which, in my opinion, the order ought to proceed.

LORD JUSTICE TURNER stated, shortly, the facts of the case, and proceeded:—The decree made at the hearing, besides the usual inquiries, contained a special inquiry, whether the leaseholds in question were subject to the plaintiff's debt. That decree has not been appealed against, otherwise I might have objected to this special direction. The ordinary decree is adapted to work out all the rights of the parties, and such a special direction tends to create confusion and embarrassment. The chief clerk's certificate found that the funeral and testamentary expenses have been paid, and that the executor has received 1,514*l.*, and has paid 1,664*l.*, leav-

(4) 3 Russ. 130; a. c. 3 Law J. Rep. Chanc. 52; 2 Sim. & S. 145.

(5) 3 Ibid. 511.

(6) 1 Russ. & M. 338.

ing 150*l.* due to the executor, and it was certified that having regard to the state of the assets, the leaseholds in question ought to bear the debt due to the plaintiff. On this certificate the learned Vice Chancellor made the order now appealed from, which declares that the leasehold estate specifically bequeathed to the defendant Frederick Rimell, is not liable to the payment of the debt certified to be due to the plaintiff, unless the other personal estate of or to which the defendant John Rimell is possessed or entitled is insufficient to pay what has been certified to be due to the plaintiff and the other creditors of the testator; that the certificate must be varied by striking out the fifth paragraph; that having regard to the matters stated in the affidavit of the defendant Thomas Nicolson, and the two affidavits of George Waller and of the defendant John Rimell, it did not appear to the Court, nor did the bill allege, that the assets of the testator bequeathed to the defendant Thomas Nicolson, in trust for the defendant John Rimell, were insufficient to pay the debt certified to be due to the plaintiff, or any other debts of the testator; that, therefore, the plaintiff is not entitled to resort to the leasehold estate specifically bequeathed to the defendant Frederick Rimell for the payment of his debt; and the plaintiff not seeking other relief against the other defendants, all further proceedings in the cause were stayed. The first declaration was, then, that these leaseholds were not liable unless it should appear that the estate not specifically bequeathed was not sufficient to pay what was due; the declaration, I say, amounts to this, that the specifically bequeathed property is not liable, unless there is a deficiency after applying the property not specifically bequeathed in payment. I do not understand that to be the law on this subject. The law fixes the liability upon all the testator's personal property, and I am not aware that this Court, although it arranges the order in which assets ought to be administered, alters the legal liability, and the ordinary decree is not confined to the estate not specifically bequeathed, but includes all the estate of the testator. The second declaration was, that the plaintiff not having alleged by his bill that the

assets of the testator bequeathed to the residuary legatee were insufficient, the plaintiff is not entitled to the estate specifically bequeathed, and this declaration rests upon the same footing; and I think therefore, that both these declarations must be struck out as well as the directions consequential upon them. What, then is the proper course as to the payment of this debt? That will depend upon the state of accounts as found by the certificate. It may be that the executor has a balance in hand; in that case the decree will direct payment by him. It may be, on the other hand, that there are no assets in the hands of the executor; in that case, the Court cannot call upon him to pay. Therefore, upon that supposition, there must be a decree against the leaseholds for this particular debt. But it is said, that according to the authority of *Gillespie v. Alexander*, the specific legatee is only subject to a contribution so far as the residuary estate is insufficient, and that here he is liable to none, because the general residuary estate is not insufficient. But does the case of *Gillespie v. Alexander*, and the case of *Greig v. Somerville*, by which it was followed, apply to such a case as the present? I am of opinion that they do not. In those cases there was a default on the part of the creditor in not coming in under the decree to prove his debt; and not that alone, but the Court had already distributed the assets. In those circumstances the creditor could not come in at all, unless he came in under the equitable rule of the Court, and that rule is, that there must be a contribution. The distinction, therefore, is, that in the one case, by the act of the Court, the creditor has been driven and put under an equity which has been imposed upon him; but in the present case the Court has only to deal with the legal rights of the creditors against the estate. On these grounds, I am of opinion that there must be a decree against the leasehold estate, and the debt must be directed to be raised by sale or mortgage of that estate, together with the costs of the suit.

LORDS JUSTICES. }

Jan. 14. }

STACEY v. SPRATLEY.

Practice—Issue Devisavit vel non.

A will of real and personal estate was executed after the Wills Act, (7 Will. 4. & 1 Vict. c. 26.) and was established as to the personalty before the Judicial Committee of the Privy Council in proceedings in which the heir-at-law (but not as such) was a party:—Held, that he was still entitled to an issue devisavit vel non.

This was an appeal from a decision of Vice Chancellor Stuart.

Mrs. Lucy Eldridge, by her will, dated the 14th of August 1854, gave her real and personal estate to Thomas Eldridge and Mrs. Handley (his sister), in equal shares, and appointed them and Mr. Spratley executors, who proved the will.

Thomas Eldridge died on the 25th of September 1854, having by will given his real and personal estate to Mr. Stacey, whom he appointed sole executor, and who proved the same.

Mr. Stacey filed a bill against Mr. Spratley and Mrs. Handley and her husband, to obtain the share of Thomas Eldridge; and in proceedings therein the validity of the will of Thomas Eldridge was disputed as to the personal estate, but ultimately it was established by a decision of the Judicial Committee of the Privy Council.

In these proceedings Mrs. Handley was a party, as one of the next-of-kin of Thomas Eldridge, she being also his heiress-at-law.

The present suit was instituted to administer the estates of John Eldridge and the said Lucy Eldridge, the former of whom had given everything, both real and personal, to the latter, his wife, directing her to give the same to their four children at her death, and two of whom were the before-mentioned Thomas Eldridge and Mrs. Handley.

Mrs. Handley, as heiress-at-law of Thomas Eldridge, claimed before the Vice Chancellor an issue *devisavit vel non*, but it was refused.

Mr. Bacon and Mr. Godfrey renewed the application as a matter of right.

Mr. Malins and Mr. Hislop Clarke, for the plaintiff, opposed it, arguing that the Court had a discretion whether to grant or refuse the writ, and cited *Man v. Ricketts* (1); and that here the heiress-at-law having been a party to other proceedings in which the will, executed with the same formalities as to real estate as it was as to personal estate, was established, the issue of the writ was wholly unnecessary.

Mr. Bacon was not called on to reply.

LORD JUSTICE TURNER.—We are bound to direct an issue. It has for many years been settled as a rule, that an heir-at-law has a right to have the validity of a will, devising real estate away from him, tried at law; and although the same formalities are required for the execution of a will of real as of personal estate, we cannot, I think, depart from that rule, notwithstanding that the validity of the will as to personalty has been conclusively established. In *Man v. Ricketts* the heir-at-law was made a trustee, and he had acted in that capacity for thirty years, and thus raised an equity against himself, which the Court set off against his right to the issue. I cannot go so far as to say that the will having been established as to personalty in proceedings in which the heiress-at-law was a party in another capacity, is sufficient to induce us to set off that fact in the same manner.

LORD JUSTICE KNIGHT BRUCE.—I am of the same opinion. The decision must be reversed.

LORDS JUSTICES. }

Jan. 12. }

ALTREE v. SHERWIN.

Practice—Special Examiner—Country Witness.

A special examiner will not be appointed on the mere ground that a witness resides more than twenty miles from London.

The Master of the Rolls had refused to appoint a special examiner to cross-

(1) 7 Beav. 93; n.c. 13 Law J. Rep. (n.s.) Chanc. 194.

examine a witness living at or near Walsall.

The suit was instituted for the specific performance of a contract. The defendant had filed many affidavits, upon which the plaintiff wished to cross-examine the deponents. They all lived 118 miles or more from London, but within 36 miles of Walsall. If examined at the latter place great trouble and expense would be saved.

A motion was made before the Master of the Rolls, supported by the affidavit of the plaintiff's solicitor, detailing the above facts, but His Honour refused it, and the plaintiff now appealed.

Mr. Lumsden Mackeson, for the appellant, referred to the cases of—

Reed v. Prest, Kay, App. xiv.

Brocas v. Lloyd, 21 Beav. 519; s. c. 26 Law J. Rep. (N.S.) Chanc. 758.

Mr. C. T. Simpson, for the defendant, was not called upon.

LORD JUSTICE TURNER.—This is not, in my opinion, a case in which we ought to disturb the order of the Master of the Rolls. There are no special circumstances, and if we were to do what is asked by the motion, I do not see how we could refuse it in any case where the witnesses reside in the neighbourhood of any place more than twenty miles from London.

LORD JUSTICE KNIGHT BRUCE.—I quite agree, and the application will be refused, with costs.

Hurst. Hurst 57 & 58 Ch 420.

KINDERSLEY, V.C. } ROBINSON v. WOOD.
July 1.

Devise in Fee subject to a Contingency—Failure of Devise over—Divesting of original Devise.

A testator devised his real estate to trustees, their heirs and assigns, upon trust to apply the rents for the maintenance of his daughter till twenty-one, and then to convey the estates to his daughter, her heirs and assigns; and in case his daughter should die under twenty-one leaving issue, then

upon trust for the absolute use and benefit of such issue as tenants in common; but if she should die under twenty-one without issue, then upon trust to sell the property and pay the proceeds to a charity. The daughter died under twenty-one, without issue, and the gift over being void under the Statute of Mortmain, it was held, upon the authority of Doe d. Bloomfield v. Eyre (1), that the original devise to the testator's daughter, assuming that she took an absolute vested estate in fee simple, was divested by the subsequent gift over, although that gift had failed, and that the trustees of the will became entitled to the estate.

John Dales Allison, by his will, dated the 3rd of September 1840, devised all his freehold, customary and copyhold estates, whatsoever and wheresoever, whereof or wherein he or any person in trust for him was seised or possessed, or to which he was entitled for any estate of inheritance, or over which he had or might have any power of appointment or disposition, or in which he had any devisable interest, whether in possession, reversion, remainder or expectancy, to hold the same to them, their heirs and assigns, upon trust, as soon as conveniently might be after his decease, to sell such part of his real estate as his trustees should think fit or needful, and pay such of his debts as his personalty was insufficient to discharge, and subject thereto to receive the rents of the remaining part of the real estate, and pay and apply the same for the maintenance, education and bringing up of his daughter, Ann Dales Allison, otherwise Ann Dales, born to him by his wife, Harriet Allison, until she attained the age of twenty-one years; and when his said daughter should attain the age of twenty-one years, upon further trust to convey, assign, transfer and assure the said residuary freehold and other real estate and property, subject as aforesaid, unto and to the use of his said daughter, her heirs and assigns for ever. And in case his said daughter should happen to

(1) 5 Com. B. Rep. 713; s. c. 18 Law J. Rep. (N.S.) C.P. 284: affirming 3 Com. B. Rep. 557; 16 Law J. Rep. (N.S.) C.P. 64.

depart this life under the age of twenty-one years, leaving lawful issue her surviving, then he directed that his said trustees or trustee for the time being should stand possessed of the said residuary real estate, upon trust for the absolute use and benefit of such issue, his, her or their heirs and assigns, as tenants in common; but in case his said daughter should happen to depart this life under the age of twenty-one years without leaving lawful issue her surviving, then upon trust to receive the rents, income and profits of his said estates and property, and equally divide the same between his said wife, if she should be then his widow and unmarried, and Mary Allison, share and share alike, with benefit of survivorship between them during their joint lives, and after the decease of the survivor upon trust to sell the said residuary freehold and other real estate and property, and pay the money to arise from such sale to the treasurer of the Primitive Methodist Society.

The testator died in September 1840, leaving Ann Dales Allison, his only child, him surviving. The testator's widow and Mary Allison both died in the lifetime of the daughter, Ann Dales Allison, who died in March 1856, under twenty-one years of age, without having been married.

The plaintiff, who was the heir-at-law of Ann Dales Allison, filed the bill in this cause claiming to be entitled to the estates devised by the testator, alleging that the devise to the testator's daughter was a vested estate in fee simple, and that as the charitable gift to the Primitive Methodist Society was void under the Statute of Mortmain, he was entitled as her heir-at-law.

The defendants were the trustees of the testator's will, who claimed the real estates as undisposed of.

Mr. Baily and *Mr. Hobhouse*, for the plaintiff, contended that the first devise to Ann Dales Allison was an absolute vested estate in fee simple; that as the object to which the remainder was given had failed, the original devise became indefeasible, and her heir-at-law was entitled to the estate. They cited—

Jackson v. Noble, 2 Keen, 590; s. c. 7 Law J. Rep. (n.s.) Chanc. 133.

Ring v. Hardwick, 2 Beav. 352.

Barrow v. Wadkin, 24 Ibid. 1.

Leeming v. Sherratt, 2 Hare, 14; s. c. 11 Law J. Rep. (n.s.) Chanc. 423.

Bromfield v. Crowder, 1 Bos. & P. N.R. 313.

Harvey v. Stracey, 1 Drew. 73; s. c. 22 Law J. Rep. (n.s.) Chanc. 23.

Attorney General v. Hinzman, 2 J. & W. 270.

Stanley v. Stanley, 16 Ves. 491.

Arnold v. Congreve, 1 R. & M. 209; s. c. 1 Tam. 341; 8 Law J. Rep. Chanc. 88.

1 *Jarman on Wills*, 2nd ed. 737, 740; 2 Ibid. 9, 11.

Mr. Swanston and *Mr. Kay*, for the defendants, submitted that the first estate given by the will was divested upon the happening of the contingency of the daughter dying without issue. This clearly shewed that the intention of the testator was, that on the happening of that event she was not to have the estate, and as the charitable devise was void, the trustees became entitled. This case was precisely similar to that of *Doe d. Bloomfield v. Eyre*, and if the Court decided in favour of the plaintiff, it could only be by overruling that authority. They also cited 1 *Jarman on Wills*, 283.

KINDERSLEY, V.C.—This is a case of considerable importance. There are two questions of construction raised, and they are questions of common law without any ingredient of equity, except that there is a devise to trustees, and therefore the interests are equitable, and whatever construction a Court of law would put upon this instrument, a Court of equity would put the same. The question then is, first, whether there is by the prior part of these limitations an absolute vested estate in fee simple given to the testator's daughter. It is not necessary for the determination of this case to decide that question; but my impression is, that it is a vested estate in fee simple in the daughter, Ann Dales Allison, liable of course to be divested. It is sufficient however to say, that I will assume in favour of the plaintiff that the testator's daughter took such absolute

vested estate in fee simple in the first instance, although she did not live to attain the age of twenty-one years. Then the next question is, whether the estate was divested by virtue of the subsequent clauses. Those clauses provide for the divesting of the estate in certain events; first, in the event of her dying under twenty-one, leaving issue; and the other, of her dying under twenty-one without leaving issue, which is the event that has happened. Now, of course, as this was a devise to a charity, it was void under the Statute of Mortmain, 9 Geo. 2. c. 36. ss. 1. and 2. The statute directs, that no lands shall be given in trust, or for the benefit of any charitable uses whatever, except in a particular manner. And then follows the third clause, directing that all gifts of any lands, tenements or hereditaments to or in trust for any charitable uses whatever, which shall be made otherwise than in that particular manner, shall be absolutely and to all intents and purposes null and void. It has been argued, that the entire gift over being void, there is nothing to divest the estate from the original taker, and I confess that I have much difficulty in getting over that reasoning; but I find that the precise question has been brought before the Court of Common Pleas and the Court of Exchequer, and it has been held that, where there is a gift over purporting to divest a prior estate in fee simple, if the devise over fails for any reason, the intention of the testator must be taken to have been that the devise should nevertheless operate to carry the estate over. Now, whatever opinions I may entertain upon the point, it is not for me, in the exercise of my functions, to overturn that decision. It appears to me, that not only is every particular the same in the case of *Doe v. Eyre*, but the arguments there used are entirely adverse to the claim of the plaintiff, and I must presume that the observations used are to be taken as the expression of opinion of the whole Court of Exchequer Chamber. If that were the case, it must follow as a matter of course, that if the case now before the Court were decided by the same Judges, their decision would be adverse to the case of the plaintiff. How, therefore, can I

take upon myself to say that the decision was wrong? If there had been a series of decisions the other way, one would have to be weighed against the other; but what are the cases cited, and suggested as being adverse? First, there is the case of a gift by will of property, or a share of property, to a child, importing an absolute gift, and directing subsequently that the share should be settled; that does not bear upon the present case, because that was not a case which turned on divesting upon a contingency. There was no contingency at all; the testator stated, that he meant to give an absolute interest, which however he wished to be modified, in order that the children might have it; but if there were no children, the original gift was to prevail. Those are not cases raising the same question. The only other case is that of *Jackson v. Noble*, which it is extremely difficult to reconcile with *Doe v. Eyre*, by reason of the language there used; but when it is looked into, it will be found that the ground of the decision was, that the contingency there contemplated, on which the gift over was to take effect, had never happened. Of course, if that was the ground upon which the decision was founded, it does not touch the present question; and whether that decision was right or wrong is of no moment, because, at all events, it is not a decision adverse, and therefore, upon the state of the pronounced opinions, it is impossible to say that the gift over is entirely inoperative; and whatever my opinion might have been but for the case of *Doe v. Eyre*, and I confess it is extremely doubtful whether I should have been of the opinion there expressed, I feel myself under the necessity of coming to the same conclusion. If I had not been precluded by law, I should probably have submitted this question to the very Court who decided *Doe v. Eyre*, for their opinion; and if I had done so, I cannot doubt but that they would have decided in conformity with their previous decision. I must therefore dismiss this bill; but having regard to the nature of the case, I shall dismiss it without costs.

WOOD, V.C. { THE AUSTRALIAN AUXILIARY
June 29. { STEAM CLIPPER COMPANY
v. MOUNSEY.

*Joint-Stock Companies Act, 1856 —
Powers of Directors—Demurrer.*

A company was incorporated under the Joint-Stock Companies Act, 1856, the objects of which were to purchase a number of vessels and run them between England and Australia, or to let out the same for hire, and generally to transact the business of shipowners. By the articles of association the business of the company, and all matters relating to the company and the affairs thereof were to be controuled, managed and regulated by the directors, who might exercise and do all such powers, discretions and things which the company might exercise and do as were not by the Joint-Stock Companies Act, or by the articles, declared to be exercisable or done by the company in general meeting.

Upon demurrer to a bill to set aside a mortgage of one of the company's ships executed by the directors,—Held, that the directors had power to execute the mortgage, the power not being required either by the act, or by the articles to be exercised by the company in general meeting.

This was a demurrer.

The bill stated, that the plaintiffs were a joint-stock company, with limited liability, established and incorporated under the Joint-Stock Companies Act, 1856, and now in the course of being wound up. The objects for which the company was established were, according to the registered memorandum of association, to purchase a number of vessels and to run them between England and Australia, or between any other countries or places that might be deemed desirable, or to let out the same for hire, and generally to transact the business of shipowners. The nominal capital was 250,000*l.*, divided into 10,000 shares of 25*l.* each. Articles of association were also registered, and the 55th of such articles was, so far as is material, as follows:—"The business of the company and all matters relating to the company, and the affairs thereof, shall be controuled, managed and regulated by the directors, who may exercise and do all such powers, discretions, acts, deeds and things,

which the company might exercise and do, as are not by the 'Joint-Stock Companies Act, 1856,' or by these articles, declared to be exercisable or done by the company in general meeting, subject, nevertheless, to the regulations of these articles, to the provisions of the 'Joint-Stock Companies Act, 1856,' and to such regulations (being not inconsistent with the aforesaid regulations and provisions) as may be prescribed by the company in general meeting; but no regulation made by the company in general meeting shall invalidate any prior act of the directors, which would have been valid if such regulation had not been made."

The company commenced business in September 1856, having then lately purchased three auxiliary screw steam-vessels called respectively the *Indomitable*, the *King Philip*, and the *Istamboul*, and in the following March they purchased another vessel called the *Undaunted*. On the 4th of August 1857, at an extraordinary general meeting of the company, held for the purpose, the following special resolution was passed:—"That the company be empowered, by the issue of debentures, to raise such sum of money as it may require, not exceeding in the whole 50,000*l.*, and be authorized to assign the company's vessels to trustees to secure the due payment of the principal and interest to be secured thereby." This resolution was read and confirmed at an extraordinary general meeting of the company on the 7th of September 1857, and duly registered pursuant to the statute. The company, or the directors thereof, never issued any debentures or mortgaged their vessels, or any of them, pursuant to the special resolution, but the directors of the company, or some of them, as the plaintiffs charged, improperly and without authority, affixed the company's seal to several instruments purporting to be mortgages. One of these instruments was dated the 16th of October 1857, and purported to be a mortgage of the *Istamboul* to the defendants Bennett and Aspinall, the shipbrokers of the company, to secure the balance due to them on an account current, with interest at 7*l.* per cent. Another instrument was dated the 19th of October 1857, and purported to be a mortgage by the company of the *Istamboul*

boul to the defendant Mounsey, as a trustee for the Northumberland and Durham District Banking Company, for 25,000*l.* and interest, to secure the payment of certain bills of exchange drawn upon the plaintiffs' company, and indorsed to the banking company. In order to give priority to this instrument, the mortgage of the 16th of October was not registered until the 20th.

The *Istamboul* arrived on the 13th of May 1858, at Plymouth, on her voyage from Melbourne to the port of London, and the mortgagees claimed to be entitled, and, in fact, intended forthwith to take possession of the vessel and to receive the freight and earnings, and to sell the vessel.

The plaintiffs charged that the seal of the company was affixed to the instruments of the 19th and 16th of October improperly and without any sufficient authority, and that those instruments constituted no valid charge on the vessel, or the freight and earnings thereof, or, at all events, no valid charge for more than such cash, if any, as might have been properly advanced at the time of the seal being affixed thereto; that the defendants had notice of the articles of association and of the special resolution of the 4th of August, and also that other vessels of the company had been already mortgaged to secure the balances on accounts current; and it prayed that it might be declared that the company's seal was improperly and without sufficient authority affixed to the instruments of the 19th and 16th of October, and that they might be set aside and given up to be cancelled; that the defendants might be ordered to do all such acts as might be necessary for vesting the *Istamboul* in the plaintiffs, and for enabling them, or their liquidators, to dispose thereof and receive the freight and earnings freed from the alleged mortgages; that the defendants might be restrained, by injunction, from selling, transferring, disposing of, taking possession of, or otherwise intermeddling with the vessel, or receiving or intermeddling with its freight or earnings, and for other relief.

Mr. W. M. James and *Mr. Giffard*, in support of the demurrer, contended that, under the 55th clause of the articles, the

directors had full power to create a valid mortgage, and referred to the 41st, 42nd, and 44th sections of the Joint-Stock Companies Act, 1856.

Mr. Rolt and *Mr. Bagshawe, jun.*, for the plaintiffs.—The articles of association give no specific power to the company to mortgage, and the shareholders had no power at a general meeting to give the directors authority for that purpose. The execution of a deed by a limited number of the partners is not binding on the company, because, if so, it would stop the business of the concern, and the acts of the majority do not bind the minority. They cited—

The Athenæum Life Assurance Company v. Pooley, 4 Jur. N.S. 371.

Ernest v. Nicholls, 6 H.L. Cas. 401.

Re the Worcester Corn Exchange, 3 De Gex, M. & G. 180; s.c. 22 Law J. Rep. (N.S.) Chanc. 593.

Greenwood's case, Ibid. 459; s.c. 23 Law J. Rep. (N.S.) Chanc. 966: reversing 2 Sm. & G. 95.

The Joint-Stock Companies Act, 1856, ss. 34, 35.

Wood, V.C., without hearing a reply.—It is plain, upon the face of the 55th clause of the articles, that the powers given to the directors are every power which the company could exercise at a general meeting, and which they are not strictly required, either by the Joint-Stock Companies Act or by this deed, to assemble the company for. The only question, therefore, is, whether the company had or had not power to raise by mortgage the money which they required for the purposes of their business. The act complained of is this: the company being in want of a sum of money for the purposes of their business, application is made to the bankers, who being already creditors of the company, require security for the advance. The question is, might not the bankers stipulate that they should have a mortgage on the assets, and might not the company consent to that stipulation? It was first argued, that the company could not do it, because the majority had no power to bind the minority, the case being argued as if it were one of ordinary partnership, but the case of a joint-stock company differs from that of an

ordinary partnership, inasmuch as it is a corporate body, and it is clear that, with regard to everything which is within the powers of the company, the majority have full power to deal with the assets of the company in order to carry on their affairs, and to bind the minority. The next question is, can the acts complained of be considered a legitimate exercise of the powers of the company, they being shipowners, and not dealers in ships? I cannot see why it should not be within their ordinary province to raise money by mortgage of their ships, either for the purpose of buying new ships or paying creditors. And if the company had the power the directors had the power, for I find that the company transferred to the directors every power which they themselves as a body had. It is not unworthy of notice that, though there appears no clause directing the mode in which money is to be raised, there is nothing which directs all the operations of the company to be carried on with ready money, and, therefore, a natural observation arises that where there is nothing said with regard to the borrowing of money, it is one of those things which are within the province of the directors. Neither the articles of association, nor the Joint-Stock Companies Act require a mortgage to be authorized by a general meeting, and it is, therefore, not within the exception in clause 55. of the articles of association. The meaning of the special resolution at the general meeting of August 1857 seems to be this: that whereas you, the directors, have certain powers which enable you to raise money for the purposes of the company, we now give you this particular power of raising 50,000*l.* by the issue of debentures and the assignment of the whole of the company's vessels, which is a very different thing from the power of dealing with single vessels, and one which no prudent directors would exercise without some special authority. Coming, therefore, as I do, to the conclusion that the company had this power, and that whatever the company could do the directors could do, subject only to the controul of a general meeting, I consider that the directors had full power to mortgage this vessel, and the demurrer must be allowed.

LOKDS JUSTICES. }
June 11, 12, 26. } TUCKER v. LOVERIDGE.

Portions—Raising Portion before the stated Time—Conversion—Real and Personal Estate—Loan of settled Money to Settlor.

*By a voluntary settlement a father covenanted with trustees that his heirs, executors, or administrators should, within six calendar months after his death, pay to them 10,000*l.* if he should die in the lifetime of his only daughter, C. H. T, who was then an infant and unmarried; and he charged his real estates with the same. The trusts were declared to be for investment and payment of the interest to C. H. T. for life, with ulterior trusts for her children; if none attained twenty-one, to hold the money as part of the settlor's personal estate. The settlor borrowed money on mortgage of his real estates, and out of the money paid the trustees of the settlement the 10,000*l.*, and they executed a release. The trustees lent part of the 10,000*l.* to the settlor on a mortgage of his real estate; the remainder they lent upon mortgage to other persons. The settlor, by his will, gave his personal estate to his wife, and his real estate to trustees in trust for his wife for life, with successive life estates to other persons, and an ultimate remainder over. He died leaving his wife and daughter surviving, and the latter died an infant and without having being married:—Held, affirming a decision of one of the Vice Chancellors, that the whole 10,000*l.* was personal estate.*

This was an appeal from a decision of Vice Chancellor Stuart.

The case was decided on the petition of the plaintiff, Mrs. Tucker, the widow of Mr. William Tucker, and the defendants were the trustees of that gentleman's will, certain tenants for life under his will, and other persons. The facts were that by an indenture dated the 23rd of June 1849, made between Mr. Tucker of the one part, and C. W. Loveridge and H. B. S. King, of the other part, after reciting that he was desirous of making a provision for the benefit of his daughter, Catherine Helen Tucker, the only child of the said William Tucker by his wife, Mr. Tucker covenanted

with the said trustees to pay to them 10,000*l.* with interest at 5*l.* per cent. in case his daughter should attain the age of twenty-one years, or should marry under that age in his lifetime; and further, that in case he should depart this life in the lifetime of the said C. H. Tucker, and before she should have attained the age of twenty-one years, or should have previously married, then the heirs, executors or administrators of the said W. Tucker, should, within six calendar months after such decease of the said W. Tucker, pay or cause to be paid, to the trustees for the time being, the said sum of 10,000*l.* and interest thereon at the rate aforesaid, from the day of the decease of the said W. Tucker until actual payment; and he thereby subjected and charged his real estates with payment of the same. The indenture empowered the trustees, at their discretion, to lay out and invest the sum of 10,000*l.* in the public funds, or at interest upon government or real securities, and to apply the income, or such part as they should think fit, during the minority and discoveriture of C. H. Tucker, for her maintenance; and after she should have attained the age of twenty-one years, or marry, upon trust for her during her life; and after death, upon certain trusts for the benefit of her children. It was also declared that if there should be no child of C. H. Tucker who should attain twenty-one, or marry, the trustees should stand possessed of the trust funds, or so much thereof as should not have become vested or have been applied under any of the trusts or powers therein contained, in trust as part of the personal estate of the said W. Tucker, and to be paid over, transferred and assigned accordingly.

W. Tucker made his will, dated the 23rd of February 1855, and appointed Mr. Loveridge and two other persons (all of whom were defendants) executors and trustees of the same; and after various specific legacies he gave and bequeathed all the rest and residue of his personal estate and effects, of what nature and kind soever, and wheresoever situate (except chattels real, if any) to his wife absolutely; and he appointed his messuages, lands and hereditaments in the parishes mentioned, and all his real estate, to his trustees, upon trust as soon as might

be after his decease, by mortgage of all or any part, to raise such monies as should be required for the payment of his funeral and testamentary expenses, debts and the legacies given by his will; and he declared that his funeral and testamentary expenses, debts and legacies, should be payable out of the monies to be raised by mortgage as aforesaid in absolute exoneration of his personal estate; and he directed that his trustees should stand possessed of the real estates, in trust for his wife for her life, with remainder to others of the defendants for successive life estates in certain events, with ultimate remainder in manner therein mentioned.

The testator died on the 11th of March 1855, without having altered his will, which was proved by the executors. C. H. Tucker survived him only four months and two days, and she died on the 13th of July 1855, an infant under twenty-one years of age, without ever having been married.

This bill was filed by the testator's widow against the executors and trustees of the will, and the persons entitled in remainder, subject to the plaintiff's life estate, praying that the trusts of the will might be performed, for general administration, for inquiry as to his real estates, and for payment thereof of the testator's debts, funeral and testamentary expenses.

The chief clerk of Vice Chancellor Stuart, by his certificate, dated the 18th of March 1858, found that the estates so charged with the payment of the 10,000*l.* were mortgaged by the testator to the Atlas Insurance Company, to secure a sum of 38,000*l.* borrowed by him. The indenture of mortgage was dated the 6th of October 1849, and it was alleged that the sum lent was increased by 10,000*l.*, which sum was paid over to the trustees, in order to make the insurance company's the first charge on the estate. 10,000*l.* was accordingly paid over to the trustees, and they subsequently advanced to Mr. Tucker 2,500*l.*, to Mr. Bullen 3,500*l.*, and to Mr. Loveridge 2,000*l.* on a mortgage of tithes, and at a still later date a further sum of 2,000*l.* to Mr. Tucker himself. One of the securities was created by deed and under seal. The particulars of the several securities are adverted to in the judgment of Lord Justice Knight Bruce.

The case now came before the Court on the petition of the plaintiff in the suit, who sought a declaration that she was entitled to the sum of 10,000*l.* as part of the testator's personal estate.

The Vice Chancellor having made an order according to the prayer of the petition, such of the defendants as were entitled to the real estate after the death of the plaintiff appealed.

Mr. Malins and *Mr. Osborne*, in support of the appeal, contended, that if the money had not been accidentally raised by the testator himself in his lifetime, payment could not, in the circumstances of this case, have been compelled at all; for, on the most adverse construction, the sum was not to be raised until six months after the testator's death, before which time the daughter had herself died, unmarried and under twenty-one. As it was, the event was gone on which the sum was to be raised. The real estate was charged only in aid of the personal covenant, and at the testator's death no obligation existed. Again, it was only by the accident of the daughter being a minor that the money was raised at all; for if that had not been so, the *cestui que trust* would have joined, and the 10,000*l.* would have been postponed to the mortgage to the Atlas Insurance Company. They cited the following cases:—

Chaplin v. Horner, 1 P. Wms. 463.

Dickenson v. Dickenson, 3 Bro. C.C. 19.

Godsal v. Webb, 2 Keen, 99; s. c. 7

Law J. Rep. (N.S.) Chanc. 103.

Evans v. Scott, 1 H.L. Cas. 43.

Mr. Bacon and *Mr. Hanson* supported the Vice Chancellor's decision, relying on *Hardey v. Hawkshaw* (1), and *Barham v. the Earl of Clarendon* (2).

Mr. F. J. Wood, for the trustees.

Mr. Osborne, in reply, referred to *Leckmere v. the Earl of Carlisle* (3).

JUNE 26.—LORD JUSTICE KNIGHT BRUCE.
—As to the 2,000*l.*, part of the 10,000*l.* in question on this appeal (I mean the 2,000*l.*

(1) 12 Beav. 552.

(2) 10 Hare, 126; s. c. 22 Law J. Rep. (N.S.) Chanc. 1057.

(3) 3 P. Wms. 211.

advanced in December 1852 to Mr. Love-ridge on the security of the tithes of Broad Windsor), the title of the plaintiff, the legatee of the personalty of the testator Mr. Tucker, is very plain and clear. The appellants' claim to the residue, or, at least, to a portion of the residue of 10,000*l.* was arguable. Notwithstanding, however, that the daughter of the testator had, very possibly, a right to say that the charge created by the original settlement, the deed of the 23rd of June 1849, in her favour upon his real estate was not moved or affected during his lifetime (at least in equity), I am apprehensive, indeed I am of opinion, that he was bound by all the deeds which he appears to have executed; probably by the instrument not under seal, dated the 26th of October 1853, also bound, I mean equitably as well as legally, so long at least as that right, if she had it, was not exercised by her or on her behalf, which it never was. She survived him and died a minor, without having been married, so that if none of the instruments not testamentary, which were intermediate between the original settlement of the year 1849 and his death, had existed, his widow, the plaintiff, would have been, I suppose, wholly wrong in her contention as to the 10,000*l.* These transactions have, I apprehend, made an important difference. The 4,500*l.* secured by the deeds of the 7th of October 1852 and the 27th of April 1853 on the testator's real property did not, I think, become absolutely or conditionally or contingently merged in his real estate. That sum was, at and before the time of his death, a debt from him in which he had in equity an interest, but only a limited interest while he was living. It was at the time of his death, and immediately before and immediately after that event uncertain, humanly speaking, whether his daughter would marry or attain her majority, and whether she would become absolutely entitled to the capital. Nor was it possible, in my opinion, for him immediately before his death, or for his successors in his real estate afterwards, to say that the 4,500*l.* stood merely on the footing on which the 10,000*l.* would have stood if none of the deeds subsequent to the original settlement of 1849 had been executed, and the instrument not under seal, dated the 26th of October 1853, had not existed. If the appellants' case can-

not, as I think it cannot, be supported as to the 4,500*l.*, it must, I conceive, and possibly *à fortiori*, fail as to the 3,500*l.* advanced in October 1852 to Mr. Bullen, notwithstanding the instrument not under seal, dated the 26th of October 1853, which does not appear to me to prejudice the plaintiff's title. Therefore, although the case is perhaps a hard one, I must hold that the appeal entirely fails.

LORD JUSTICE TURNER.—This is a question whether the sum of 10,000*l.* in dispute between the parties, or any portion of that sum, belongs to the devisees of the real estate of W. Tucker, the testator in the cause, or whether the whole of that sum belongs to the testator's widow, the legatee of the personal estate. The Vice Chancellor, Sir John Stuart, has decided that the whole of the sum belongs to the testator's widow, and the parties interested in the real estate have appealed from that decision.—[After a statement of the settlement and the facts of the case his Lordship proceeded]—Several points were urged, on the part of the appellants, in support of their claim to have the whole 10,000*l.* considered as belonging to the real estate of the testator. It was said, on their part, that C. H. Tucker not having married and not having attained the age of twenty-one, the trust of the deed of covenant under which the 10,000*l.* was to become part of the testator's personal estate never arose; that the trusts of the deed having come to an end before the expiration of six months from the testator's death, the payment of the 10,000*l.* could not have been compelled; and, further, it was said that the release of the trustees did not discharge the estate from the 10,000*l.*, but that C. H. Tucker, had she survived and become entitled, could have resorted to the estate for payment of that sum, and that the 10,000*l.* was put into the hands of the trustees only for the convenience of the mortgagees. None of these arguments seem to me to touch the question before us. The question is between the real and personal estate of the testator. The 10,000*l.* was raised from the real estate, and in any view of the case it must, as I think, have become part of the personal estate. It must have become

so under the trusts of the deed if those trusts took effect, and if not, it must, as I apprehend, have become so under a resulting trust. It could not, as it seems to me, have been less part of the personal estate, because the testator may not have been compellable to pay it, or because the estate charged with it may not have been well discharged, or because it may have been lodged with the trustees for the convenience of the mortgagees. The arguments on this point on the part of the appellants, when followed out to their legitimate consequences, would, I think, require us at least to assume that if the claim for the 10,000*l.* under the covenant had come to an end in the testator's lifetime, he would have required that sum in the hands of the trustees to be applied in discharge of the mortgage which he had created for the purpose of raising it; but I can find no authority, and I can find no principle which would warrant us in making that assumption. The appellants' case, therefore, in my opinion, entirely fails as to the whole sum of 10,000*l.*, but then it appears that the trustees lent to the testator on mortgage 4,500*l.*, part of the 10,000*l.*, in their hands; and it is contended, on the part of the appellants, that this 4,500*l.* ought to be considered to belong to the real estate. It was said, on the part of the appellants, that this sum was, to use the language of the cases, "at home." It never was, however, at home in the testator's lifetime, for up to the time of his death the trustees had an undoubted right to call for the payment of it; and I apprehend, that as between the appellants and the widow, no right of any third party intervening (I think that a very material point), the rights must stand as they stood at the time of the testator's death. Besides, the observations which have been made as to the assumption with respect to the mode in which the testator would have required the 10,000*l.* to be dealt with, seem to me to apply equally to this sum of 4,500*l.* The appellants' argument as to 3,500*l.*, which the testator directed to be applied in discharge of the mortgage to the Atlas for that amount, stands, I think, upon the same footing, for upon that payment being made the Atlas mortgage was to be assigned to the trustees. I am of opinion, therefore, that this appeal must be dismissed,

and, I think, it should be dismissed with costs.

An arrangement was ultimately made regarding costs, that if the appellants would not carry the case to the House of Lords they should take their costs out of the fund.

KINDERSLEY, V.C. { *In re* THE WARWICK
March 30. { AND WORCESTER
RAILWAY COMPANY.

*Winding-up Acts—Inchoate Company—
Liability of Shareholders—Statute of Limitations.*

A railway company having been projected in 1845, 700 persons signed the subscribers' agreement and parliamentary contract, by which it was stipulated that the majority of the managing committee should have power to bind all the members as to payment of solicitors and others employed by them. No act of parliament was obtained, and this inchoate company amalgamated with two other companies in the same position, at which time it was agreed that a specific sum should be set apart for payment of the expenses incurred by the original company.

The solicitors of this company, who had been employed by the committee of management, applied to the amalgamated company for payment of their bill of costs. The liability was denied, and upon the winding up of the company in 1849, the solicitors carried in their claim before the Master. No decision having been then come to, the matter stood over, and the solicitors after the expiration of six years sought for payment of their debt from the general body of shareholders, the fund set apart upon the amalgamation having been already expended:—Held, that all the members of the inchoate company who had signed the subscribers' deed and parliamentary contract were liable for the debt, and that as the claim had been carried in before the Master within six years, the solicitors were not barred by the Statute of Limitations.

This was a motion to discharge an order made by the Master upon the winding up of the Warwick and Worcester Railway

Company, by which he had disallowed a claim carried in by the solicitors, Messrs. Wright, Handbury & Pidcock, to the amount of 4,433*l.* for costs incurred respecting the company. The scheme was projected in 1845, and in October of that year the subscribers' agreement and parliamentary contract were signed by all the shareholders, amounting in number to 700. By one of the clauses contained in the subscribers' agreement it was provided, "That the committee of management should be fully indemnified against and in respect of all contracts, arrangements, acts and things whatsoever by them in pursuance of the powers and provisions of these presents, entered into, made, done and authorized." They were thereby empowered to retain and reimburse themselves respectively out of the funds of the company, all losses, costs, damages and expenses which they respectively might incur or be put to, in or about or incident to all such contracts, arrangements, acts and things." By the parliamentary contract of the same date as the subscribers' agreement, it was declared "that the majority of the members of the general committee of management for the time being present at any meeting of such committee, consisting of not less than five members, should have power to bind all present as well as absent members of the said committee, as also the general body of subscribers; and the said several persons parties to those presents, for themselves severally and respectively, and for their several and respective heirs, executors, administrators and assigns, did thereby undertake and agree that, in the event of the then intended application to parliament not being successful, the said parties to those presents should and would well and truly bear, pay, allow and discharge all the expenses which should have been incurred, previously to or after the execution of those presents, in or about or with a view to the establishment or promotion of the said undertaking, whether in or about the making, obtaining or completing of any surveys or estimates for the said then intended railway, branches and works, or any of them, or on account of any solicitor's charges, counsel's fees, costs of preparing for, soliciting or procuring any such

act as aforesaid, travelling expenses and all other costs and charges of every description incident or preparatory to the proposed undertaking; all such expenses, costs and charges to be computed and assessed rateably on the amount of the sums respectively subscribed by each of the several parties to those presents."

No act of parliament was ever obtained by this company. In January 1846 an amalgamation was formed by the Warwick and Worcester Company with two other inchoate companies, the Rugby, Warwick and Worcester Company and the Worcester, Warwick and Rugby Company, and upon the amalgamation a deed was executed by the managing committees of all three companies, which contained a recital that 39,049*l.* 10*s.* had been received by the Warwick and Worcester committee; that their expenses up to the 1st of January 1845 amounted to 24,049*l.* 10*s.*; that the sum of 49,056*l.* had been received by the Rugby, Warwick and Worcester committee, and that their expenses amounted to 22,056*l.*; that the sum of 44,100*l.* had been received by the Worcester, Warwick and Rugby committee, and that their expenses amounted to 17,000*l.* By that deed it was agreed that the then companies should be amalgamated into one, having for its object the construction of a railway from Rugby through Warwick to Worcester. The Warwick and Worcester Company contributed 15,000*l.* to the funds of the amalgamated company, and the other two companies 27,000*l.* The sum of 24,049*l.* 10*s.* was deducted for the payments made and expenses incurred by the Warwick and Worcester Company, and it was by the said deed agreed that all costs, charges and expenses which had been incurred prior to the 1st of January then instant by the said several amalgamating companies respectively, should be borne and paid by them respectively, as to the said Warwick and Worcester Railway Company, by and out of the said sum of 24,049*l.* 10*s.* retained by such company as aforesaid.

Messrs. Wright and Messrs. Bedford & Pidcock had acted as the joint solicitors to the Warwick and Worcester Railway Company from its original projection up to the time of the amalgamation, and upon the order being made for winding up the

amalgamated company in 1849 they applied for payment of their bill of costs, and claimed a lien in respect of such bill upon the money reserved for the expenses of the Warwick and Worcester Company. In February last the matter came on for discussion before the Master, who decided that Messrs. Wright and Messrs. Bedford & Pidcock were not entitled to enforce their claim, on the ground that they had not within a reasonable time made it, upon the parties holding the 24,049*l.* 10*s.*, out of which their costs were to have been paid, but had allowed them to expend the money in the payment of other charges upon the company, and that the company were consequently absolved from any obligation to satisfy the claim.

Mr. Baily and *Mr. Lewis* now moved to discharge the Master's order.

Mr. Glasse and *Mr. Roxburgh* opposed the motion for the official manager, on the ground that the provisional committee who employed the solicitors were the only persons liable and not the shareholders generally. The remedy was against the actual debtors, who were the persons who gave the orders to the solicitors and employed them. The committee might have their remedy over from the shareholders, but in the first instance they were the only persons liable. It was also contended that the claim was barred by the statute.

The following cases were cited:—

Terrell v. Hutton, 4 H.L. Cas. 1091.

Wryght's case, 21 Law J. Rep. (N.S.) Chanc. 807; s. c. 2 De Gex, M. & G. 636; 22 Law J. Rep. (N.S.) Chanc. 183; 5 De Gex & Sm. 244.

Barton v. Hutchinson, 2 Car. & K. 712.

Hutchinson v. Surrey Gas-Light Association, 21 Law J. Rep. (N.S.) C.P. 1; s. c. 11 Com. B. Rep. 689.

Taylor v. Crowland Gas-Light Company, 23 Law J. Rep. (N.S.) Exch. 254; s. c. 24 Law J. Rep. (N.S.) Exch. 233.

Payne v. New South Wales Coal Company, 24 Law J. Rep. (N.S.) Exch. 117.

In re India and Australia Mail Steam-Packet Company, 18 Law J. Rep. (N.S.) Chanc. 390; s. c. 17 Sim. 25.

KINDERSLEY, V.C.—There is nothing more unsatisfactory than to have to decide questions on this part of the law relating to the winding up of joint-stock companies, namely, the application of the law to incorporate companies, or in other words, associations endeavouring to form a company, and not succeeding in doing so. It is, I say, extremely unsatisfactory to have to apply to such cases the provisions of acts of parliament which are wholly inapplicable in their nature and terms to these cases. We are obliged, however, to do the best we can, and endeavour to work out that which we suppose the legislature intended. Now, in such a case as the present, and all other similar cases, there is no company properly so called; that is, we have here only a number of persons endeavouring and intending to form a company, for which it is necessary to go to parliament for an act. Here there were a great number of persons combining and co-operating for the purpose of obtaining the act of parliament, which they failed in doing. No doubt, where there are a number of persons who in that sense form an association, some of them may employ Mr. A. as their solicitor, and be liable to him; others of them may employ Mr. B. as their engineer, and be liable to him, and so on: and so different persons or different individuals, or the body at large, may be liable to different creditors. And no doubt that is different from a case in which there is a formed company who have employed the solicitor or engineer, where a debt would be due from the company to the creditors. But what I should observe is, that whenever an association of that sort is formed, every member of that association who concurs in employing the individual incurs the debt; and if every member of the association does so concur, there is a debt due from the association. There is then no individual who can say, "I did not concur in the different appointments"—the appointment of a solicitor or the employment of an engineer. If every one of them has actually concurred and signed the paper by which the solicitor and the engineer were appointed or employed, or in any other way given their assent to it, then there is a debt due from the association at large, that is, from

every member of it. Now, what have we here? We have a number of persons who in October 1845 all concurred in executing the two deeds, one of which was the subscribers' contract, and the other was the parliamentary contract. By the subscribers' contract they entered into certain arrangements by which they stipulated that they would indemnify the promoters or directors against any liability they incurred, and they made certain provisions which are perfectly immaterial to the present question. But in the parliamentary contract there is a clause to this effect:—"It is hereby declared"—now every member of the association signs the instrument and seals it too—"it is hereby declared that the majority of members of the general committee of management"—I should observe, that it is a committee of management for carrying into effect the object of this association, and it is declared—"that the majority of members of the general committee of management for the time being present at any meeting of such committee, consisting of not less than five members, shall have power to bind all present as well as absent members of the said committee, as also the general body of subscribers." So that so far, whatever act is done by the committee of management at any meeting at which five members are present, their act is to bind all the subscribers, that is, every individual member of the association. And then it goes on: "The said several persons parties to these presents, for themselves severally and respectively, and for their several and respective heirs, executors, administrators and assigns, do hereby undertake and agree that in the event of the intended application to parliament not being successful, the said parties to these presents shall and will well and truly bear, pay, allow and discharge all the expenses which shall have been incurred previously to or after the execution of these presents, in or about or with the view to the establishment or promotion of the said undertaking, whether in or about the making, obtaining or completing of any surveys or estimates for the said intended railway, branches and works, or any of them, or on account of any solicitor's charges, counsel's fees, costs of preparing, applying for, soliciting or pro-

curing any such act as aforesaid, travelling expenses and all other costs and charges of every description incident or preparatory to the proposed undertaking; all such expenses, costs and charges to be computed and assessed rateably on the amount of the sums respectively subscribed by each of the said parties to these presents." Now, what has happened? Previously to this deed several gentlemen had been appointed by the promoters to be the solicitors to the society, that is, the parties who were endeavouring to form the company. That was before the deed was executed. They continued to give their services, and then this deed is executed; and the same gentlemen remained as the solicitors of the association, and were authorized to continue to be solicitors by this general committee of management, and they so continued until the beginning of the following year. Now, as I understand it, the charge or claim which these gentlemen make, consists of remuneration for their services prior to this deed of October 1845, and partly—or in fact, as it is represented to me, mainly—for services rendered subsequently. Now, that being the case as to the expenses incurred, and the costs which were incurred subsequently to the date of the deed, I cannot conceive there can be a doubt about it. Here we have an association of persons who all agree that whatever is done by the committee of management shall bind them all, and they will bear all the costs and expenses and everything relating to the matter in every form or shape. Then this committee continues the employment of the solicitors, and on the faith of that employment the solicitors continue to act. Then I am told that this association does not owe their solicitors a single farthing. It is impossible to conceive on what grounds they can escape. If it had been merely A, B, and C, being partners, having employed a solicitor, and there had never been any agreement by other persons that they should bear the expenses, then it must be admitted that the liability would have been exclusively the liability of these parties. But here we have what was wanting in *Wryghtie's case* and the other cases. We have the actual agreement by every individual contributory—that is, every person

and partner in the association—concurring in the effort to form the company; every one agrees that whatever is done by their committee of management—which includes, of course, the continuing to employ solicitors—shall be binding upon all, and they will bear the expenses; therefore, as to what was incurred subsequently to this deed, it appears there cannot be the least doubt about it. Then the observation and the principle applied by Lord St. Leonards in that case, in the House of Lords, applies here, that the employment of these gentlemen by the committee of management was a mere continuation of that which had been previously done by the promoters, and it is included expressly in this agreement as binding all parties that they should bear the expenses. It appears to me that no distinction can be drawn between the costs incurred prior to the date of the deed and the costs incurred subsequently to the date of the deed. I am, therefore, of opinion that there is in that sense, in the language and the intention of the legislature, a debt. I am not saying to what amount, whether it is 5*l.* or 50*l.*, or 100*l.*, or 500*l.*, or 5,000*l.*—that I have nothing to do with at present; but what I say is, there is a debt. It is admitted that at the time when these gentlemen ceased to be employed there was a debt due to them, and they say that that debt, unless barred by the Statute of Limitations, or barred by the conduct and negligence of the parties, would have been proved before the Master, and allowed by him.

Then, it is said that the debt, in the first place, ought not to be allowed as a claim against this company, because, shortly after the date of the deed—that is, shortly after the beginning of 1846—this company became amalgamated with two other companies, and by arrangements made among those three companies—each having had contributions paid by their subscribers—it was provided, that what each had received should be applied in paying their own particular past expenses, and the residue should be brought into the general fund of the amalgamated companies; and among the rest, this company having received 39,000*l.* from its subscribers, 24,000*l.* was to be applied by the committee of management or governing body, in paying past

expenses. So the 24,000*l.* was to pay the past expenses, including the expenses incurred by the appointment of these solicitors; and it was contended that these solicitors had lost their right, because they had not insisted upon being paid out of that 24,000*l.* Now, I assume that they were perfectly cognizant of this 24,000*l.* being in the hands of the committee of management—it is said that they were not cognizant of it until the following year. That appears to me to make no difference; this is the act of their debtors, by which their debtors contribute from their own means a certain sum to pay their debts. Then is the creditor barred by laches, because he does not say, "I will come upon that particular 24,000*l.*, or call upon the parties to pay me"? If it had been that the only persons legally liable to the creditors had been certain promoters or particular committeemen, and they had nothing more than a right of indemnity over against the individual members, then, indeed, the individual members would have a right to say, "We indemnified you, it is true, but we released ourselves from that because we put into your hands 24,000*l.* for the purpose of paying the debts." And the right in that case would be only against the persons who employed him. But that is not the case here, because every individual member has concurred in the employment.

Then it is said that the Statute of Limitations applies. Now, it appears to me that that decision of Vice Chancellor Wood is directly in point here; that was a case where, within the six years, a creditor came in and offered proof of his debt, but by reason of the change of Masters, or for some other reason, the matter was never brought before the Master for his opinion to be expressed upon the subject until after six years had expired, and Vice Chancellor Wood decided that in that case the Statute of Limitations did not apply; and I think very justly, because it would be extremely unjust and unreasonable that a creditor should be prevented by the act from suing at law, or bringing any action until he has proved his debt. The 74th section is this: "The creditors of the company making proof of their respective debts or demands before the Master shall make proof thereof by deposition or affidavit in

the same manner in all respects as is now allowed in bankruptcy. Provided, nevertheless, that it shall be lawful for the Master to allow or direct the proof of such debts or demands, or any of them, to be made by the official manager, or by the claimant, in such other form and in such other manner as he shall think fit." It appears to me that the intention of the legislature was this: to require the matter to be brought to the notice of the Master, and when once he had expressed an opinion about it, whatever that opinion might be—whether favourable or unfavourable, allowing the debt or rejecting it, or allowing it to stand over, or whatever else might be the case—then the creditor was no longer bound to abstain from suing, but might bring his action. But until something has been done before the Master, something for the Master to express his opinion about—that is to say, whatever proof has been brought before him, something of the kind must be done, as it appears to me, before the creditor can bring his action. There the Vice Chancellor's view was most just, that it would be extremely unfair to have that provision, and at the same time to say that the Statute of Limitations was to run when the six years had altogether expired after the time when the winding-up order was made. I think, therefore, that the debt ought to be allowed as a debt against this company, if I may call it so, or against this association.

KINDERSLEY, V.C. { SUTTON v. THE MAYOR
March 30. AND ALDERMEN OF
 NORWICH.

Public Health Act—Local Board of Health—Power of making Deposit-beds.

A local board of health has no power, under the Public Health Act, 11 & 12 Vict. c. 63, to enter upon land without the consent of the owner for the purpose of making reservoirs and deposit-beds for retaining the sewage; and the Court granted an injunction to restrain such a proceeding.

The bill stated that by the Public Health Act, 11 & 12 Vict. c. 63, the local board of health for the city of Norwich had cer-

tain powers given them for making sewers, drains, &c. Under these powers the board proposed to construct a sewer on the north side of the city, for the purpose of draining all that portion of it; and the land through which the drains were to run included a strip of land used as a public footpath on the bank of the river Wensum, and which piece of land was vested in the plaintiff, Mrs. Sutton, as tenant for life.

In carrying into effect the object of the board a surveyor had been employed, and in pursuance of his report a notice had been served upon the plaintiff that the sewer in question was about to be constructed, by the board of health, under the powers of the act.

It appeared that the intention of the board was to widen the sewer at its termination, so as to form a reservoir for solid sewage, to be collected there, and afterwards disposed of as manure.

The plaintiff objected to this course, and the result was, that this bill was filed for an injunction to restrain the defendants (who represented the local board of health), their agents and workmen, from making on the land in question the tank or reservoir delineated on the plan, and called deposit-beds, or any work whereby any portion of the sewage might be collected or retained on any part of such land.

The sections of the Public Health Act applicable to this case were the 43rd, 44th, 45th, 46th and 145th.

Section 43.—“That all sewers, whether existing at the time when this act is applied, or made at any time thereafter (except sewers made by any person or persons for his or their own profit or for the profit of proprietors or shareholders, and except sewers made and used for the purpose of draining, preserving or improving land under any local or private act of parliament, or for the purpose of irrigating land, and sewers under the authority of any Commissioners of Sewers appointed by the Crown), together with all buildings, works, materials and things belonging or appertaining thereto, shall vest in, belong to, and be entirely under the management and controul of the local board of health.”

Section 44.—“That the local board of

health may, if they shall think fit, purchase the rights, privileges, powers and authorities vested in any person for making sewers, or contract for the use of any sewers within their district, or purchase any such sewers, with or without the buildings, works, materials and things belonging or appertaining thereto; and any person to whom any such rights, privileges, powers, authorities, sewers, buildings, works, materials or things belong, may sell and dispose of the same to or otherwise contract with the said local board; and in case of any such sale, the purchase-money shall be settled and applied to the same uses and trusts to which the property purchased may have been subject at the time of such sale, and the property purchased shall vest in and belong to the local board of health purchasing the same, anything to the contrary notwithstanding: Provided always, that notwithstanding any such purchase, any person who previously thereto may have acquired perpetual right to use any sewer so purchased shall be entitled to use the same, or any other sewer substituted in lieu thereof, in as full and ample a manner as he would or might have done if such purchase had not been made.”

Section 45.—“That the local board of health shall from time to time repair the sewers vested in them by this act, and shall cause to be made such sewers as may be necessary for effectually draining their district for the purposes of this act; and the said local board may carry any such sewers through, across or under any turnpike-road, or any street or place laid out as or intended for a street, or under any cellar or vault which may be under the pavement or carriage-way of any street, and after reasonable notice in writing on that behalf (if, upon the report of the surveyor it should appear to be necessary), into, through or under any lands whatsoever; and the said local board may from time to time enlarge, lessen, alter, arch over or otherwise improve all or any of the sewers vested in them by this act, and discontinue, close up or destroy such of them as they may deem to have become unnecessary: Provided always, that the discontinuance, closing up, or destruction of any sewer shall be so done as not to

create a nuisance; and if by reason thereof any person is deprived of the lawful use of any sewer, the said local board shall provide some other sewer as effectual for his use as the one of which he is so deprived."

Section 46.—"That the local board of health shall cause the sewers vested in them by this act to be constructed, covered and kept so as not to be a nuisance or injurious to health, and to be properly cleared, cleansed and emptied; and for the purpose of clearing, cleansing and emptying the same, they may construct and place, either above or under ground, such reservoirs, sluices, engines and other works as may be necessary, and may cause all or any of such sewers to communicate with and be emptied into such places as may be fit and necessary, or to cause the sewage and refuse therefrom to be collected for sale for any purpose whatsoever, but so as not to create a nuisance."

Section 145.—"It is declared and enacted that nothing in this act shall be construed to authorize the local board of health to use, injure or interfere with any sluices, flood-gates, sewers, groynes, sea defences or other works already or hereafter made under the authority of any Commissioners of Sewers appointed by the Crown, or any sewers or other works already or hereafter made and used for the purpose of draining, preserving or improving land under any local or private act of parliament, or for the purpose of irrigating lands, or to use, injure or interfere with any watercourse, stream, river, dock, basin, wharf, quay or towing-path in which the owner or occupier of any lands, mills, mines or machinery, or the proprietors or undertakers of any canal or navigation, shall or may be interested, without consent in writing first had and obtained; and that nothing herein contained shall prejudice or affect the rights, privileges, powers or authorities given or reserved to any person under any local or private act of parliament for the drainage, preservation or improvement of land, or for or in respect of any mills, mines, machinery, canal or navigation as last aforesaid."

Mr. Glasse and Mr. Bird, in moving

for the injunction, contended, on behalf of the plaintiff, that, under the above sections of the act, the local board had no power to make any reservoir or cesspool without the sanction of the owner of the land. Whatever powers the board might have for making drains and sewers without the consent of persons interested, they could not make reservoirs for retaining the sewage. Even if they had power to make a reservoir for the purpose of cleansing the sewers or drains, that certainly was not the intention here, but the plan of the board was to have a cesspool to collect the deposit for subsequent sale. It appeared that this land was very valuable for the purpose of erecting buildings; but this question was not of any consequence, since, if the board had no power to carry out their intention under the sections of the Public Health Act, the plaintiff would be entitled to the injunction prayed.

Mr. Baily and Mr. Thring, for the defendants, submitted that the proposed reservoir was no more than a sewer widened, and it came within the terms of the act. The 46th section, however, gave the board power to make reservoirs for collecting the sewage, and the reservoir now proposed was strictly within the terms of that section.

The following cases were cited:—

Oldaker v. Hunt, 6 De Gex, M. & G. 376.

Frewin v. Lewis, 4 Myl. & Cr. 249.

Tinkler v. the Wandsworth Board of Health, ante, 342.

Mr. Glasse, in reply.

KINDERSLEY, V.C.—There is no doubt about the principles governing these cases, but the difficulty is the application of them. In the present case there is this additional ingredient, that is, the putting a construction upon an act of parliament. There is no doubt that the piece of land in question is capable of being built upon, although such a site might not be selected for any other purpose than wharfage. The question, however, is not material whether the land is or is not capable of being built upon, for the plaintiff has a right to say

that the local board shall not affect her land by stirring one step out of the exact limit prescribed by the act of parliament. That act must be taken to prescribe the power given to the board, and the motives which actuate the plaintiff are of no consequence. The language of the act is more or less difficult to construe.—[His Honour, after reading and commenting upon the sections already set out, continued:]—The word “drain,” as used in the act, evidently means a passage for sewage from a single house only, which may afterwards fall into a cesspool or larger sewer. The word “sewer” comes from the word to “sew,” i. e., to drain, and has a much more extended signification, embracing works on the largest scale, such as draining the fens of Lincolnshire, by means of canals, &c. In the common sense of the term, it means a large and generally, though not always, underground passage, for fluid and feculent matter, from a house or houses to some other locality; but it does not comprise a cesspool for the purpose of retaining the sewage, whether as a simple deposit or to be converted into manure or other useful purpose. The 45th section applies, first, to public ways, and then to all lands whatsoever, and gives power, without the leave of the owners, to carry sewers through their lands on giving notice. So far, there is no doubt, for the purpose of making a drain, supposing there is a sufficient surveyor’s report—which was clearly the case here—the defendants had a right to carry the sewer through the lands of Mrs. Sutton. Then comes the 46th section, which gives power to clear the sewers by means of reservoirs, sluices, &c. The question is, whether that section authorizes the local board to come *in invitum* upon the land of individuals without their concurrence, to make reservoirs and collect the sewage, &c. in the words of the section. It appears to me impossible to say that they can do that. That section applies only to keeping the sewers in a proper state so as not to create a nuisance, and for cleansing and emptying them, and for that purpose to make reservoirs, sluices, &c.; and it would be very unfair to construe that section so as to give the board the power of making a reservoir for the purpose of retaining the sewage,

which is the real intention here, and not to carry it off. It was said that they merely meant to enlarge the sewer, but the very fact of intercepting and retaining the sewage is inconsistent with such a plan. Under these circumstances, my opinion is that the injunction must be granted.

LORDS JUSTICES.

July 14, 15, 24,
26, 31.

HEDGES v. BLICKE.
HEDGES v. HARPUR.

Will—Construction—Bequest of Annuity, whether Perpetual or for Life—Vesting—“Die without Issue.”

A testator by his will bequeathed to each of his five daughters 400l. per annum, to be payable during their natural lives, and after their respective decease he gave the same to their children respectively, share and share alike, such children not to be entitled to more than their deceased parent’s share; and in case any or either of his daughters should die without issue, he directed such annuity to cease and fall into the residue of his estate:—Held, overruling a decision of the late Master of the Rolls, that the annuities given to the daughters and after their deaths to their children were perpetual, and not merely life annuities; also, that the words “die without issue” did not enlarge the gift to the daughters to an absolute gift; and also that no interest vested in the children of daughters who died in the lifetime of their parents.

This was an appeal from a decision of Lord Langdale, late Master of the Rolls, made in the year 1846 (1), in an administration suit. The testator in the cause, Mr. Thomas John Fentham, by his will, dated the 12th of September 1808, among other bequests made the following:—“I also give to each of my said five daughters 400l. per annum, to be payable half-yearly, during the term of their natural lives; and after their respective decease, I give the same to their children respectively, share and share alike, such children not to be entitled to more than their

(1) *Hedges v. Harpur*, 9 Beav. 479.

deceased parent's share; and in case any or either of my said daughters shall die without issue, then I direct such annuity to cease and fall into the residue of my estate." And the testator gave his residuary real and personal estate to trustees, upon trust for the benefit of his son, Thomas John Fentham, and his children, in manner therein mentioned, and in default of his issue, upon trust to pay the rents, issues, dividends and profits of the same hereditaments and premises and personal estate, unto and amongst his five daughters, share and share alike, as tenants in common, and not as joint tenants; and in case any of his said daughters should be then dead, leaving issue, such issue to be entitled to their deceased parent's share, to take as tenants in common, and not as joint tenants, with benefit of survivorship in case of no issue.

Other passages than those set out above were relied upon in the argument, as indicating the intention of the testator, and those passages, together with the arguments founded upon them, are dealt with by Lord Justice Turner in his judgment.

The testator died in December 1808, leaving his son, Thomas John Fentham, who died in 1843, without issue, and five daughters, namely,—1. Mary Ann Hedges, who died in 1857, leaving two children, who with their children, were the appellants on the present occasion; 2. Charlotte Hedges, who was still living, and who had one child, also an appellant; 3. Ann Bainbridge, who died in 1856, having had children, who all died in her lifetime; 4. Elizabeth Ball, who died in 1845, having also had children who died before her; 5. Penelope Milbourne, who died in 1853, without having had any issue.

In this state of circumstances, the Master of the Rolls had decided that, according to the true construction of the bequest in the testator's will contained, of the annuities of 400*l.* to each of his daughters and their children, each of the testator's daughters, Mrs. Mary Ann Hedges, Mrs. Charlotte Hedges, Mrs. Ann Bainbridge and Mrs. Penelope Milbourne, the plaintiffs (Mrs. Ball being dead), became entitled to an annuity of 400*l.* for her life, and that upon the decease of each of the plaintiffs, leav-

ing any child or children living at her decease respectively, the annuity of her so dying would vest in her child or children respectively, if more than one, equally to be divided between them for his, her, or their life or lives respectively only, and that upon the death of such child, the annuity or portion of the annuity so vested in him or her respectively, would fall into the residue of the testator's personal estate. Mrs. Ball being dead, without leaving issue, sufficient money to answer the four annuities was invested in consols to four separate accounts in trust in the cause. Since the date of and pursuant to the decree, the capital of the annuities of Mrs. Milbourne and Mrs. Bainbridge had been divided between the residuary legatees. Mrs. Mary Ann Hedges lately died, and her children and the children of Charlotte Hedges appealed from the decree at the Rolls, so far as regarded the two annuities to their mothers; and the petition was afterwards amended so as to include the annuities given to Mrs. Ball and Mrs. Bainbridge. The petition of appeal prayed a declaration, that according to the true construction of the will, the several annual sums of 400*l.* each were, subject to the respective life interests therein of each of the testator's daughters, perpetual annuities, determinable only as to the annuities of each such daughter upon her death without leaving a child or other issue her surviving; and that if necessary, such order might be made respecting the payment or distribution of the capital stock set apart for the payment of the annuities, as the Court should think fit.

The case, on appeal, was elaborately argued, the appellants' counsel contending that the capital of the annuities vested in them absolutely; while, for the respondents, the residuary legatees, and the administrator of one of them, it was insisted that the decision of the Master of the Rolls was correct, in declaring that the annuities to the children of the daughters was for life only.

Mr. Roundell Palmer and Mr. Dean,
in support of the appeal, cited—

Savery v. Dyer, Amb. 139.

Stokes v. Heron, 12 Cl. & F. 161.

Potter v. Baker, 13 Beav. 273 ; s. c. 15 Ibid. 489 ; 21 Law J. Rep. (N.S.) Chanc. 11.

Pawson v. Pawson, 19 Ibid. 146 ; s. c. 23 Law J. Rep. (N.S.) Chanc. 954.

Kerr v. the Middlesex Hospital, 2 De Gex, M. & G. 576 ; s. c. 22 Law J. Rep. (N.S.) Chanc. 355.

Mr. Lloyd and Mr. Hobhouse, for the respondents, relied on—

Innes v. Mitchell, 9 Ves. 212.

Brandon v. Brandon, 2 Wils. 14.

Robinson v. Hunt, 4 Beav. 450.

Blewitt v. Roberts, Cr. & Ph. 274 ; s. c. 10 Law J. Rep. (N.S.) Chanc. 342.

Yates v. Maddan, 3 Mac. & G. 532 ; s. c. 21 Law J. Rep. (N.S.) Chanc. 24 : reversing 16 Sim. 613 ; 18 Law J. Rep. (N.S.) Chanc. 310.

Lett v. Randall, 3 Sm. & G. 83 ; s. c. 24 Law J. Rep. (N.S.) Chanc. 708.

July 26. — LORD JUSTICE TURNER. — This is an appeal from an order in this cause made many years ago by the late Lord Langdale, when Master of the Rolls. The question which is raised by the appeal is, whether certain annuities, or annual sums of 400*l.*, given by the will of Thomas Fentham, the testator in the cause, to his five daughters for their lives, and after their deaths to their children, are given to the children for their lives only or in perpetuity. Lord Langdale held that the children took these annuities, or annual sums, for their lives only. The appellants insist that they were given to the children in perpetuity. Questions of this nature, like all other questions arising on wills, depend on the intention of the testator to be derived from the words of the will ; not of course, as I understand the law, that the decisions of the Courts are to be governed by the strict literal interpretation of the words, but in the sense that the Courts are to gather it, not by speculation or conjecture as to what the testator may have intended, but by a sound and reasonable construction of the words that he has used. In determining the question before us, we must therefore, in the first place, carefully examine the dispositions of this

will. The testator, after devising all his real and personal estate to trustees, and after making some specific bequests of a part of his personal estate not material to the present question, proceeds thus :—"I also give to each of my five daughters 400*l.* per annum, to be payable half-yearly, during the term of their natural lives ; and after their respective decease I give the same to their children respectively, share and share alike, such children not to be entitled to more than their deceased parent's share, and in case any or either of my said daughters shall die without issue, then I direct such annuity to cease, and fall into the residue of my estate." Then there is a bequest to Mr. Benjamin Parnell, of an annuity, or sum, of 50*l.* per annum for his life, and another bequest to his sister Ann, at Soley Hall, of 50*l.* per annum during her life. Then there follow these words : "I give to John Fentham's widow, now living with her, the sum of 20*l.* per annum, to be payable quarterly" (not saying for her life). "I give to Mrs. Metcalf the sum of 20*l.* per annum, to be payable quarterly" (not saying for her life). "I give to Mrs. Britain the sum of 20*l.*, payable quarterly" (not saying for her life), "such last mentioned annuity to be payable only to themselves, and not to be subject to the debts, controul or engagements of their present or any future husbands." There follows then a number of pecuniary legacies, which it is not material to mention, and then there is a gift of all the rest, residue and remainder of the testator's freehold and copyhold messuages and lands, and so on, and personal estate, except the household furniture. As to the residue, he says, "I give, devise and bequeath the same to the trustees on the trusts afterwards declared of and concerning the same." Then there follow directions to pay the rents, income and profits to the son, Thomas John Fentham, for his life, and after his decease in trust for the benefit of the children ; and among other trusts there are these : the children are to take at twenty-one, and so on ; and if any or either of such children shall happen to die under the age of twenty-one years, leaving no issue, then "I do hereby will and direct that the share or shares of him, her or

them, so dying under the age of twenty-one years without issue, shall go to and be equally divided amongst the survivors of them, if more than one, and if but one of them shall survive, then I do hereby will and devise the same premises unto such only child at his or her age of twenty-one years; but in case any of such children so dying under the age of twenty-one years shall leave any issue, then such issue shall have his or her father's or mother's share divided between them, share and share alike." Then there follow other provisions about the children, including a provision that in the event of there being no children of the son, he gives it to the daughters; and in case any of the daughters shall then be dead leaving issue, such issue to be entitled to their deceased parent's share, to take as tenants in common, and not as joint tenants. Then there follows a power to lay out and invest all the property in the purchase of freeholds or copyholds, with a proviso and condition "that the respective person and persons to whom the possession of the freehold and copyhold hereditaments and premises and personal estate shall descend and come by virtue of this my will, shall and do apply the rents and profits thereof in the first place in payment of the several annuities thereinbefore given by me." Then there follows the usual power to appoint trustees, with a direction—"That when and so often as any such trustee or trustees shall be so nominated or appointed as aforesaid, all and singular the said freehold and copyhold, leasehold, *annuities* or yearly sums, stocks, funds, securities, and other the trust premises which shall be then vested in the trustees or trustee for the time being, shall thereupon be assigned to the new trustees." That is all that there is to be found in the provisions of this will. The principal disposition on which the question before us depends is, of course, that by which these annuities or annual sums are given. That provision is divisible into three parts: first, the gift of the annual sums to the daughters; secondly, the gift of the annual sums to their children; and, thirdly, the gift over in the event of their dying without issue. It may be observed that, as to the gift to the daughters, what is given to each of

them is described as the sum of 400*l.* per annum. In some cases, perhaps, there may be a distinction between the gift of a certain sum per annum and the gift of an annuity; the term annuity having by usage acquired somewhat more of relation to an interest limited by the duration of life, than the term, a sum certain per annum. But if any such distinction could in any case be made, I think, upon the context of the will, it could not be maintained here; for these very annual sums of 400*l.* are called by the testator "*annuities*"; and in other parts of the will, "*other annual sums*" are likewise so designated. The first part of the disposition, therefore, does not seem to me to have any important bearing on the question before us. The second part of the disposition is as follows:—"And after their respective decease I give the same to their children respectively, share and share alike." The testator, it is to be observed, in the first part of the disposition had aggregated the five annuities of 400*l.*; he here separates them; the separation is effected by the words "*respective*" and "*respectively*." In considering this part of the disposition, I am satisfied that what the testator intended by it was no more nor less than this, that on the death of each daughter the 400*l.* which she took for life should go to her children, and should go to them share and share alike. These words, "*share and share alike*," were much commented on in the argument. It was argued that the children were to take equal interests, and the children of different ages could not so take an annual sum, if they took for life only. I attach no weight to that argument, for I think that clause imports no more than this, that the children were to divide the annuity between them—that they were to take equal shares of it, but not necessarily interests of equal value. There is, however, another observation to be made on these words, which I shall presently mention, and which seems to me to be of more importance; there follows these words this provision, "*such children not to be entitled to more than their deceased parent's share*," and much reliance was placed on the part of the appellants on these words, "*their deceased parent's share*." It was contended that these words imported that

the children were to take the capital of the fund in which the parents took the life interest ; and this argument was enforced by reference to other clauses of the will, in which reference is made to children taking their parent's share ; but I think that these words point only to a mere provision for securing the interests of the children, and that they refer to the parent's share in the aggregate of the five annuities which had been created in the first part of the disposition ; I am not disposed, therefore, to attach any great weight to this argument either. Then we come to the third part of the disposition, which is in these terms : —“ And in case any or either of my said daughters shall die without issue, then I direct such annuity to cease and fall into the residue of my estate.” It is, in my opinion, upon this clause that the decision of the question before us must principally depend. It cannot, I think, be deemed that the clause imports that the annuity of the daughter was not to cease unless she died without issue ; nor can it, I think, be denied that when the annuity ceased, it was to fall into the residue as one entire fund. But where is the provision that the several shares of the annuities which the children were to take, if there were children, should fall into the residue on their deaths, whether with or without issue ? There is an entire absence of such a provision, and I cannot but think that if the testator had intended that the interests of the children in their share of the annuities should cease and fall into the residue on the deaths of the children, he would have expressly so provided as he has provided in the event of the daughters dying without issue. There is this further observation to be made—these annuities are given to the daughters expressly for their lives, but there is no such limitations of the interests of the children. Then it was said, however, for the respondents, that there were other annual sums given by the will, in which there was no such limitation, but those other annual sums do not stand in contrast with the express dispositions for life immediately preceding them ; and, on examining the will, it will be found that those other annual sums are to married women, and that there are directions con-

nected with them which of themselves may be thought to point to a conclusion that those are limited to the duration of the lives of the annuitants. They seem, however, to furnish no argument against the annuities of the children of the daughters having been intended to be perpetual, and, looking at the particular disposition alone, I think they were so intended. Does the context of the will indicate the contrary ? In my opinion it does not. I think it rather in favour of than against the children of the daughters, in reference more particularly to the provision contained in the clause as to the appointment of new trustees, which was noticed in the argument. With respect to the cases on the subject, most of which were referred to in the course of the argument, I have carefully examined them, and in my opinion none of them furnish any rule determining the question before us, which must in my judgment be determined on the terms of this particular will. It was strongly urged for the appellants that this case falls within the rule laid down in *Stokes v. Heron*. With reference to funds set apart for the payment of annuities, I should hesitate long before deciding the case on that ground. For the respondents the cases of *Innes v. Mitchell*, *Blewitt v. Roberts*, and *Yates v. Maddan* were much relied on ; but the provisions of the wills in those cases were very different from the provisions in this will ; and I can find no principle laid down in those cases which can govern our judgment in this case. On the whole, therefore, with all proper deference to the judgment of the late Lord Langdale, I dissent from the conclusion at which he arrived, and am of opinion, upon the true construction of this will, that the children of the daughters take perpetual annuities. I have the less hesitation in thus differing from Lord Langdale, because I observe that the case of *Stokes v. Heron* was not cited in the argument before him, and as the case cited before Lord Langdale of *Blewitt v. Roberts* was then the governing authority. But that case, as to the only part of it material to the present, has since been materially shaken, and certainly it cannot now be considered to have the same authority as it had when this case was decided by Lord Langdale. The order

must be to alter the declaration in conformity with the opinion which has been pronounced, in which my learned Brother concurs.

LORD JUSTICE KNIGHT BRUCE.—I agree in my learned Brother's construction of the will under consideration, nor perhaps should I have thought the point one of difficulty, but for the opinion of Lord Langdale. Dissenting as I do from that opinion, I am not persuaded that his Lordship's decision would have been what it was, if all that has been discussed and decided since, had been discussed and decided before that year. I do not, however, say, that in the year 1846 I should not have interpreted the will before us as I now interpret it.

At the close of the judgment counsel stated that there were other points to be decided, namely, what was the real effect of the words in the limitation over, "in case either of my said daughters shall die without issue," and whether the children of daughters took absolute vested interests on their birth, or subject only to the contingency of their surviving their parents. The argument on these points was postponed.

July 31.—*Mr. Lloyd and Mr. Hobhouse* argued that, inasmuch as the words, "if either of my said daughters shall die without issue," would, if used with regard to real estate, have given an estate tail by implication to the daughters themselves, they would confer an absolute interest in personal property, and cited *Simmons v. Simmons* (2) and *Green v. Ward* (3). Further, that if the words did not refer to a general failure of issue, but to the failure of the objects of the preceding gifts, the rational construction would be, "if there shall be no children"; and, therefore, that if a child were born he or she took absolutely, subject only to his or her interest being partially divested in favour of after-born children—*Kimberly v. Tew* (4) and *Watson v. Watson* (5).

(2) 8 Sim. 22; s. c. 5 Law J. Rep. (N.S.) Chanc. 198.

(3) 1 Russ. 262; s. c. 4 Law J. Rep. Chanc. 99.

(4) 4 Dru. & W. 139.

(5) 11 Sim. 73.

Mr. Roundell Palmer and Mr. Dean contended that the testator's meaning was, that only the issue living at their parents' death should take.—They relied upon—

Pinbury v. Elkin, 1 P. Wms. 563.

Wilkinson v. South, 7 Term Rep. 555.

Trotter v. Oswald, 1 Cox, 317.

2 *Jarman on Wills*, 444.

LORD JUSTICE KNIGHT BRUCE said, that the first question was whether the terms in which the annuities were given over gave an absolute interest to the daughters. The cases in which, after previous gifts not carrying an estate tail or absolute interest, reference to the issue had been held to convert the previous limited interest into an estate tail, or absolute interest, were decided upon the principle of effectuating the intention of the testator as deduced from the whole instrument. In his Lordship's opinion, it was plain from the whole of the gift in the present case, whether considering it affected or not by the context, that it would disappoint the intention of the testator to hold that an absolute interest was given to the daughters. The next question was, whether there was any gift, other than the residuary gift, in favour of the children of a daughter who should die without leaving issue, and for which *Mr. Lloyd and Mr. Hobhouse* contended; and his Lordship was of opinion that, as plainly as if the testator had spoken according to all the rules of grammar, and all the forms of conveyancing, he did not mean to give any share to any child or issue of a daughter who, having had or having not had a child, should die without leaving issue. Therefore, the capital of those daughters who had died without leaving issue fell into the residue, if not by way of gift, yet by the absence of gift.

LORD JUSTICE TURNER was of the same opinion with reference to the daughters' interests. He considered it impossible to hold that an absolute interest was given to them by this clause consistently with the gift of the residuary estate in a subsequent part of the will, where the residue was given to the daughters themselves, on failure of the children of the testator's son. As to the question whether an absolute interest was given to the children, or

one contingent on their surviving their parents, his opinion was not so clear as that of his learned Brother, but on the whole, he thought his learned Brother's was the correct construction. Looking at the whole context of the will, and the general use of the word "issue" (which was used throughout as "children"), he thought that there was no intention that the children should take such an interest as would prevent their share falling into the residue, in case of their death in their parents' lifetime.

M.R. }
May 3, 22. } NAISH v. BRYANT.

Stockbroker — Rights of Creditors — Breach of Duty.

A stock and share broker of the city of London gave a bond to the corporation for the due performance of his office; he appropriated to his own use large sums of money intrusted to him for investment. After his decease, upon a claim filed by a simple contract creditor,—Held, that the defrauded creditors had no priority by virtue of the bond; and that the amount due upon such bond was equitable assets for the benefit of all the creditors (1).

This claim was filed, by Henry Samuel Naish, on behalf of himself and the other creditors of Edward Newton Bryant, deceased, against Ann Bryant, his widow and executrix, to obtain payment of a debt of 941*l.* 8*s.*, with interest and costs; and in default thereof, for the realization of his real and personal estates, and for a distribution of the proceeds among the unsatisfied creditors.

E. N. Bryant was a stock and share broker of the city of London; he was duly admitted, on the 20th of May 1837, by the corporation.

The 6 Anne, c. 16. provides that all persons who should act as brokers within the city of London and liberties thereof should from time to time be admitted so to do by the Court of the Mayor and Aldermen of the city for the time being, under such

restrictions and limitations for their honest and good behaviour as that Court should think fit and reasonable; and that they should, upon such their admission, pay to the Chamberlain of the city for the time being the sum of 40*s.* (since increased by 3*l.*), and should also yearly pay the sum of 40*s.* (since increased by 3*l.*) upon the 29th of September in every year.

Section 5. provides that every person who shall act as a broker, without having been so admitted, shall forfeit a sum of 25*l.* This sum, by the 57 Geo. 3. c. lx., is increased to 100*l.*

The Court of Aldermen have from time to time made rules, orders and regulations under the 6 Anne, c. 16, and those now in force were made in the year 1818, and they provide for the increase of the penalty in the bond to be entered into by brokers to 1,000*l.*, with two sureties in 250*l.* each. These bonds contain various conditions, intended to protect the public against fraud or deceit, and for enforcing the due and faithful performance by the brokers of the duties attached to such office and employment.

E. N. Bryant, on his admission as a broker, executed the usual bond, one of the conditions of which was, to well and faithfully execute and perform the office and employment of a broker, without fraud, covin or deceit.

This bond was accompanied by the bonds of two sureties for 250*l.* each, conditioned to be void on E. N. Bryant duly performing the office of broker.

E. N. Bryant, by his will, dated the 25th of November 1856, gave the whole of his real and personal estate to his wife, her heirs, executors, administrators and assigns, for her own benefit; and he appointed her his executrix, and she proved the will as for property under 4,000*l.*

The testator died shortly after making his will. It was soon afterwards ascertained that he had misappropriated large sums of money intrusted to him for investment.

A petition was accordingly presented to the mayor and aldermen of the city of London by one of the sufferers, making various allegations of fraud and deceit against E. N. Bryant, and praying that the bonds might be enforced.

(1) See *Taylor v. Plumer*, 3 M. & S. 562.

The petition was taken into consideration by the Court of Aldermen, and an action was commenced against the executrix; but as other petitions had been presented it was not proceeded with, as it was considered more advisable to make a claim in this suit.

Upon the cause being heard, on the 21st of February 1857, a reference was directed to the chief clerk, who, by his report, certified that the only specialty debt was that claimed by the city for 1,000*l.* and interest; and that the simple contract debts of the testator amounted to 21,016*l.* 10*s.* 4*d.*

It was stated that the practice of the city of London in similar cases had been invariably to make an equitable distribution of the money recovered on the bond amongst those who had petitioned the Court of Aldermen, and made known their respective complaints against the defaulter; and the question now raised was, whether they ought still to be permitted to receive and distribute the sum now claimed in the same manner as heretofore.

Mr. Lloyd and Mr. Sheffield, for the plaintiff.—The bond given to the city does not give any preference to the defrauded creditors; they cannot divide the proceeds of the bond, and claim to participate with the other simple contract creditors of the deceased. They have been guilty of laches in not seeing that their money was duly invested, and can have no claim to a double dividend—*Mitchelson v. Piper* (2).

Mr. Follett, for the creditors.

Mr. Baggallay.—The city of London are trustees of the bond for those defrauded by the broker. They have always distributed the fund among the persons defrauded. The bond is taken to secure the performance of a public duty, and the authority to take it must be considered as not having been given without a jurisdiction respecting its application and division.

Mr. W. D. Lewis, for Ann Bryant, the executrix.

(2) 8 Sim. 64; s. c. 5 Law J. Rep. (N.S.) Chanc. 294.

THE MASTER OF THE ROLLS.—This question is new. It would seem, however, that the city could only take the penalty for the benefit of the creditors generally; they would then have to distribute it as general assets, and not merely among those creditors who have suffered from the default of the deceased. I will, however, consider the case before I finally decide.

May 22.—THE MASTER OF THE ROLLS.—The sum due on the forfeited bond must be dealt with as equitable assets, and made available for the creditors at large. No exclusive benefit was conferred upon the creditors in consequence of the malpractices of the deceased in his character of broker. I shall make a declaration accordingly. The costs of the city of London, and of the proceedings in chambers, must be paid out of the estate.

M.R. }
June 23. } WARD v. TYRRELL.

Appointment—First Cousins—Unequal Division.

A testator directed his trustee "to divide an estate among his, the testator's, first cousins, as he, in his discretion, might think proper, by dividing the whole equally among them, or between two or more, or giving the whole to any one for such estates and interests, and subject to such conditions and limitations, as he should think proper":—Held, that the trustee had a power of selection only, and that if he appointed to more than one, he must do so equally among them.

David M'Intosh, by his will, dated the 6th of December 1841, said, "I give, devise and bequeath unto my uncle, James M'Intosh, and to Timothy Tyrrell, all my real and personal estates and effects whatsoever and wheresoever, to hold the same unto them, their heirs, executors, administrators and assigns, according to the nature thereof, in the first place, to pay and satisfy thereout all my just debts, funeral and testamentary expenses; and subject thereto, I direct that they and the survivor of them

will divide the same among my first cousins, as they or he may, in their *uncontrolled discretion*, think proper, by dividing the whole equally among them, or between two or more of them, or giving the whole to any one of them, and for such estate or estates, interest or interests, and with, under and subject to such powers, discretions and limitations as my said trustees or trustee may think proper, so that the same are in favour of some one or more of my said first cousins, or their descendants. And I do hereby appoint James M'Intosh and Timothy Tyrrell executors of this my will."

The testator died on the 7th of January 1856; the will was proved by T. Tyrrell, the only surviving executor.

By a deed-poll, under the hand and seal of T. Tyrrell, dated the 3rd of April 1856, after reciting the facts as to the state of the testator's family, and reciting that the said T. Tyrrell, in exercise of the trust and discretion reposed in him by the testator's will, had determined to make such provision out of the real and personal estate as was thereafter declared in favour of the first cousins of the testator thereafter named, and in exclusion of all other such first cousins, and, subject thereto, to give the whole of the testator's real and personal estate to the testator's first cousin, David M'Intosh absolutely; he, T. Tyrrell, directed that several sums and annuities should be paid to some of the testator's first cousins, and that other sums should be settled on other of the first cousins and their issue, and that the residue of the real and personal estate of the testator charged with the several payments should go and belong to David M'Intosh, his heirs and assigns for ever.

This suit was instituted on the 9th of December 1856; and by a deed-poll, dated the 6th of April 1857, T. Tyrrell appointed all the real and personal estate of the testator to David M'Intosh absolutely; and he declared that he would stand possessed of such real and personal estates in trust for David M'Intosh accordingly, but subject to a proviso that this appointment should be without prejudice to the deed-poll of the 3rd of April 1856, if valid, and that it should operate only in case the first deed-poll should be declared by the decree

of the Court to be wholly or to some extent invalid.

The bill was filed, by John Egerton Ward and Christiana Ryder, his wife, insisting that the division made by the first deed-poll was invalid, as not being authorized or directed by the will.

Mr. R. Palmer and *Mr. W. D. Lewis*, for the plaintiffs.—The question is, whether the word "equally" governs both the first branches of the directory clause of the power, or whether it is confined to two alone. It is difficult to understand why the testator should take away the power of appointing equal shares if all the first cousins were included, but give it if some of them should be excluded and others included; and, therefore, unless he expressed that clearly, it would not be inferred by any intendment that it was not necessary. The two clauses, however, are grammatically connected, "by dividing the whole equally amongst them or between two or more of them." The word "equally" belongs to the verb divide, and qualifies both the case of its being amongst them all, and the case of its being between two or more. In that view the plaintiffs would be entitled to a decree for the administration of the estate, unless the second appointment, made *pendente lite*, should be considered more valid, and to exclude the plaintiff's interest.

Mr. Lloyd and *Mr. Rodwell*, for the defendant T. Tyrrell, endeavoured to support the first deed. The general intention of the testator should leave an uncontrolled discretion in the division. The subsequent words were rather in exposition than in limitation of the discretion given. The words "to all equally" would entirely exclude the notion of giving different estates to the defendants; but the testator himself says, "for such estates and interests, and subject to such powers as the trustees might think proper." The very words, therefore, indicated inequality. The number, as well as the interest of the defendants was dependent upon the trustee's exercise of the discretion. The word "equally," therefore, did not controul the verb divide, since it would be inconsistent with the limitations of different estates and interests

in favour of the first cousins or their descendants; an appointment, therefore, to one, who died to-morrow, for life, with remainder to another, would directly produce inequality. The word "equally," therefore, cannot govern the whole; should the first appointment be invalid, the second is good, and its being made *pendente lite* is immaterial, as the existence of the suit does not destroy the power.

The MASTER OF THE ROLLS.—It is not the province of the Court to make the will of a testator rational; it has only to expound it where there is any ambiguity, and however capricious his expressions may be, if it is not contrary to law, this Court must carry it into effect. The object of the testator would, apparently, have been better accomplished if he had given to the trustee the most uncontrolled discretion in the division of the fund, not merely as to the shares; but also as to the interests of the first cousins; but looking at the words of the will, two things must be borne in mind: first, the subject-matter of the gift; and, second, what is the interest given. Here the trustee may "divide it equally amongst them, or between two or more of them, or give the whole to one." This can only mean a gift of the whole to one, or an equal division amongst the whole, or amongst two or more or any other number selected, but the word "equally" covers the whole of the division. It is nowhere said that an unequal division may be made if the appointment is made to all or less than the whole number, though the appointment might have been made to one of the first cousins for life, with remainder absolutely to another. In the course of events, therefore, this might have produced inequality, and one first cousin might have become entitled to a greater share than another. What, no doubt, the testator intended was, that the first cousins might take for life, with remainder to their children; but he has not expressed it. Bearing in mind, therefore, that the objects of the power and the shares which they are to take are certain, and that the interests, which may be limited only, are uncertain, the first appointment is not valid.

The second appointment, however, is a

good execution of the power, and it must take effect. I must, however, give all parties their costs.

M.R. }
May 7. } In re DALY'S SETTLEMENT.

Power—Appointment—Domicil.

The Gallancess Trusts 52 L.R. Ch 792
A married woman, whose husband was domiciled in England, had power, by any writing under her hand, or by her last will, to appoint, as if she were sole and unmarried, a sum of 3,226l. 12s. 1d. She resided in Paris, apart from her husband, for many years before her death without there having been any legal separation or divorce. She disposed of the fund by three several papers, signed by her. They were all unattested:—Held, that as the wife of a domiciled Englishman, she could not obtain a foreign domicil, and that the papers, though valid as a will in France, were invalid in England.

Held, also, that the contemplated appointment by will deprived the documents of any force as a writing under her hand, and that there had been no valid execution of the power.

By a settlement, dated the 10th of November 1807, and made upon the marriage of Anthony Blagrove with Rachel Susannah, his wife, a sum of 10,000 star pagodas which, with accumulations, was now represented by 3,226l. 12s. 1d. 3½ per cent. annuities, was settled to such uses as Mrs. Blagrove "by writing or writings, signed by her with her own hand, or by her last will and testament in writing, should, notwithstanding her coverture and as if she were sole and unmarried, appoint."

Mr. Blagrove was an Englishman born, and up to the present time he had retained an English domicil. Mrs. Blagrove left the house of her husband in 1815, and for some time resided alone in Kensington, but in 1822 she removed to Paris, and continued to reside there apart from her husband. She made occasional visits to England, but she died in Paris on the 19th of November 1857, without any legal separation having taken place between her husband and herself.

The three following unattested papers contained the only appointments which could affect the fund comprised in the settlement. The first was as follows:—
 "In the name of God, Amen—I, Rachel Susannah Blaggrave, wife of A. Blaggrave, Esq., of Barrow House, near Bristol, Somersetshire, make this my last will and testament, I give and bequeath to my granddaughter Frances Rachel Digby, the child of my beloved lost daughter, the sum of 3,000*l.* stock in the 3½ per cents. To my godson, Edmund John Charlton, I give 226*l.* 12*s.* stock. R. S. Blaggrave, 24th of July, 1850, Rue de Vaugirard." The second was in these terms:—
 "I desire to be placed in the coffin as I am found, quite dressed, in my night-clothes, as may be. 3,000*l.* in the 3½ per cents. goes to my darling Fanny, the child of my late dear and lamented daughter; 226*l.*, accumulated interest on the above 3,000*l.* in the 3½ per cents., I leave to my godson, E. J. Charlton, as it is probable he will be near me, and will have to defray the expenses of my funeral. I desire my son, John Henry Blaggrave, to pay the funeral and all just debts of mine. I request Mr. Digby to pay one year's interest of the 3,000*l.* to the above-named John Charlton. R. S. Blaggrave, May 12, 1854." The third was,
 "I desire to be buried in the tomb of my ever-beloved daughter Frances Margaret Anna Digby, situate in the cemetery of Père La Chaise, at Paris. I bequeath to my granddaughter Frances Rachel Digby 3,000*l.* in the new 3*l.* per cents. To E. J. Charlton 226*l.* 12*s.* 1*d.*, being interest consolidated with the principal; also a year's interest on the same. July 22, 1856. R. S. Blaggrave, Rue de Vaugirard."

The papers were admitted to be valid testamentary papers according to the law of France.

The 3,226*l.* 12*s.* 1*d.* had been paid into court under the 10 & 11 Vict. c. 96, and a question was now raised as to whether the three papers contained a valid execution of the powers reserved to Mrs. Blaggrave by the settlement of the 10th of November 1807.

Anthony Blaggrave, the husband, renounced all right to take out letters of administration, and on the 18th of March

1858 they were granted to J. H. Blaggrave, the son, and he now asked that the fund might be paid to him.

Mr. Lloyd and Mr. Rendall, for J. H. Blaggrave.

Mr. R. Palmer and Mr. Ware, for C. W. Digby, the guardian of Frances Rachel Digby, and also for E. J. Charlton.

Mr. Busk, for other parties.

The following authorities were cited:—

Tovey v. Lindsay, 1 Dow, 124.

Warrender v. Warrender, 2 Cl. & F. 488.

Bainbridge v. Smith, 8 Sim. 86.

7 Will. 4. & 1 Vict. c. 26. s. 10.

Sugden on Powers, 289, 6th ed.

Watts v. Shrimpton, 21 Beav. 97.

THE MASTER OF THE ROLLS.—I have to consider, first, whether these writings under the hand of Mrs. Blaggrave are within the power reserved to her; and, secondly, whether they or any of them constitute a good execution of the power. They clearly are all testamentary, and but for the 7 Will. 4. & 1 Vict. c. 26. they might have been proved here. They contain bequests, give directions as to the funeral, and are evidently intended to operate after death. If they had been designed as instruments *inter vivos* there should have been an act amounting to a delivery. This case is similar to *Bainbridge v. Smith*. The law requires a will to be attested by two witnesses, but this has not been attended to; and as the testatrix has attempted to execute the power by will, these documents cannot be a due execution under the other alternative of writings under her hand. But it is said that she was domiciled in France, and that these papers constitute a good will by the French law; if that were so, they would be a good execution of the power, but this depends upon whether Mrs. Blaggrave, as the wife of an Englishman domiciled in England, could, by residence in Paris apart from her husband, acquire a French domicile. She certainly could not. I must, therefore, decide that there has not been a valid execution of the power.

LORDS JUSTICES.
 Feb. 11. }

RENNIE v. YOUNG.

Equitable Relief—Lying by—Expenditure on Property.

A. B., who had contracted to buy a ship, agreed with C. D., that he should make engines of a stated speed, at a stated price, and if the speed were not attained C. D. should remove them. This contract was not binding under the Ship Registry Acts. A. B. and Messrs. G. F. & S. Y. arranged with the owner of the ship that it should be sold to the Messrs. Y., and that A. B. should be entitled to buy it on certain terms. The ship was transferred to S. Y. absolutely. C. D. made the engines, and put them into the ship, with the knowledge of S. Y., the registered owner, but they would not attain the required speed. C. D. offered to remove the engines, but S. Y. would not allow it, nor would he pay for them. C. D. then filed a bill against A. B. and the Messrs. Y. for payment of the cost of the engines or for sale of the ship and payment of the cost of the engines out of the proceeds, and for other purposes. The Master of the Rolls gave the plaintiff liberty to bring an action, for which he imposed certain terms; but, upon appeal,—Held, overruling that decision, that the plaintiff's remedy, if any, against S. Y. was at law, and not in equity.

This was an appeal from a decision of the Master of the Rolls.

At the end of 1853 Mr. Green entered into an arrangement (not binding under the Ship Registry Acts) with Mr. Penn, the registered owner of the ship *Times*, for the purchase of that vessel. At the same time he contracted with Mr. Rennie to fit it with engines, to attain a certain speed, for 1,200*l.* Very soon after Messrs. George Frederick Young and Sidney Young and Mr. Green arranged that the *Times* should be bought by those gentlemen, and Mr. Green was to have the right of pre-emption on stated terms. Ultimately, by bill of sale, dated the 23rd of December 1853, the ship was transferred to Mr. S. Young, and on the 11th of January 1854 he was duly registered owner.

Mr. Rennie, in December 1853, communicated with the Messrs. Young as to

the engines; and they, on the 15th of that month, wrote to him to say that when he had fitted the engines and secured a guaranteed speed, they would sell the *Times*, and out of the proceeds pay their own claims on it, and then pay Mr. Rennie what was due to him under the agreement he had made with Mr. Green.

A correspondence took place between the Messrs. Young on the one hand, and Mr. Rennie on the other, which ended in an offer by them that when Mr. Green had paid them 4,200*l.* they would pay Mr. Rennie 750*l.*, on his producing the certificate of Mr. Green that his (Rennie's) contract with him (Green) had been fulfilled, and then, after paying themselves what was due to them from Green, would pay Mr. Rennie the remainder of his 1,200*l.*; but that if Green did not pay the 4,200*l.* they would sell the vessel, engines, &c., and after paying themselves 4,200*l.*, pay to Mr. Rennie his claim in the same way as if the 4,200*l.* had been received from Mr. Green. Messrs. Young wrote to Mr. Rennie to say that, only on his assurance that he would fit the engines in accordance with his contract with Mr. Green, should they feel justified in completing the purchase of the vessel.

On the 10th of February 1854, Mr. Rennie and Mr. Green entered into a contract in writing (unknown as it was alleged to the Messrs. Young), by which it was agreed that 1,200*l.* should be paid for the engines, if a speed of from eight to nine knots an hour were attained, but if not Mr. Rennie should remove them without expense to Mr. Green. This instrument was not binding under the Ship Registry Acts.

When the engines were fitted, which they were in August 1854, they were found deficient in speed, and on the 18th of December Mr. Green served Mr. Rennie with an order to remove them, but when he proceeded to do so, Messrs. Young prevented him. Mr. Green released all his interest in the ship to Messrs. Young on their undertaking to settle with Mr. Rennie. This occurred in March 1855.

A correspondence and negotiations took place between Mr. Rennie and the Messrs. Young, which did not end satisfactorily, and Mr. Rennie filed his bill against them

and Mr. Green, praying that the defendants might be decreed to pay him 1,200*l.* and the costs of some extra works, or that the ship might be sold, and the plaintiff paid his claim, and for other relief.

In November 1857 the Master of the Rolls, by his decree, gave the plaintiff liberty to bring an action against the defendant Green, which was to be defended by the Youngs, and they were to make admissions that all they had done was done as agents for Green, and further proceedings were stayed against Green.

From this decree the defendants, the Youngs, appealed.

Mr. Roundell Palmer and *Mr. Shapter*, for the plaintiff, in support of the decree, contended that the plaintiff had an equity for relief inasmuch as the Youngs had stood by and permitted, and even encouraged him to put the engines into the ship, giving him a legal right against Green, and then doing such acts as had effectually defeated that legal right. In such a state of circumstances the Youngs were bound to indemnify the plaintiff—*Onslow v. Corrie* (1). Having so encouraged the putting in of the engines, under the agreement with Green, and having refused, as they had, to permit them to be removed, or to pay for them, the plaintiff was entitled to the relief he asked, the more especially as he had no legal remedy against the Youngs, as he did not contract with them, and the ship, of which the engines now formed a part, was wholly theirs—*Goss v. Quinton* (2). The case of *Thornton v. Court* (3) was a case of a party standing by and permitting outlay, and was applicable both as to that and as to the other points. The plaintiff admitted that he had no lien on the vessel.

Mr. Follett, for the defendant Green, took no part in the discussion.

Mr. Lloyd and *Mr. Speed*, for the appellants, argued that there was no ground for equitable relief.—The mere fact of there not being a remedy at law did not raise an equity—*Kirk v. the Bromley*

Union (4). As to lying by, that was wholly out of the question, for in all cases in which relief had been granted on such a ground, the equitable claimants were ignorant of the true title to the property on which they had expended money, while here the plaintiff was fully aware of everything that the Messrs. Young had done. If the Youngs had contracted with the plaintiff, he would have a remedy against them at law; and if they had not, what possible right could he have against them?

Mr. Shapter was heard in reply.

LORD JUSTICE KNIGHT BRUCE.—The plaintiff executed an order for certain engines, for which he was to be paid by the defendants, or one of them; and he also did certain further works. I cannot see what equity arises from this. It is admitted that the plaintiff has no lien on the vessel, for if there had been, then possibly he might have succeeded. If the plaintiff has any right to have the machinery restored to him, and that is refused, he may pursue his remedy at law. I cannot see how his rights can be made better or worse by what has passed between the defendants. His demand is a mere money claim for work and labour and materials, and if he has a demand he must pursue it at law, for in equity he has no title to relief. The bill must be dismissed, with costs, without prejudice to any action.

LORD JUSTICE TURNER.—I am also of opinion that this decree cannot be supported, and the bill must be dismissed. The decree is intended to work out relief against the Youngs, for it stays all further proceedings against Green. Lien must be laid out of the case, for it is admitted that no claim to lien can be maintained. What case is there then against the Youngs in equity? Either they were under contract with the plaintiff, or they were not. If they were, the plaintiff's remedy is at law; if they were not, then the only circumstance on which an equity could be founded is, that they allowed the plaintiff to put his machinery into the ship which legally belonged to them. But the plaintiff does not say that he did not know

(1) 2 Mad. 330, 345.

(2) 3 Man. & G. 825; s. c. 12 Law J. Rep. (N.S.) C.P. 173.

(3) 8 De Gex, M. & G. 293; s. c. 22 Law J. Rep. (N.S.) Chanc. 361.

(4) 2 Phill. 640; s. c. 17 Law J. Rep. (N.S.) Chanc. 127.

the ship belonged to them. If a man places his property on the land of another person, with full knowledge of that person's title, how can the fact, that the landowner assented to its being placed there, give an equity to have it restored? If it did, the doctrine would come to this, that whenever a man lays out money on another man's land with the consent of the owner, he has an equity to have it repaid. The agreement of the 10th of February 1854 not being within the Ship Registry Acts, prevents any equity arising on it. The bill must be dismissed with costs; but I agree that the dismissal is to be expressly without prejudice to any action.

KINDERSLEY, V.C. { *In re* THE EASTERN
April 27. { COUNTIES RAILWAY
COMPANY, *ex parte*
THE VICAR OF SAW-
STON.

Railway Company — Re-investment of Purchase-money of Land—Fine on Admission to Copyholds.

A railway company having taken copyhold lands, and paid the purchase-money into court, an order was made for re-investment of the money upon other copyholds, and for payment by the company of the costs, charges and expenses incurred of or relating to the purchase, and the costs of the conveyances, and of the application for re-investment and consequent thereon:—Held, that the company was not liable to pay the fine upon the admission to the copyholds.

In this case, certain copyhold lands in the parish of Sawston, which were vested in trustees and in the Vicar of Sawston for the time being, were taken by the Eastern Counties Railway Company, under the compulsory powers of their act of parliament, and the purchase-money had been paid into court. The trustees of the property and the vicar subsequently entered into a contract for the purchase of other copyhold lands; and upon a petition to the Court, an order was made for the reinvestment of the purchase-money so paid into court in the said copyholds.

The order of the Court as to taxation of costs, which was made in pursuance of the 33rd section of the company's act, 7 & 8 Vict. c. lxii, was in the following terms:—
“It is ordered, that on the execution of such conveyance, it be referred to the proper taxing Master to tax the costs, charges and expenses of the petitioner properly incurred, of and relating to the purchase of the hereditaments and premises, and also the costs, charges and expenses of the petitioner and of the trustees, of the conveyances executed as aforesaid, and of this application and consequent thereon,” which costs were ordered to be paid by the railway company. The taxing Master, in pursuance of this order, allowed the fees payable upon the admission to the copyholds, and also the fine due upon such admission, as part of the costs, charges and expenses payable by the company. The 33rd section of the company's act, which was a local and personal act, contained the following clause, with respect to the reinvestment of money deposited in the Bank of England:—“That the Court of Chancery may in all such cases, except where monies shall have been so deposited by reason of the wilful refusal of any party entitled thereto to receive the same, or to convey or release the lands, in respect whereof the same shall be payable, or the failure or neglect of any party to make a good title to the land required, order the costs of the following matters, including therein all reasonable charges and expenses incident thereto, to be paid by the company; (that is to say) the costs of the purchase, or of the taking or using the lands, or which shall have been incurred in consequence thereof, other than such costs as are herein otherwise provided for, and the costs of the investment of such monies in government or real securities, and of the reinvestment thereof, or of the government or real securities purchased therewith, in the purchase of other lands, and also the costs of obtaining the proper orders for any of the purposes aforesaid, and of the orders for the payment of the dividends and interest of the government or real securities upon which such money shall be invested, and for the payment out of court of the principal of such monies, or of the government or real secu-

rities wherein the same shall be invested, and of all other proceedings relating thereto, except such as are occasioned by litigation between adverse claimants."

A motion was now made, on behalf of the railway company, to vary the order of the taxing Master in respect to the allowance by him of the fine payable upon the reinvestment of the purchase-money in copyholds.

Mr. Goldsmid, in support of the motion, contended that the taxing Master was wrong in the conclusion he had come to, and that the fine ought not to have been charged to the company. The order directed that the company should pay the costs, charges and expenses of the petitioner relating to the purchase and the conveyances executed, and of the application, and consequent thereon; but this could not mean consequent upon the purchase, but upon the application. The fine was no part of the costs of the purchase, and it ought in this case to be paid out of the purchase-money, and not by the company. He cited—

Graham v. Sime, 1 East, 632.

Barrow v. Barrow, 26 Law T. Rep. 22.

In re Cann's Estate, 15 Jur. 3; s. c.

19 Law J. Rep. (N.S.) Chanc. 376.

In re the Eastern Counties Railway Company, ex parte Wadham College, not reported.

Mr. Cole appeared for the trustees and the Vicar of Sawston, and submitted that the fine upon the admission to copyholds formed part of the costs of admission, and the words "consequent thereon" meant the costs consequent upon the admission. A purchaser of copyholds could not be admitted without payment of the fine, and the fine therefore ought to be paid by the company. He cited *In re Lady Byron's Settlement* (1).

KINDERSLEY, V.C.—The only question before me now is this, whether, having regard to the terms of the order made by the Court on the petition of the Vicar of Sawston, in this matter, the taxing Master ought or ought not to

have allowed, as part of the costs which he was authorized to tax, the amount of a fine on the admission to the copyhold lands. With respect to the fees, there is no doubt they are properly charged to the company—indeed, that does not appear to be seriously disputed between the parties. But as to the fine, the taxing Master felt, in the absence of any authority upon the point, that, although the matter might not stand on precisely the same footing as the fees, still he ought to allow it as a payment to be made by the company. He considered the fine to be a reasonable charge or expense occasioned by the original taking of the land by the company, and by the reinvestment of the purchase-money in other lands of the same tenure. Now, I think, if he had heard the cases cited which I have heard, he would have come to the conclusion at which I have arrived. The order in this case was made in conformity with the 7 & 8 Vict. c. lxii. s. 33; and if it happened that the order went beyond the terms of the act, or was less extensive than the act authorized, the taxing Master could only follow the terms of the order; that was his guide. If there were any doubt as to the language of the order, whether it did or did not exceed or fall short of the terms of the act—of course, the words of the act would go a long way in the construction of the order. One thing is quite clear: it never could have been intended that the order should go beyond the jurisdiction conferred by the act; and I do not think it does. The 33rd section authorized the Court "to order the costs of the following matters, including all reasonable charges and expenses incident thereto, to be paid by the company." There is no doubt of the meaning of those words, that they included in those costs all reasonable charges and expenses incident thereto, that is, to the matters to which the costs related. It then goes on to specify these matters, that is, "the costs of the purchase, of taking and using the land, and which were incurred in consequence thereof, other than such costs as were otherwise provided for;—viz. the original purchase by the company, the costs of the investment of such money in government or real security, and of the reinvest-

(1) 4 De Gex, M. & G. 694.

ment thereof, or of such government or real securities, in the purchase of other lands,"—so that the Court was authorized to direct payment by the company of those matters, and the costs of getting proper orders, &c. The order made in pursuance of that was, "that, on the execution of such conveyance (of the copyholds), it be referred to the proper taxing Master to tax the costs, charges and expenses of the petitioner properly incurred, of and relating to the purchase of the hereditaments and premises." That clearly does not include the fine, but only relates to the vicar's contract, and so far the trustees' costs could not have been taxed at all, but only the vicar's, but whether that would have included all his costs is another question. "And, also, (in addition to the costs of the purchase) the costs, charges and expenses of the petitioner and of the trustees (naming them), of the conveyances executed as aforesaid, and of this application and consequent thereon." If the taxing Master ought to have allowed the fine in question, it was under the latter words, "the costs of the conveyance," &c. What do those words, "consequent thereon," refer to, unless to this application, and also to the prior words, "conveyances to be executed as aforesaid"?—so as to include costs consequent upon them. It was contended, that under the words "charges, &c. consequent thereon," it was competent to include the fine of admission, and the authority cited was *Lady Byron's Settlement*. In that case, my opinion was overruled by the Lords Justices, who thought that the words of the act, in that case, extended to the purchase and everything connected with it; but that decision went upon the peculiar circumstances: the words were strained to meet that case. If this case had been similar, I should unhesitatingly have adopted it; but here the order, and not the act, is to be construed. That order must be construed in the ordinary way; the object of the respondents is to strain it, so as to include, not only the costs of the purchase, but the fine itself. But that is not reasonable or just. It is admitted on the cases cited, that it was not part of the costs of the surrender, but something arising by reason of being admitted. Besides, in *Cann's case*, which has been verified by

reference to the Registrar's book, and in the case of *Ex parte Wadham College*, the principle is established that, as between the company who have to pay costs generally (whether under the Lands Clauses or special acts) and the parties dealing with them, it is right and reasonable that a fine of admission to the copyholds should be paid, not by the company, but out of the capital of the money paid for the purchase thereof. According to these authorities, which are founded on extreme good sense, it is not reasonable to exonerate the fund from such payment; moreover there is the additional circumstance that by reason of the fine, a much less sum was paid for the same copyhold acres than would have been paid for freehold, and that is obvious. There was nothing, therefore, in the special circumstances to vary the case from those cited; and as I find that the Lords Justices and Vice Chancellor Wood, in the abstract, thought it just and reasonable that the fine should be paid out of the capital, the Court has authority, though there is no special provision in the act on the subject, to direct payment of the fine out of the purchase-money to prevent the necessity of throwing it on the tenant for life, which is the ground of the decision in *Lady Byron's Settlement*. This order ought not to be strained, but the ordinary meaning given to the words "consequent thereon." The fees must be allowed, but not the fine. For the purpose of saving expense to the petitioners, if, consistent with the practice, the order can be altered at once, it may be done.

LORDS JUSTICES. { *Ex parte* JESSOP, *in re* THE
June 2, 26. { LONDON AND COUNTY
ASSURANCE SOCIETY.

*Joint-Stock Company — Winding up —
Contributory — Transfer of Shares — Power
of Directors — Invalid Arrangement.*

A joint-stock company was in difficulties, and the directors came to an arrangement with an actuary experienced in such matters for the purpose of "resuscitating" the company. One of the directors disagreeing with his co-directors in this and other

matters, transferred his shares to a nominee of the actuary, and the transfer was executed with all the formalities required by the deed of settlement. Soon afterwards the company was ordered to be wound up, and one of the Vice Chancellors being of opinion that the arrangement to "resuscitate" the company, however beneficial, was not warranted by the deed of settlement, and was beyond the powers of the directors, and that the transfer of the shares, though formally executed, was invalid, and that, therefore, the director who made the transfer did not get rid of his liability, and must be placed upon the list of contributories; but,—Held, upon appeal, that although the arrangement with the actuary might have been beyond the powers of the directors, the transfer of the shares having been made bona fide, the decision of the Vice Chancellor must be reversed, and the name of the director removed from the list of contributories.

This was an appeal from a decision of Vice Chancellor Kindersley, ordering the name of Mr. Jessop, formerly a shareholder in the London and County Assurance Company, but who had transferred his shares before the order for winding up the company had been made, to be placed upon the list of contributories. The facts of the case were as follows:—In October 1851 the appellant, Mr. Jessop, signed the deed of settlement for 100 shares, and subsequently became possessed of others, amounting in all to 474. In February 1856 the company got into difficulties, and several of the shareholders and directors, and Mr. Jessop among others, thought that the company ought to be wound up, and on the 13th of February a memorandum was drawn up and signed by Mr. Jessop and others, holders of shares, expressive of that opinion. On the 4th of March, at a meeting of the board, at which Mr. Jessop attended, a resolution was come to and an order made, on the proposal of Mr. Betteley and seconded by Mr. Jessop, "that the secretary having stated that one Mr. Skilman had applied for a form of transfer, the secretary at his discretion should communicate with the registrar at the joint-stock registration office; that as this company was the subject of terms of

dissolution, all transfers of shares then attempted were for the purpose of evading joint liability, of effecting a forfeiture and unfairly charging those shareholders who were willing to meet all claims on the company, and of defeating the title of creditors, and that he should request the registrar not to register any such transfers without notice to the board of directors." The secretary communicated with the registrar in pursuance of this order, but was informed by him that he had no power to interfere in such a matter. It also appeared that Skilman had effected a registration of a transfer either to or from himself, notwithstanding such resolution and order. Meantime, Mr. Jones (partner in the firm of Jones & Betteley), the solicitor to the company, negotiated with a gentleman named Sheridan, who was manager of the "Times Life Insurance Company," for the purpose of making an arrangement whereby the company might be "resuscitated," having the advantage of Mr. Sheridan's knowledge, and thus prevent the necessity of the company being wound up. Mr. Sheridan was accordingly introduced by Mr. Jones at a board meeting, held on the 6th of March 1856, when a minute was entered, to the effect that such an interview had taken place "with a view to appoint additional directors, and revive and carry as on the company," and the motion to the winding up was directed to stand over. On the 13th of March there was a board meeting, at which Sheridan attended, and the arrangement made was embodied in a resolution, Jessop being present, which resolution was, that within seven months 3,000*l.* should be procured, either by the issue of new shares, by payment of calls, &c.; Sheridan to be consulting actuary at a salary of 200*l.* per annum, that there should be given to him or his nominee (credited with 5*l.* per share) all shares then or thereafter to be forfeited, at the time and in the manner he might require; &c., provided that in case of a winding-up order being made within one month, Sheridan should not be entitled to any benefit under the resolution. Subsequently some of the directors disapproved of giving up the affairs of the company so entirely into Sheridan's hands, which eventually led to its being wound up. On the 14th of

March another meeting took place, when Sheridan was again present, and it was resolved that certain advances should be made by the directors, and powers were given to Sheridan. This document was signed by Jessop, who was also to be credited with sums he had lent the company to repay money which they had borrowed of the Argus Company. Jessop then wrote a letter to Sheridan, which was, in fact, written by Mr. Betteley, and transcribed by Jessop, the effect of which was to sanction and recognize the arrangement. Sheridan then nominated one Spence, and Jessop transferred all his shares to him, and Spence executed the transfer in the ordinary form. These and other facts of the case are entered into with much minuteness in the judgment of Lord Justice Turner, and the question was, whether the transfer from Jessop to Spence was a valid transfer so as to divest Jessop of all further liability, or whether he should be placed on the list of contributories.

The Vice Chancellor decided that Mr. Jessop must be placed on the list of contributories, after examining *visd voce* Mr. Jessop, Mr. Sheridan and other witnesses who had made affidavits when the matter was before the chief clerk at chambers (1).

(1) His Honour, in delivering judgment, said that Mr. Jessop was from the beginning a director of the company. The result of the meetings of the 13th of February and the 14th of March 1856 shewed clearly that it was the opinion of the board of directors, indeed of those persons who were present, that general transfers ought, if possible, to be prevented, because the object of such transfers was to evade joint liability, to effect forfeitures, and unfairly to charge those shareholders who were willing to meet the claims, and to defeat the title of creditors. Then came the negotiations with Mr. Sheridan, and it was clear that when he intended to prevent the company from being wound up, which it was evident must take place unless something was done, the resolution passed for introducing additional directors, and containing the "&c.," was pregnant with something more than merely appointing such additional directors, and involved all the machinery attendant upon such introduction; and the company being confessedly in a tottering condition, it was necessary to hold out some temptation to take shares and become directors. It was obvious, therefore, that inasmuch as Mr. Jessop and others had distinctly intimated their desire to wind up, they should be got rid of, not speaking of such a proceeding as an impropriety, but for the purpose of carrying on the company. It appeared that the registrar upon being applied to stated that he had no power to interfere; and Skilman, notwithstand-

ing the order, had registered some transfer; and it was suggested that inasmuch as the company had failed in preventing the transfer, no party to the expression of opinion that no transfer should be made, ought to be bound by such expression, and should be permitted to transfer. No doubt, if it was merely a question whether after that time Jessop was justified in making a transfer to third persons, either for value or not, his Honour's opinion was that there was nothing to prevent the validity of such transfer. But then came the proceedings of the 13th and 14th of March, the substance of which was that Sheridan undertook to procure 3,000*l.*, not including the giving up of shares by Jessop or others, on certain terms of remuneration, and it was also understood between Sheridan and the directors, that for the purpose of resuscitating the company, the whole affairs should be placed at his disposal, which, without imputing anything morally wrong to any one, made him a dictator, a despot, until the company was made efficient under his controul. One reason why this was not carried into effect was, that the arrangement was not approved of by some of the directors, who did not consider it right that Sheridan should have the affairs of the company put so entirely into his hands. Some of the directors, rightly or wrongly, thought fit to make such arrangements, and some disapproved, the result being that Sheridan's expectations were not realized. There was no evidence of any specific arrangement between Jessop and the other directors, or between Sheridan and Jessop, as to Jessop transferring his shares; but Sheridan at least felt that Jessop and the other directors who desired the winding up should be got rid of; and it was understood that Jessop should get rid of his liability. The arrangement between Jessop and Sheridan was clearly not for the benefit of Sheridan as transferee, but for the benefit of the company, and for obtaining solvent shareholders. It was difficult to ascertain the exact position of Spence as Sheridan's nominee, for it was admitted, that although a most respectable man, his position was not such a desirable one as was required for a new shareholder. Spence, in fact, was the instrument of Sheridan for the purpose of the company, Jessop having written a letter concurring in and sanctioning all these arrangements. If he had simply got rid of his shares to A. B. irrespective of the arrangement with Sheridan, no doubt he would have absolved himself from all liability, but the result was, that the transfer to Spence could not be considered a transfer made by a shareholder *bona fide* (not using the word in an obnoxious sense) to a transferee, but in accordance with, and for the purpose of working out the arrangement with Sheridan. That arrangement, however beneficial for the company, was one which the directors had no power or authority to make, so as to bind the shareholders generally. The transfer to Spence, therefore, made under such circumstances, without imputing *mala fides* to any one, was one which, when the company came to be

Mr. Baily and Mr. Roxburgh, for the appellant, Mr. Jessop.

Mr. Glasse and Mr. Hamilton Humphreys, for the official manager, relied upon

ing the order, had registered some transfer; and it was suggested that inasmuch as the company had failed in preventing the transfer, no party to the expression of opinion that no transfer should be made, ought to be bound by such expression, and should be permitted to transfer. No doubt, if it was merely a question whether after that time Jessop was justified in making a transfer to third persons, either for value or not, his Honour's opinion was that there was nothing to prevent the validity of such transfer. But then came the proceedings of the 13th and 14th of March, the substance of which was that Sheridan undertook to procure 3,000*l.*, not including the giving up of shares by Jessop or others, on certain terms of remuneration, and it was also understood between Sheridan and the directors, that for the purpose of resuscitating the company, the whole affairs should be placed at his disposal, which, without imputing anything morally wrong to any one, made him a dictator, a despot, until the company was made efficient under his controul. One reason why this was not carried into effect was, that the arrangement was not approved of by some of the directors, who did not consider it right that Sheridan should have the affairs of the company put so entirely into his hands. Some of the directors, rightly or wrongly, thought fit to make such arrangements, and some disapproved, the result being that Sheridan's expectations were not realized. There was no evidence of any specific arrangement between Jessop and the other directors, or between Sheridan and Jessop, as to Jessop transferring his shares; but Sheridan at least felt that Jessop and the other directors who desired the winding up should be got rid of; and it was understood that Jessop should get rid of his liability. The arrangement between Jessop and Sheridan was clearly not for the benefit of Sheridan as transferee, but for the benefit of the company, and for obtaining solvent shareholders. It was difficult to ascertain the exact position of Spence as Sheridan's nominee, for it was admitted, that although a most respectable man, his position was not such a desirable one as was required for a new shareholder. Spence, in fact, was the instrument of Sheridan for the purpose of the company, Jessop having written a letter concurring in and sanctioning all these arrangements. If he had simply got rid of his shares to A. B. irrespective of the arrangement with Sheridan, no doubt he would have absolved himself from all liability, but the result was, that the transfer to Spence could not be considered a transfer made by a shareholder *bona fide* (not using the word in an obnoxious sense) to a transferee, but in accordance with, and for the purpose of working out the arrangement with Sheridan. That arrangement, however beneficial for the company, was one which the directors had no power or authority to make, so as to bind the shareholders generally. The transfer to Spence, therefore, made under such circumstances, without imputing *mala fides* to any one, was one which, when the company came to be

Ex parte Bennett (2) and *In re the Kilbricken Mines Company* (3).

June 26.—LORD JUSTICE TURNER said, that this was a motion to discharge an order of Vice-Chancellor Kindersley, ordering the appellant, Mr. Jessop, to be placed upon the list of contributories, as holding 474 shares in the company; and the motion went on to ask that his name might be excluded from the list. Mr. Jessop was the holder of the shares until the 17th of March, perhaps till the 20th of March 1856 (for the deed of transfer was dated on that day), at which time he transferred his shares to Mr. J. F. Spence. This transfer was perfectly formal and regular; it was affirmed by the directors on the 25th of March, which approval was customary on the transfer of shares, though not necessary according to the constitution of the company. No doubt, therefore, on the 20th or 25th of March the transfer was complete at law, as the order for winding up the company was not made until November 1856; and it was therefore for the official manager to shew that this transfer, valid as it was at law, was invalid in equity. The transfer was, however, opposed on these grounds. It was said, that the appellant was a director of the company, and that the company was in difficulties in 1855, or certainly in February 1856, when an extraordinary meeting of the shareholders was held to consider the situation of the company, and to determine on the measures which should be adopted in consequence. This meeting was held on the 13th of February, but there was not a sufficient attendance of shareholders to constitute a meeting. Several directors, however, were present, and resolutions were signed by them to the effect that it was not expedient to carry on the company, and that it should be wound up under the Court of Chancery, and that the shareholders should be called together for the purpose of confirming this proceeding. The appellant signed these resolutions. On the 4th

wound up, could not be held valid, and the Court was under the necessity of putting Mr. Jessop upon the list of contributories.

(2) 5 De Gex, M. & G. 248; s.c. 24 Law J. Rep. (n.s.) Chanc. 130.

(3) 30 Law T. Rep. 185.

of March 1856, at a meeting of the directors, a shareholder having applied to transfer his shares, the secretary was instructed to apply to the Registrar of Joint-Stock Companies, and to inform him that the company was about to be wound up, and to ask him to refuse to register any transfers. On the 6th of March 1856, Mr. Sheridan, the manager of another insurance company, had an interview with the board, with a view to the reconstruction of the company. On the 11th of March a meeting of the directors was held, at which the secretary reported that the Registrar of Joint-Stock Companies said that he had no power to stop transfers, and that the shareholder who had made application to him had been permitted to transfer his shares. A resolution was then moved, that the solicitor of the company be instructed to proceed with the necessary measures to wind up the company in Chancery. This resolution was, however, lost, four votes being against it, and three in its favour. The appellant voted in favour of the motion. On the 13th of March Sheridan again attended the board, when a resolution was passed, that in consideration of Sheridan procuring, in the way of ordinary business, or by issuing new shares, or by obtaining payment from shareholders in arrear, £3,000*l.* in seven months, he should have a salary of 200*l.* a year as consulting actuary, and should also have distributed among his nominees 500 shares, and all shares forfeited in the next three months on which not less than 1*l.* had been paid up. It was, however, provided that Sheridan's remuneration should be dependent on his providing the sums specified, and that in case of an order to wind up the company being made within one month, Sheridan was not to be entitled to any remuneration. On the 14th of March another meeting was held, at which it was resolved that certain advances should be made by the directors. A statement was then made out, and signed by Sheridan, and by each director who was present; and it was resolved that no shares should be allotted without Sheridan's approbation; and that he was to have a seat at the board. On the same day an agreement was come to between the appellant and Sheridan. The appellant was at that time a creditor of the

company for 600*l.* or 700*l.*, which he had lent the directors to pay sums due to the Argus Insurance Company, and he was also liable on behalf of the company to the Argus Company. It was agreed that the appellant should give up the debt, and that the amount should be added to his account in respect of his shares, so as to make them more valuable, and that he should give up his bond to the company on condition of his being released from all liability. This agreement was signed by the appellant, and at the foot was this memorandum, "I accept the above in explanation of the resolutions passed this day." It was in consequence of this agreement that the transfer of his shares was made. On these facts it was contended, by the official manager, that the transfer was not *bona fide*, but that it was contrived to give effect to the arrangement between the directors and Sheridan, and that they had exceeded their powers in making that arrangement; and that, therefore, the transfer could not be maintained. On the other hand, it was argued that it was competent to any shareholder to transfer his shares, without limit or restriction. It was contended, that the appellant had advocated the winding up of the company, and was not satisfied with the arrangement with Sheridan; and that he had determined either that the company should be wound up, or that he would dispose of his shares, and get out of the company on that account. And it was also argued, that his agreement with Sheridan was made in order to carry that intention into effect, and the sacrifice made by the appellant in giving up the debt due to him was relied on as a proof of the honesty and *bona fides* of his intention. On these conflicting views, the Court had to decide whether the transfer, which was undoubtedly valid at law, was invalid in equity. That the transfer was honestly and fairly intended, his Lordship had no doubt. If it could be invalidated at all, it must be in consequence of its connexion with the arrangement with Sheridan—an arrangement which certainly seemed to his Lordship not to be justified. But assume, that it was unjustifiable, and that it was a breach of duty on the part of the directors, did it then follow that this transfer was impeachable? His Lordship

thought not. It was a fair conclusion from the evidence that the arrangement induced the transfer, and not the transfer the arrangement. The appellant was in this position. A majority of the directors would not concur with the appellant in winding up, and he had no remedy but to wind up the company himself, or to retire from his connexion with it by transferring his shares. No other ground for impeaching the transfer was alleged, except that the shares were transferred to the person by means of whom the arrangement was to be carried into effect. But the appellant had an unrestricted right to transfer to whom he pleased; and although the Court would watch strictly a transfer under such circumstances, and if it appeared to be tainted with any unfairness, would interfere, yet if it was in all respects open and fair, it would not set it aside; especially where, as in this case, the shareholder had full right to transfer to whom he pleased. *Bennett's case* had been relied on by the official manager, but that case was not applicable; for there the acceptance by the directors was a breach of their duty. There was no such case here. On the whole, his Lordship was of opinion that the appellant was successful, and his name must be struck out of the list. He could, however, have no costs; and the costs of the official manager must be paid out of the estate.

LORD JUSTICE KNIGHT BRUCE was also of opinion that, consistently with *Bennett's case*, the transfer was legally and equitably effectual, and that Mr. Jessop ceased to be a shareholder in the company. He therefore agreed with his learned Brother that Mr. Jessop's name must be struck out of the list of contributories.

J.R. Ch. 502. Name. 82 R. 528.
 Wood, V.C. } *May or 4 of 1858 in London 4*
 BYLES, J. } THE ATTORNEY GEN- *62 560.*
 June 10, 11, 24, 25; } ERAL V. MATHIAS. *52 22 62.*
 July 8. } *Tucker & Linger 52 25*
94.
 Custom—Prescription—Forest of Dean
 —Profit à prendre in alieno solo—Lost Grant.

Whether a right can legally exist in an officer of the Crown to sell the soil of the

Crown and not account for the proceeds, quære; but, if it can legally exist, such right ought to be established by evidence cogent and invincible.

Semble, an office of trust under the Crown cannot be annexed to a manor.

A profit à prendre in another's soil cannot be claimed by custom, however ancient, uniform and clear the exercises of that custom may be.

A right to carry away the soil of another, without stint, cannot be claimed by prescription; nor can the claim be sustained by evidence of a lost grant.

The information in this case stated that the Queen, in right of her Crown, was seised of the soil of the Forest of Dean in Gloucestershire, and of all timber and other trees standing or growing thereon, and of all mines and minerals within or under the said forest, subject to the rights and privileges of the registered free miners of the said forest, and to such grants by Her Majesty or her predecessors as were then in force.

By the 1 & 2 Vict. c. 43. the Dean Forest Mining Commissioners were constituted, with power to grant leases of any quarries in the forest for any term not exceeding twenty-one years, to free miners, who were therein described; and it was enacted, that no quarry within the forest should be opened by any person or persons whomsoever, other than under or by virtue of a lease or leases to be granted as therein mentioned, and no person should be entitled to any quarry within the forest except such as, under the provisions of the act, should be specified in the award of the Commissioners, or except the same should be held under a lease to be granted in pursuance of the provisions of the act. Section 85. was in the following terms:—
“And whereas a claim was made by William Ambrose, Esq., as lord of the manor of Blakeney, before the said Commissioners of Inquiry, to grant gales for quarries and exact gale fees and rents within the bailiwick of Blakeney, in the said forest, founded upon some grant or alleged grant, made by Her Majesty's royal predecessor King Edward the Third, which claim is not admitted, but altogether denied on behalf of Her Majesty, and legal proceed-

ings have been instituted by the Attorney General on behalf of Her Majesty, and are now depending for the trial of such claim; Be it therefore enacted, that nothing in this act contained shall prejudice the just and legal rights of the said William Ambrose, or the just and legal rights of Her Majesty, her heirs and successors, in relation to such claims, or any proceedings already taken, or which may be hereafter taken by or on behalf of Her Majesty, her heirs and successors, or the said William Ambrose, his heirs, executors, administrators and assigns, in relation to such claim so preferred by or on his behalf as aforesaid.”

The defendants, William Mathias and Henry Mathias, claimed to be the successors in title of William Ambrose, and to be entitled to grant what are called gales, enabling the grantees thereof to open and work stone quarries within what they alleged to be the manor or bailiwick of Blakeney within the Forest, by virtue of the above-mentioned grant; and they further alleged that they and their predecessors had, for upwards of 100 years past, *de facto* exercised such right so as to entitle them, as against the Crown to the benefit of the provisions of the Nullum Tempus Act (9 Geo. 3. c. 16), and also alleged such right to be within the 85th section of the 1 & 2 Vict. c. 43.

The information then stated that the manor of Blakeney was wholly distinct from the bailiwick or woodwardship of Blakeney, the office of bailiff or woodward being a forestal office, and the duty of the bailiff or woodward being to protect the royal property and the forestal rights within his bailiwick or woodwardship; but in point of fact the owners of the manor, which was wholly without the boundaries of the forest, had, for very many years, been the holders of the office, and the office had been considered as annexed to, and had *de facto* been held with the manor, and “by reason thereof and of usurpation by the defendants and their predecessors, the duty and perquisites of the forestal office had come to be claimed and treated by them as rights of property annexed to the manor, and they had treated the boundaries of the manor as co-extensive and synonymous with the boundaries of the district

over which the forestal office was exercisable."

The information was filed against William Mathias, Henry Mathias, and Charles Morse, who not being a free miner was working a quarry within the forest, under a grant made by the other defendants, and it prayed that it might be declared that the defendants, W. Mathias and H. Mathias, had not any right or title to grant gales or leases of quarries within any part of the Forest of Dean, to any person or persons whomsoever, or to exact gale fees or rents in respect thereof, and that they might be restrained by injunction from making or granting any more such grants or leases; that Morse might be in like manner restrained from continuing his quarry; and that an account might be taken of the quantities of stone worked and the timber cut down by or under the authority of the defendants, and of the issues and profits thereof, and of the fees, rents and royalties received by W. Mathias and H. Mathias, in respect of any gales or leases granted by them.

The alleged grant from King Edward the Third was not found.

Mr. W. M. James, Mr. Bovill (of the common-law bar), and *Mr. Hanson*, appeared in support of the information.

Mr. Willcock and *Mr. W. Morris*, for the defendants.

The arguments of counsel fully appear in the judgment of Byles, J.

The following authorities were cited:—

Gateward's case, 6 Rep. 59.

Blewitt v. Tregonning, 3 Ad. & E. 554; s. c. 5 Nev. & M. 234; 4 Law J. Rep. (n.s.) K.B. 223.

Rogers v. Brenton, 10 Q.B. Rep. 26; s. c. 17 Law J. Rep. (n.s.) Q.B. 34.

Goodtitle v. Baldwin, 11 East, 488.

Clayton v. Corby, 5 Q.B. Rep. 415; s. c. 11 Law J. Rep. (n.s.) Q.B. 239; 14 Ibid. 364.

The Attorney General v. the Corporation of London, 2 Mac. & G. 247; s. c. 2 Hall & Tw. 1; 19 Law J. Rep. (n.s.) Chanc. 314.

Bright v. Walker, 1 Cr. M. & R. 211; s. c. 4 Tyrw. 502; 3 Law J. Rep. (n.s.) Exch. 250.

Mill v. the Commissioners in Charge of the New Forest, 18 Com. B. Rep. 60; s. c. 25 Law J. Rep. (n.s.) C.P. 212.

The Mayor of Hull v. Horner, 1 Cowp. 102.

Lord Pelham v. Pickersgill, 1 Term Rep. 660.

The Attorney General v. Lord Hotham, Turn. & R. 209.

Gibson v. Clark, 1 J. & W. 159.

Roe d. Johnson v. Ireland, 11 East, 280.

Heddy v. Wheelhouse, Cro. Eliz. 558.

Selby v. Robinson, 2 Term Rep. 758.

Grimstead v. Marlowe, 4 Ibid. 717.

Benson v. Chester, 8 Ibid. 396.

Wellesley v. Mornington, 23 Law J. Rep. (n.s.) Chanc. 49.

The Law Officers of State v. the Earl of Haddington, 5 Wils. & Sh. 570, 591.

4 Inst. 315.

5 Com. Dig. tit. 'Officer,' c. 193.

Manwood's Forest Laws.

July 8.—*BYLES, J.*—The defendants, Messrs. Mathias, claim a right to grant gales or licences for working stone quarries in uninclosed lands within a part of the Royal Forest of Dean, called "Blakeney Walk," to exact payments in the shape of gale fees or rents in respect thereof, and to apply those payments to their own use, without accounting to the Crown. They allege that they enjoy this right as woodwards or foresters of the Crown in Blakeney Walk; that the office of woodward or forester was annexed to a small manor called "Blakeney Manor," which is without the limits of the present Forest of Dean, and that the office, with its perquisites, has devolved upon them as owners of the manor. This is in effect, an alleged right of an officer of the Crown to sell the soil of the Crown, and not to account for the proceeds. It is plain, to say the least, that serious doubts may exist as to the legality of any such right, and that if it can legally exist, it ought to be established by evidence cogent and invincible. But, on the threshold of the case, before arriving at the two inquiries—first, whether in point of law the alleged right can exist; and, secondly, whether, if so, it ever did in

fact exist, the informant presents the preliminary difficulty that the defendants' rights, if ever they had any, are extinguished by the 1 & 2 Vict. c. 43. Into the detailed provisions of that statute it is not necessary to enter, for it is admitted that unless the defendants can bring themselves within the words of the saving clause (s. 85.), introduced for the benefit of their predecessor in title, one William Ambrose, the statute and the award made under it extinguished all previous right of quarrying, however good in law and however clearly established in fact; thus making a *tabula rasa* on which to inscribe the new rights created by the statute. That saving clause does not purport to save all the rights of William Ambrose, whatever they may have been, but only his right as he stated and claimed it before the Commissioners of Inquiry. This claim, it appears from the same section (85.), was this:—A claim by him as lord of the manor of Blakeney, founded on a grant of Edward the Third, to grant gales for quarries, and exact gale fees and rents within the bailiwick of Blakeney. The first observation upon the saving clause is that even if the claim be perfectly legal and established, it is not clear that the saving clause would prevent the indirect operation on the defendants' rights of the extinctive clauses of the statute; for, from the defendants' answers, and from the statements of their counsel it appears that the defendants do not claim to grant a gale or licence to any stranger, but only to persons called free miners, who, though not claiming in respect of any land owned or occupied by them, but only in respect of their birth, residence or occupation within the district, yet claimed a right to have these gales granted to them. The rents and profits of the defendants appear, therefore, on their own statement, to be entirely dependent on the rights of the old free miners. But by the statute a new body of free miners is substituted for the old body, and the old body of free miners is extinguished. The new free miners are to be registered; and by section 21 no person is to be deemed a free miner whose name is not upon the register. To the new registered free miners alone are gales or leases of quarries for the future to be

granted (section 23). Now, as to the defendant Morse, to whom the other defendants are accused by the information of galing a quarry, he is not one of the new registered free miners, and the rights of all the old free miners to gales are abolished absolutely. How, then, can the defendants, Messrs. Mathias, support a claim to grant gales to persons not only whose title to demand a gale, but whose capacity to accept a gale, is abolished? The saving clause reaches the case of the old free miners. And the saving clause introduced in favour of the defendants seems to reach their case only in the event of a contingency made impossible, that is to say, of an old free miner still entitled and still qualified to take a gale accepting a gale from them. To hold that the old free miners still exist for the benefit of the defendants would be to nullify the main provisions of the act of parliament. A clause giving compensation would heal the injury, if any were really inflicted; but there seems to me great force in the informant's objection that the saving clause does not. Suppose, however, that the saving clause could be stretched to meet the case, still it only meets it, if the claim contained in the saving clause be made out in its terms. To make out that claim the defendants must establish each of these three propositions:—First, that they are the woodwards or foresters of Blakeney Walk, for they claim the rights in question as perquisites of that office; secondly, that the woodwardship is annexed to the lordship of the manor of Blakeney; thirdly, that it was annexed to the lordship of the manor of Blakeney by a grant of Edward the Third. Each of these positions requires to be briefly examined. First, are the defendants woodwards or foresters of Blakeney Walk? They cannot pretend to be so otherwise than as lords of the manor of Blakeney. A prescriptive title to the office in gross is negatived by the grants of Edward the Third, and there is no evidence, direct or presumptive, of any grant of the office in fee to any individual in gross, still less to any ancestor of theirs, and no evidence of the exercise of the office by their ancestors as grantees of the office in trust. As to taking it by assignment from a grantee in gross of the Crown,

the office is according to the authorities an office of trust, incapable of assignment without a licence from the Crown, founded on the return to a writ of *ad quod damnum* (4 Inst. 315). The defendants are therefore obliged to claim, and do accordingly claim, the office of woodward or forester as annexed to the manor of Blakeney. Secondly, was the woodwardship ever annexed to the manor of Blakeney? In the first place, it should seem from the passage cited from Lord Coke that the office cannot be so annexed. For if it can, it becomes assignable, and, though it be an office of trust, may pass to the assignees of a bankrupt,—which is a startling proposition. An authority, indeed, has been cited from *Manwood*, to the effect that it may be annexed to a manor, but in the conflict of authorities one is disposed on principle to think that it cannot be so annexed; and the absence of examples or precedents of such an annexation fortifies the conclusion. But suppose it can be annexed, was it, in fact, ever so annexed? Certainly not by any evidence of express existing grant. Certainly not by prescription, for grants of this very woodwardship by the Crown to individuals at pleasure and for life have been produced since the time of legal memory. Is a lost grant since the time of legal memory to a lord of the manor, as such, in fee to be presumed? Is there any reasonable evidence of the continuous exercise of an hereditary office by individuals in their capacity of lords of the manor in fee, and necessarily and only in that capacity an exercise of the office so restrained to the lords of the manor as to be inexplicable on any other hypothesis than that they held the forestal office in fee as lords of the manor? It is not easy to see any such. If there be none, then there is no evidence of lost grant. But there is evidence on the other side, for the actual grants which have been produced make it more reasonable that if any exercise of the office is referable to any presumed grant, it should be referred to a grant of such a description as the grants which are proved actually to have existed—viz. grants during pleasure or for life. The only three foundations of such a right, therefore,—viz. existing grant, prescrip-

tion, lost or presumed grant—seem equally to fail. But assuming that the woodwardship could be, and really was, annexed to the manor by royal grant, there arises the other inquiry, thirdly, was it annexed by a grant of Edward the Third? To arrive at this conclusion, one or other of these gratuitous assumptions must be made—either that the last grantee for life of Edward the Third, whose grant is dated 1349, pre-deceased that king, or that the king, after the death of the grantee for life, and before the date of his own death in 1376, granted to a lord of the manor in fee as he had never done before; or else that Edward the Third, between 1349 and 1376, granted the reversion in fee in the office to the lord of the manor. It is surely not too much to say there is no evidence whatever in support of either of these hypotheses. They are purely gratuitous. Indeed, there is no more reason in fact or in law, but less reason, to presume a grant by Edward the Third than by any of his successors. For these reasons, it appears to me, assuming the defendants' claim to be of a nature capable of being supported in point of law, that they have failed to make out any one of those requisites, every one of which they must establish to bring themselves within the saving clause of the statute; and, if that be so, then the extinctive clauses of the statute wipe out and expunge all their rights, whatever they may have been. But it may be more satisfactory to the defendants if we proceed to inquire whether they really had, or rather, in point of law, ever could have had, before the statute, any such legal right as they claim, though not falling precisely within the very words of the saving clause. Could they, under any circumstances, make out by this, or any other presumptive evidence, a right to take by the hands of the free miners the soil of the Crown without accounting for the proceeds? The whole burden of proof is on the defendants, for the soil of the forest is in the Crown. The statute recites that fact; and if it be contended that the saving clause protects the defendants from being injuriously affected by that recital, the informant's evidence proves the soil to be in the Crown, and the answer of the defendants admits it. It

seems to me, first, that the free miners themselves could, in point of law, have had no such right as the defendants' claim assumes them to have had. Now, the claim of the free miners is to subvert the soil, and carry away the sub-stratum of stone without stint or limit of any kind. This alleged right, if it ever existed, must have reposed on one of three foundations—custom, prescription or lost grant. The right of the free miners is incapable of being established by custom, however ancient, uniform and clear the exercises of that custom may be. The alleged custom is a custom to enter the soil of another and carry away portions of it. The benefit to be enjoyed is not a mere easement, it is a *profit à prendre*. Now, it is an elementary rule of law that a *profit à prendre* in another's soil cannot be claimed by custom, for this, among other reasons, that a man's soil might thus be subject to the most grievous burdens in favour of successive multitudes of persons, like the inhabitants of a parish or other district, who could not release the right.

The leading case on the subject is *Gateward's case*, which has been repeatedly followed, and never overruled. Thus, in *Blewitt v. Tregonning* it was held, that the right to take even the adventitious soil or sand that had been blown from the shore on to land contiguous to the sea could not be claimed by custom, though it was urged that to follow this drifted sand was only following a chattel. It is true that the Court of Queen's Bench, in *Rogers v. Brenton*, expressed an extra-judicial opinion that the custom of tin-bounding in Cornwall, which involves the taking of a profit *in alieno solo*, might have been good, if coupled with an obligation to work. But, assuming that opinion to be correct, I am not aware that it has ever been extended to any other case, and so difficult did the learned counsel for the plaintiff in *Rogers v. Brenton* feel their position to be, that they desired to treat the custom which they were bound to support as the *lex loci* of a province. Notwithstanding all that was said in *Rogers v. Brenton*, yet *Gateward's case* still stands forth as a land-mark of the law on this subject; and no actual decision has been

cited at the bar to shew that a right of this nature has been claimed by custom only and supported. The next question is, can such a right as this be claimed even by prescription? I will assume, against the fact, that there is no evidence to negative prescription. The present is a claim, not only to carry away the soil of another, but to carry it away without stint or limit; it is a claim which tends to the destruction of the inheritance, and which excludes the owner. A prescription, to be good, must be both reasonable and certain (*Comyns's Digest*), and this alleged prescription seems to me to be neither. Thus, a claim of a common without stint annexed to a messuage without land is bad—*Benson v. Chester*. Lord Coke says, (*Co. Lit.* 122, a,) that you must not exclude the owner of the soil. And in *Clayton v. Corby*, although a jury had found a thirty years' exercise without interruption, as of right, of a claim by prescription to dig clay in the plaintiff's land for the defendant's brick-kiln, and though the verdict would not be assailed, yet the Court of Queen's Bench gave judgment for the plaintiff, *non obstante veredicto*, on the ground that such a prescription was radically vicious, and incapable of being sustained, for that it was an indefinite claim to take all the clay; in other words, to take the whole close. That case rests on the soundest rules of law, and it is an authority expressly in point, shewing that the strongest evidence of user could not support this as a prescriptive claim. The only remaining question on this part of the case is this: Can the claim be sustained by evidence of a lost grant? Prescription presupposes a grant, and if you cannot presume a grant of an unreasonable claim before legal memory, *à fortiori* can you not presume one since. The defendants have relied on statutes of limitation, but as to that, a claim which is vicious and bad in itself cannot be substantiated by a user, however long. Upon statutes of limitation the case of *Clayton v. Corby* is again decisive. The statute 2 & 3 Will. 4. c. 71. enacts, that no claim which may be lawfully made at common law by custom, prescription or ancient grant shall be defeated after the periods there mention-

ed; yet *Clayton v. Corby* shews that if the claim was not one which could be lawfully made by custom, prescription or presumed grant, it will, however clearly proved, nevertheless be defeated. These legal objections apply to the claim of the free miners, but they apply equally to the defendants, who claim to enjoy the benefit of taking away the soil by the hands of the free miners; and the defendants are, on their own shewing, in a worse position than the free miners, for the defendants have to shew a valid prescription exempting them from accounting for the proceeds of the Crown's soil, which they have sold. If a forester cannot prescribe to have windfalls, as, according to Lord Coke, he cannot—4 *Inst.* 299, because they were a portion of the king's inheritance, then, by the stronger reason, can he not prescribe to sell the very soil on which the trees grow, and to appropriate the proceeds. If these observations on the law of the case be well founded, it is unnecessary to add any further remarks on the evidence; for I regret that I feel it my duty to express to his Honour, the Vice Chancellor, my humble opinion that the claim is one which cannot be supported in point of law.

WOOD, V.C. concurred.

M.R. }
June 4. } SPENCE v. HANDFORD.

Will—Children—Referential Provisions
—Gift supplied.

A residuary estate was given to three brothers and a nephew for their lives as tenants in common, and after their decease then in trust for their heirs and assigns as tenants in common. The will then contained provisions that the shares of any or either of their children dying under twenty-one without issue should go to the survivors, and that the share of such child as died under twenty-one leaving issue should go to the children of such child; but that in case one child only of the brothers and nephew should attain twenty-one, or be married, then in trust for such child, his or her heirs or assigns:—Held, that the brothers and nephew

took an absolute vested interest in the residuary estate, with an executory devise over in case of children being born.

John Spence made his will, dated the 2nd of August 1853, and it contained the following clause:—

“I give, devise and bequeath unto my brothers and nephew as follows, viz., to my brother James Spence, to my brother Charles Howe Spence, to my brother Frederick Spence, to my nephew George Hogarth, all and singular my real and personal estate whatsoever and wheresoever, which I shall be possessed of or entitled to at the time of my decease, and whether in possession, reversion or expectancy, to hold the same and every part thereof according to the nature and quality of the same respectively, unto my aforesaid brothers James Spence, Charles Howe Spence, Frederick Spence, and my nephew George Hogarth, during their natural lives, to share and share alike as tenants in common, and after the decease of my aforesaid brothers and nephew then to be held in trust for all and every their heirs and assigns as tenants in common; provided always, and I hereby direct that if any or either of their children shall depart this life under the age of twenty-one years without leaving any lawful issue, the share or shares of each of them so dying shall be in trust for the survivor or the survivors of them or their heirs and assigns respectively, if more than one as tenants in common; but in case any or either of such child or children of my aforesaid brothers or nephew shall die under the age of twenty-one years and leave any lawful issue, then I direct the part or share of each child so dying shall be in trust for his or her child or children; and in case there shall only be one such child of my aforesaid brothers or nephew who shall live to attain the age of twenty-one years or be married, then in trust for such only child, his or her heirs, assigns, &c. for ever.”

The testator died on the 1st of October 1856; he left his brothers and nephew surviving, but neither of them ever had any issue. George Hogarth died shortly after the testator. James Spence, the testator's brother, instituted this suit to obtain a

construction of the will, and a declaration of their rights under it.

Mr. Selwyn and Mr. Cole, for the plaintiff, contended that the brothers and nephew took the residuary estate absolutely.

Mr. Greene, for the executor and residuary devisees of the testator's nephew, insisted that he took an absolute interest in the estate.

Mr. Lloyd and Mr. Beavan, for the heir-at-law of the testator.—The brothers and nephew took only a life estate in the property. It was altogether independent of the trust for "all and every their heirs and assigns." The word "heirs" had reference to the children, the word "assigns" to their possible alienees. There was a clear general intention that children should take in fee, and as there were none in existence, the heir was entitled. There could be no survivorship among them, and the heir was entitled to so much as had fallen in.—

Milroy v. Milroy, 14 Sim. 48; s.c.

13 Law J. Rep. (N.S.) Chanc. 266.

2 *Jarman on Wills*, 68, 2nd ed.

Sibley v. Perry, 7 Ves. 522.

Edwards v. Edwards, 12 Beav. 97.

Gummoe v. Howes, 23 Ibid. 194; s.c.

26 Law J. Rep. (N.S.) Chanc. 323.

Symers v. Jobson, 16 Sim. 267.

Mr. Hoffman, for Mr. Handford, the executor.—The word "heirs" must be referred to children. There could be no doubt of it, were it not for the word "assigns." If the words "heirs and assigns" were rejected, the will would be consistent; the provisions in favour of children would then have their effect; if they were retained, and effect given to them, it would be against the intention of the testator.

THE MASTER OF THE ROLLS.—It is not easy to come to a satisfactory conclusion upon this obscure will; but I have, in my own mind, arrived at what I believe to be the scheme and object of the will, and it will appear, by referring to various parts of it, to account for the form in which it stands. I think some passage must have been omitted, perhaps in copying: prob-

ably a gift to the children, after the gift to the brothers and nephew, and their heirs and assigns. The will goes on to state what is to be done in case these children, to whom he seems to have supposed he had given a share in a certain event, should die without leaving issue. The testator may be assumed to have reasoned thus: I have given my property to my three brothers and nephew, who are my next-of-kin; none of them have children; I give the estate to them for their lives, and at their deaths I give it to them absolutely in case they have no children, but if they have children, then I wish the children to have the estate previously given to them, and if there be only one child, that one is to take the whole. What appears in this will to sanction that conclusion is, that he directs what shall be done with respect to the shares of the children who shall die under twenty-one, without leaving issue; and it is to be observed that there is no gift to any child throughout the will, except in the case of there being one child only, in which case he is to take, upon attaining the age of twenty-one, the whole estate. I cannot, as suggested, strike out the words "heirs and assigns," or give them no meaning at all. I think the testator meant to give the brothers and nephew a fee simple, with this direction, that if they should have children, which he seemed to think was an improbable event, then these children were to take; otherwise they, the brothers and nephew, were to take a fee simple in the property; and I think accordingly that the first words of the will must create an absolute interest in the brothers and nephew, which was to be cut down in case there should be any children, but there not being any children, that contingency has not arisen. An absolute interest, therefore, vests in them, but I express no opinion upon the result should any child be afterwards born. I shall, therefore, declare, that a fee simple was given to the brothers and nephew, as tenants in common, with an executory devise over in case of children being born. This construction will at once prevent intestacy, and put an end to any claim by the heir-at-law.

M.R. }
 June 10. } MANSERGH v. CAMPBELL.

Annuity—Perpetual Rent-Charge—Construction of Will.

*A testator gave an annuity or yearly rent-charge of 300*l.* to his niece A. B, and after her decease unto her children equally, if more than one, share and share alike, to be applied for their maintenance until the youngest should attain twenty-one; on the happening of which event he directed the annuity to be absolutely sold by such children, and the proceeds divided among them; and he charged the said annuity upon his real estates, which he devised to H. in fee:—Held, that the gift created a rent-charge on the estates in fee simple.*

William Hinton, by his will, dated the 4th of January 1810, gave and bequeathed to his niece, Ann Baker, one annuity or clear yearly rent-charge of 300*l.*, to be paid quarterly, for her life, free from all deductions on any account whatsoever, except the tax upon property or income; and from and after the decease of his niece he gave and bequeathed the said annuity or yearly rent-charge of 300*l.* unto all and every the children, if any, of his said niece, if more than one share and share alike, and if but one, then to such only child, to be paid and applied for and towards the support, maintenance and education of such child or children, by equal quarterly payments until such only child, or the youngest of such children, should attain the age of twenty-one; and upon the happening of such event then he directed that the said annuity of 300*l.* should be absolutely sold and disposed of by such child or children of his said niece; and that the money to arise or be produced from such sale should go to or be equally divided among such children, if more than one share and share alike. The testator then charged all his freehold estates with the payment of the said annuity accordingly; and subject to and charged and chargeable with the said annuity, he devised the estates to James Harvey, his heirs and assigns.

The testator died shortly after making his will. On the 24th of October 1811, Ann Baker, the annuitant, intermarried

with John Campbell, and died in 1856, leaving four children. The question now was, whether the annuity or yearly rent-charge was to continue for lives only, or was perpetual; and if perpetual, the bill, which was filed by one of the children, asked that it might be sold.

Mr. R. Palmer and Mr. J. H. Palmer, for the plaintiff.—The gift, in effect, gave a freehold interest in the land; it was of so much of the rents and profits as might be adequate to raise the 300*l.* a year for ever; it was created with a view to a sale, and it could exist only in fee.

Potter v. Baker, 13 Beav. 273; s. c. 21 Law J. Rep. (N.S.) Chanc. 11; 15 Beav. 489.

Yates v. Maddan, 16 Sim. 613; s. c. 18 Law J. Rep. (N.S.) Chanc. 310; 3 Mac. & G. 532; 21 Law J. Rep. (N.S.) Chanc. 24.

Pawson v. Pawson, 19 Beav. 146; s. c. 23 Law J. Rep. (N.S.) Chanc. 954.

Robinson v. Hunt, 4 Beav. 450.

Mr. Selwyn and Mr. Follett, for other of the children.

Sir R. Bethell and Mr. Giffard, for the residuary devisee, referred to—

Stokes v. Heron, 2 Dru. & W. 89; s. c. 12 Cl. & F. 191.

Blewitt v. Roberts, 10 Sim. 491; s. c. Cr. & Ph. 274; 9 Law J. Rep. (N.S.) Chanc. 209; 10 Ibid. 342.

Innes v. Mitchell, 6 Ves. 460; s. c. 9 Ibid. 212.

Co. Lit. 144, b, n. 13.

A perpetual annuity is not created by a direction to sell the interest given.

Kerr v. the Middlesex Hospital, 2 De Gex, M. & G. 576; s. c. 22 Law J. Rep. (N.S.) Chanc. 355.

Wilson v. Maddison, 2 You. & C. C. C. 372; s. c. 12 Law J. Rep. (N.S.) Chanc. 420.

Ex parte Wynch, 1 Sm. & G. 427; s. c. 22 Law J. Rep. (N.S.) Chanc. 750; 5 De Gex, M. & G. 188; 23 Law J. Rep. (N.S.) Chanc. 930.

Holderness v. Carmarthen, 1 Bro. C. C. 377.

The MASTER OF THE ROLLS.—An annuity or rent-charge may be granted for

any length of time—it may be perpetual, it may be for a life or lives in being, or it may be for years; and the only question is, what is the term which the testator has attached to this annuity? It is also equally clear that if an annuity is given to any person, that means merely an annuity for the life, and if it be given to a person expressly for life and afterwards to another, that is simply for the life of that person; but the question in this case is, whether the testator has not granted an annuity *simpliciter*, and then, whether he has not dealt with that in a particular manner. It is not very material to consider whether the creation of the annuity precedes or succeeds the rights and interests which he carves out of the annuity. What, then, is the annuity which he deals with in giving interests out of it? He says, “I do hereby charge and make chargeable all and singular my freehold estates situate anywhere in England with the payment,” and then, instead of saying of the said several annuities, I choose to read it “these two,” or “this one annuity,” (for it is only one I have to deal with), or a yearly rent-charge of 300*l.*; and subject and charged with the payment of the said annuity, I give the estate to my good friend J. Harvey in fee. That is the gift which is the limitation of that annuity or rent-charge. Or I give the whole of my property in England to J. Harvey in fee charged with the annuity or rent-charge of 300*l.* What is the distinction? It is clear that the cases which have been referred to do not touch that case at all. No inference can be drawn from the words, or if any can be drawn, it would be in favour of a perpetual annuity, inasmuch as he has given an annuity without limiting the duration of time. How, then, has he dealt with it? It is coupled with the name of no person whatever; is not limited to the life of any person, according to *Blewitt v. Roberts* and those other cases of which the principle is clearly established. Then he says, in the way in which I read the will, I give to my niece this annuity or rent-charge of 300*l.* for her life, and then after her death I desire it to go for the benefit of all her children, for their maintenance and education until the youngest attains twenty-one, and when the youngest attains twenty-one, I desire

this annuity or rent-charge to be sold. It is not called by the name of any person, and is still in the same indefinite state as it was before, a rent-charge issuing out of estates of which the only interest is a perpetual interest, an estate in fee simple. He gives a rent-charge without giving any definite time for it to a person for life, then to maintain her children until the youngest attains twenty-one, and then that rent-charge is to be sold. Why then is that to be cut down to the lives of the children? I am unable to see any reason for that. If it had said I give the annuity to the children, then it would have been another thing, but it is only until the youngest child shall attain twenty-one for their maintenance and education. The giving an annuity to persons for life and directing it to be sold would seem to be surplussage, an idle direction. What is the advantage of giving an annuity of 100*l.* a year for the life of A, and then directing the annuity to be sold and paid to her? Of course A. may sell her annuity if she pleases without any direction for that purpose; but this is simply a direction that this particular annuity so indefinitely created and so charged upon all his property shall be sold and the produce of it divided amongst them. I could entertain no doubt whatever that such was the real construction of the will if the will had been drawn in the mode in which I have read it; that is to say, if it had originally created the rent-charge, and then had proceeded to deal with it in this manner. But does it make any difference that in fact he begins it in this way? I give an annuity or rent-charge to my niece for her life: after her death I give the same annuity or rent-charge for the maintenance and education of her children until the youngest shall attain twenty-one, and when the youngest attains twenty-one I desire this annuity or rent-charge to be sold and the produce divided amongst them. What annuity or rent-charge? Not that given to his niece for her life, for that has expired; not that which was applied to the maintenance of the children until the youngest attains twenty-one.

[*Sir R. Bethell.*—The clause about maintenance is a parenthesis which follows the gift to the children. But one limb of the parenthesis after the words “only

child," the other after "twenty-one years."]

I read it thus : After the decease of my niece Ann Baker, I give and bequeath the said annuity, yearly rent-charge or sum of 300*l.* unto all and every the children (if any) of my said niece, lawfully to be begotten, if more than one share and share alike, and if but one then to such only child, to be paid and applied for and towards the support, maintenance and education of such child or children, by equal quarterly payments on the days and times and in manner aforesaid, until such only child or the youngest of such children shall attain the age of twenty-one years. I stop there, and say that the will does not go beyond that. Then I say, that no child takes an annuity beyond any child attaining twenty-one, and that the bequest is limited to the youngest child attaining twenty-one years, and that there is no gift beyond that; then when the youngest child attains twenty-one, there is a direction that the said annuity or yearly sum of 300*l.* shall be absolutely sold and disposed of by such child or children of my niece, and that the money to be produced by it shall be divided among them in equal shares and proportions, share and share alike. If he had intended them only to take life interests, he would simply have said, I give annuities to them, and direct that during their minorities their share of the annuity shall be applicable to their maintenance and education. But, on the contrary, here is an express gift of an annuity until the youngest child shall attain twenty-one, and then a direction that it shall be sold. I was observing that up to this time we do not know what annuity is given, because it is not an annuity given to my niece, for that has expired at her death; it is not an annuity given to the children, because that has expired on the youngest attaining twenty-one. Then, what is the annuity which he afterwards directs to be sold? There is no direction of what the annuity is. You come afterwards to another part of the will, and he says he directs the annuities to be charged on estates in fee simple, which estates are devised subject to the annuities. What is there to limit that? In my opinion it is indefinite; he intended

this to be a rent-charge in fee simple issuing out of fee simple estates, which were to be limited in this manner—to the niece for life, afterwards to the children for their maintenance and education until the youngest child should attain twenty-one, and afterwards to be sold and divided amongst them. I shall make a declaration to that effect.

M.R. } FURNESS v. THE CATERHAM
July 8, 22. } RAILWAY COMPANY.

Stellorthern & Johansson 53
Railway Company—Liabilities—Judg. & C. L. 71
ment Creditor—Charge on Railway.

A creditor, who had obtained a judgment against a railway company, the tolls of which were wholly inadequate to meet the debts of the company, was held entitled to a charge on the tolls. He was also appointed receiver. A sale of the lands was refused, but inquiries were directed as to the best means of making the undertaking profitable.

The Caterham Railway Company was incorporated by the 17 & 18 Vict. c. lxviii., and under the powers of this act they purchased and took lands for the construction of the railway.

The plaintiff George Furness contracted with the company for the construction of the railway, and in pursuance of that contract, the company gave him nine debentures of the company, amounting in the whole to 8,000*l.*, in part payment of what was due to him for the construction of the railway; they also made various cash payments, but after giving credit for the whole, there remained 3,850*l.* due to the plaintiff.

On the 5th of February 1857, the plaintiff brought an action in the Court of Exchequer of Pleas, to recover the 3,850*l.*, and on the 7th of April 1857 entered up judgment in the action for the full amount of debt and costs, and two days afterwards it was duly registered in the Court of Common Pleas.

The plaintiff issued a writ of *fi. fa.* under the judgment against the goods and chattels of the company, but realized 30*l.* 7*s.* 6*d.* only. He then obtained an attach-

ment under the judgment against a cash balance standing to the credit of the company at their bankers, and realized a further sum of 82*l.* 17*s.* 6*d.*, leaving 3,821*l.* 1*s.* 6*d.*, with interest, due to the plaintiff.

The plaintiff afterwards issued an *elegit*, under the judgment, against the lands of the company, and he had been put into possession of the railway and the tolls, which, however, were very inconsiderable. The plaintiff also gave notice requiring payment of the debentures for 8,000*l.*, and the interest due thereon. It appeared, however, so far as the plaintiff could ascertain, that the only property of the company consisted of the land on which the railway was constructed, with the line of rails, buildings and offices.

The railway was worked under a contract with the South-Eastern Railway Company, that company having hired the railway for a period, which would expire on the 31st of July 1858, at 150*l.* a month. By their contract the South-Eastern Company was to run an engine, tender and certain railway carriages along the line at stipulated times, and they were to charge, by way of deduction from the 150*l.*, 15*l.* per cent. on 2,300*l.*, the estimated value of the engine, tender and carriages; and the Caterham Railway Company were to purchase all the coal, coke, oil, and other stores for the purposes of such railway, and to pay the wages of all the men employed on the railway, and all the incidental working expenses. The general result of this arrangement was a profit of about 10*l.* a month; but this, as a fund, was insufficient to pay what was due to the plaintiff and the other incumbrancers of the company.

There were also several registered judgments against the Caterham Railway Company, several of which were for unpaid purchase-money of lands sold to the company, with costs; and the several parties, by virtue of such judgments, claimed a right to stand as incumbrancers on the land and railway.

The plaintiff then asked for a declaration that he was entitled to a charge on the lands of the company, as more than a year had elapsed since the judgment was entered up; and he also asked for accounts of the money due to him, and the other in-

cumbrancers on the railway, and of their priorities, and that the lands of the railway might be sold, and the proceeds applied in payment of what should be so found due.

Mr. Lloyd and Mr. Smythe.—The plaintiff is entitled to a charge upon the railway by virtue of his judgment. A mortgage of the tolls and property of the railway vested in the mortgagee no interest in the land; a mortgage also admitted of no actions of covenant against the company. The special remedy was alone under the statute against the undertaking, the rates and duties; but under a charge the Court might enforce a sale of the railway. It was therefore necessary only to consider in what way the powers given for the benefit of the public were to be preserved to them.—

Doe d. Myatt v. the St. Helen's Railway Company, 2 Q.B. Rep. 364; s. c. 11 Law J. Rep. (n.s.) Q.B. 6.

Russell v. the East Anglian Railways Company, 3 Mac. & G. 104; s. c. 20 Law J. Rep. (n.s.) Chanc. 257.

Hart v. the Eastern Union Railway Company, 8 Exch. Rep. 116; s. c. 22 Law J. Rep. (n.s.) Exch. 20; 7 Exch. Rep. 246; 21 Law J. Rep. (n.s.) Exch. 97.

Hawkins v. Gathercole, 1 Sim. N.S. 150; s. c. 20 Law J. Rep. (n.s.) Chanc. 303.

Mr. Erskine, for the vendors of the lands taken by the company, claimed a lien for the unpaid purchase-money, and a prior charge on the railway.

Mr. Surridge, for the railway company.—The 1 & 2 Vict. c. 110. has no application to the present case. The only property of the company was the line of way; that was vested in the company for public purposes, which could only be taken away by another act. The Caterham Railway Act incorporated the Companies Clauses Consolidation Act, 1845, the Lands Clauses Consolidation Act, 1845, and the Railways Clauses Consolidation Act, 1845, 8 & 9 Vict. cc. 16, 18, 20. The plaintiff, however, insisted that the 1 & 2 Vict. c. 110. overrode the whole, and in fact repealed the Caterham

Railway Act, a proposition that could not be maintained—*Potts v. the Warwick and Birmingham Canal Company* (1).

Mr. W. W. Cooper, for George Smith, a judgment creditor.

Mr. Hingeston, for the London, Brighton and South Coast Railway Company, who were also judgment creditors.

Mr. R. Palmer referred to—

The Exchequer Loans Acts.

Jortin v. the South-Eastern Railway Company, 6 De Gex, M. & G. 270; s. c. 2 Sm. & G. 48; 24 Law J. Rep. (N.S.) Chanc. 343; *ante*, 145.

Mr. Lloyd, in reply.—The railway is at present worked by the South-Eastern Railway Company, and the contract will terminate on the 31st of July, but they carry on the traffic only as carriers, and after paying for the engine, there remains but little from the tolls to pay either the debts or interest.—

Fripp v. the Chard Railway Company, 11 Hare, 241; s. c. 22 Law J. Rep. (N.S.) Chanc. 1084.

Pontet v. the Basingstoke Canal Company, 3 Bing. N.C. 433; s. c. 4 Sc. 182; 6 Law J. Rep. (N.S.) C.P. 177.

THE MASTER OF THE ROLLS.—You are certainly entitled to a charge, and I must enforce it, but then it must be against the tolls only. The provisions of a railway act always assume that a railway will be productive. If the tolls were foreclosed there must still be somebody to carry on the railway traffic. Judgment creditors, however, are only entitled to one period for redemption; were it otherwise, there never could be a foreclosure. If the company did hold possession of the land on which the railway was made, still it was merely nominal. They could not dispose of it, and deprive the public of their right. At present the traffic was carried on by the South-Eastern Railway in their character of carriers, but the contract was about to expire. It was most material that some steps should be taken for the benefit of all parties, and creditors seeking to enforce their claims against an insolvent company, must at some time be relieved from the

liability to account. I shall, therefore, direct an account of what is due to the plaintiff for principal, interest and costs, both on his judgment and the debentures; there must, also, be an account of all sums received by him. Inquire, also what incumbrances there are upon or affecting the railway or the undertaking, tolls and duties, and what is due thereon, and their priorities. Inquire whether anything, and what, is due to any, and which, of the defendants, as landowners, for the land taken by the company, and not paid for by them, and what lands are affected by their claims; and whether any and what means can be taken to make the railway available for paying the plaintiff and the incumbrancers the amounts due to them respectively, and whether any, and what arrangement, can be made for working the railway after the termination of the present contract with the South-Eastern Railway Company. Let the plaintiff also be appointed receiver of the railway tolls, without salary and without security, and all parties incumbrancers must add their costs to their securities.

WOOD, V.C. }
July 5, 6. }

HORTON v. SMITH.

Mortgage—Merger—Extinguishment.

A tenant in tail in remainder expectant upon a prior estate tail took a transfer to himself of a mortgage term affecting the estate. He afterwards became tenant in tail in possession, and, after remaining in possession five years, died a bachelor and intestate, without having barred the entail, and without having indicated any intention as to whether the charge should merge or not. Upon a bill by his administrator against the remainderman,—Held, that the charge was a subsisting charge.

By a deed-poll, dated the 6th of May 1778, made in exercise of a general power of appointment, Mercy Ward appointed certain houses and lands at Upton, in Herefordshire, after the decease of her husband and herself, to the use of Richard Turner for a term of 500 years, upon trust by sale or mortgage to raise 2,700*l.*,

(1) Kay, 142.

and subject thereto, to the use of James Horton for life, with remainder to Catherine Horton, his wife, for life, with remainder to their first and other sons in tail, with remainders over, and with the ultimate remainder to the use of the heirs of Catherine.

There were two sons of James and Catherine Horton, viz., William Moseley Horton and John Horton.

In 1790, Mercy Ward and her husband being both dead, R. Turner, the trustee, mortgaged the 500 years' term for 1,700*l.*, and in 1799 he raised the further sum of 1,000*l.* also by mortgage of the term.

The last tenant for life died in 1824, and in 1828 the mortgage debts and term were assigned to John Horton.

W. M. Horton, the first tenant in tail under the settlement, died on the 12th of December 1850, a bachelor, and thereupon J. Horton, the next tenant in tail, entered into possession and receipt of the rents and profits of the estate, and so continued until the 11th of December 1856, when he died, a bachelor and intestate.

The bill was filed by the administrator of J. Horton against the remaindermen for an account of principal and interest due on the mortgage, and for a foreclosure of the term, or a sale of a sufficient part of the premises. This was resisted by the defendants, on the ground that the term had merged in the inheritance by devolution of the estate upon J. Horton as tenant in tail, and the charge was therefore extinguished.

Mr. Rolt, Mr. Shapter and Mr. Hislop Clarke, for the plaintiff.

Mr. Willcock and Mr. Wickens, for the defendants.

The authorities cited were—

- Forbes v. Moffatt*, 18 Ves. 384.
Wigzell v. Wigzell, 2 S. & S. 364;
 s. c. 4 Law J. Rep. Chanc. 84.
Grice v. Shaw, 10 Hare, 76.
Donisthorpe v. Porter, 2 Eden, 162.
Lord Compton v. Oxenden, 2 Ves.
 jun. 261.
The Duke of Chandos v. Talbot, 2 P.
 Wms. 601.
Chester v. Willes, Amb. 246.
Astley v. Milles, 1 Sim. 298.

Drinkwater v. Combe, 2 S. & S. 341;
 s. c. 3 Law J. Rep. Chanc. 178.

Trevor v. Trevor, 2 Myl. & K. 675.

The Earl of Clarendon v. Barham, 1
 Y. & C. C.C. 688.

St. Paul v. Lord Ward, 15 Ves. 167.

Burrell v. Lord Egremont, 7 Beav.
 205; s. c. 13 Law J. Rep. (N.S.)
 Chanc. 309.

The Earl of Buckinghamshire v. Hobart,
 3 Swanst. 186.

Jones v. Morgan, 1 Bro. C.C. 206, 217.

Hood v. Phillips, 3 Beav. 513.

Smith v. Frederick, 1 Russ. 174, 208.

Story's Eq. Jur. sec. 486.

WOOD, V.C.—In coming to the conclusion which I feel bound to come to in the present state of the authorities, I am not quite sure that there is any contradiction in them at all—perhaps more in the later authorities than in the earlier—because the two earlier authorities cited from *Ambler* and *Peere Williams* unquestionably pointed out a difference between the payment of a charge by a tenant in tail and the payment of a charge by a tenant in fee simple. The later authorities are the other way; and it has been held in all cases of a tenant in tail paying off a charge, unless he indicates—I am not quite sure it is confined to the time of the payment, but either then, or at all events afterwards,—an intention to keep up the charge, it is to be assumed that he intended the payment to be for the benefit of the estate. In that passage, in *Ware v. Polhill* (1), which seems to me to comprise all the numerous other cases on the subject, Lord Eldon puts it clearly; at page 277, he makes this remark—"The principle as to infant tenants in tail is very strongly marked by the cases of merger; and those cases are extremely well accounted for by the principle upon which the Court maintains its doctrine as to tenants in tail adult, viz., if a tenant in tail adult pays off a mortgage or becomes entitled to a charge, as he might acquire (as the Court is in the habit of saying somewhat inaccurately) the absolute ownership, a presumption arises, that his intention was not to keep alive the charge." So, again, the same

principle is laid down by Sir George Turner in *Grice v. Shaw*, and again by Sir Anthony Hart in *Astley v. Milles*. It is always put as the case of a tenant in tail paying or being entitled to a charge. Now the case which has occurred here, and which is certainly more analogous to *Wigsell v. Wigsell* than to any other case, is the case of a tenant in tail in remainder with an interposed estate tail taking a mortgage, and the term becoming vested in him as a security for that mortgage. The remainder in tail has fallen in from the failure of the preceding estates, and he has remained tenant in tail for a period of five years, which is not altogether an unimportant consideration, but nothing more was done.

Then one sees this difference, no doubt, between a charge and an actual payment. With regard to a charge to which the tenant in tail may be comeentitled under a will or otherwise, in which he has taken no active part, if the estate afterwards devolves upon him, he having expressed no intention whatever one way or the other, then the case arises which Sir William Grant refers to in *Forbes v. Moffatt* as being the principle of the decision in *Wyndham v. Lord Egremont*. He says, speaking of that case, "what the counsel for the personal representatives contended was, that the charge should not merge, unless at some period in Lord Thomond's life it was indifferent to him whether the term should be kept on foot or not." That was a case like *Trevor v. Trevor*, and that class of cases. "Upon looking into all the cases in which charges have been held to merge, I find nothing which shews that it was not perfectly indifferent to the party, in whom the interest had united, whether the charge should or should not subsist, and in that case I have already said it sinks." That is the part which occasioned me more doubt in the consideration of this case, perhaps, than any dictum—for precise authority there is none, unless it is *Wigsell v. Wigsell*. He is there speaking, not of a charge which the party has created in his own favour by an advance of money, but he is speaking generally of a charge,—that is to say, he supposes a case in which there being not the least expression of intention at the time of the charge being created,

nor the least expression of intention after the estate tail had devolved, you consider whether it is a matter of perfect indifference to the person that there should be a charge on an estate tail, which the Court has said is equivalent in this respect to a fee simple, because he could acquire the fee any day he chose. You find nothing said one way or the other at any time, but in the total absence of any indication of intention you assume that it being perfectly indifferent to him, the charge is to sink. This seems to be the principle upon which Sir John Leach decided *Wigsell v. Wigsell*, that you have a clear indication of the intention of the person entitled to the charge at the time the charge is created, because he creates it by advancing money at a time when there is an estate for life and an estate in tail intervening, and he is only tenant in tail in remainder, and all the authorities hold that that in itself is a clear and distinct indication that he means it to be a charge at the time of creating it. What occurred in the case before Sir John Leach was this: there was found a case in which there was a person who paid off an old mortgage at the time she was in a similar position to that of the plaintiff in this case. The only difference that I can discover between the two cases is, that there existed an intervening term of 500 years, under which the lady herself was entitled to a charge of 1,500*l.*—the same lady who had paid off the old mortgage. She afterwards concurred in the settlement of the estate, and on all sides it was agreed that her intervening charge of 1,500*l.* was a matter out of the question, the only point being as to the debts, which was not argued by anybody. No one seems to have dwelt upon this point of the intervening term for any other purpose than this: in the course of the argument I find Mr. Roupell, who is arguing for the successful party, says, "There could be no merger in this case on account of the term of 500 years which intervened"; and so Sir John Leach says at the end, "This case has been partly argued on the ground of merger, but merger is out of the question here, because of the intermediate estate." But now really the difficulty one has on that part of the case is in bringing one's mind to bear upon the effect

of that intervening estate which nobody dreamed would have any real effect whatever, excepting that of preventing merger. Then, on the authority of *Forbes v. Moffatt*, and that class of cases, the technical question was, whether merger or not could have anything to do with the question, because there Sir William Grant says a Court of equity is not guided by the rules of law; it will sometimes hold a charge extinguished where it would subsist at law, and sometimes preserve it where at law it would be merged. In the case of *Lord Compton v. Oxenden* there was an outstanding term as security for the charge, but the person entitled to the charge there became entitled in fee simple, and although he was a lunatic and expressed no intention at all upon the subject, it being a fee simple interest that he was entitled to, and the remedy and the right being in one and the same person, the two things were united and at an end; and although there was the actual outstanding term, it was said you could not raise it for the benefit of the person entitled to the fee simple because of the absurdity it would give rise to with regard to those who were entitled after his death, the real or personal representative having that which never could be raised in a man's own lifetime, namely, a charge against his own estate. There was only this difference between the case before Sir John Leach and this case: it was not a substantial point, or anything with reference to the technical question, whether the estate was merged. The difference was, that the lady was not in possession for more than a year, whereas in this case the tenant in tail has been in possession five years; and Mr. Wickens has said this morning, the very circumstance of the tenant in tail being the owner of a mortgage, and being in possession of the property and remaining five years without doing anything (and some degree of weight may be attributed to an argument of that kind) is a sufficient indication that he intended the charge to be at an end. On the other hand, there is this difficulty, that if you were to hold the contrary view to that which Sir John Leach took in this case, and when the charge is clearly and plainly from its commencement created by the person who, by the very

act of creating the mortgage, being only entitled in the way I have described, indicates an intention that it shall be considered as money due to his personal estate,—when you have that clear and distinct indication, if the mere circumstance is to be an indication of different intention, and so as to merge the charge, then you have the difficulty which might be pointed out of a person becoming tenant of the estate tail without knowing it; the person entitled to the prior estate might have died in India, or at some other distant place, and the estate tail might devolve upon the next tenant in tail without his knowing anything about it. You have also this inconvenience, of the tenancy in tail not being a thing, as Lord Eldon pointed out, which can be converted into a fee in one moment: it requires some degree of deliberation; you have this inconvenience, that assuming you find in the first instance the charge to be a debt due to his personal estate, if having a clear charge upon the estate he dies before the recovery could be suffered or the fine levied, the charge is at once merged. That is an inconvenience which the decision of Sir John Leach, in *Wigsell v. Wigsell*, appears to guard against. When you notice the principle upon which that case is argued it is perfectly clear on what ground he rests the decision, because that case was argued by Sir Edward Sugden and Mr. Pemberton for the unsuccessful party, and they put it in this way: "If it makes no difference whether the estate or the charge first vests," they must assume that, for the basis of the argument, "it is difficult to see how it can be made out that this charge subsisted after the inheritance became vested in Susannah Wigsell." Then they go on to argue upon it. It does seem to be difficult in that case, unless you rely upon what is a mere technical intervention of the 500 years' term, to find any principle on which it can be distinguished from the decided authorities. Then, Sir John Leach meets that view by saying, "where a tenant in tail in possession pays off a mortgage, and declares no intention that the charge shall continue for the benefit of the personal estate, there the charge ceases, because the estate is considered as his own, inasmuch as he may make it his own by suffering a recovery.

This principle has no application to a tenant in tail in remainder, whose estate may be altogether defeated by the birth of issue of another person; and it must be inferred that such a tenant in tail means to keep the charge alive. When Susannah Wigsell, therefore, became tenant in tail in possession—he notices that; he does not refer there to the intervening term as anything more than interfering with the possession, “this charge subsisted as a part of her personal estate; and not having afterwards declared any intention to the contrary, I am of opinion that it continued part of her personal estate at her death, and that the plaintiff is entitled to the relief which she prays.” This case of *Wigsell v. Wigsell* is now considered law, and has been so for a long while; there has been no appeal from the decision, and it having remained so long as it has undisturbed, it appears to me that I should be unsettling the law on this subject if I were to lay hold of minute distinctions such as the mere technicality of the intervention of the 500 years term in question, (for Sir John Leach treated the lady as being tenant in possession notwithstanding that term,) or the fact of the person having lived five years instead of one year previous to her death, and did not rely on broad principles. All the other authorities simply say this, that when the tenant in tail in possession makes the payment and does nothing more, the charge is to sink; or when he has a charge which comes to him, as to which, therefore, he expresses no intention either one way or the other, and the estate tail comes to him, then you must rely on what Sir William Grant pointed out in *Forbes v. Moffatt* as to the utter indifference of it being one or the other. But when he has expressed an intention once for all, then, I apprehend, according to *Wigsell v. Wigsell*, the charge continues.

Now, Mr. Willcock, I must say, put a very ingenious point. He says, the best way of judging of his intention is by the legal effect of his acts. He takes a mortgage to himself knowing that he is tenant in tail in remainder after a previous tenancy in tail; and therefore he means by this mode of proceeding, instead of taking an assignment to a trustee, that the charge shall merge if ever he becomes tenant in tail in

possession. I think that is the best way in which it can be put in this particular case, but I think it would be an extreme refinement to attribute this degree of intention where there is not only an intervening estate, but an actual intervening estate tail; and therefore the better opinion is to follow the old authority and say, that at the time he was tenant in tail in remainder he meant it to be a charge. I cannot think he had at that time the refined intention of saying, when the two things become confused then I intend the charge to sink; and there is not a sufficient distinction from *Wigsell v. Wigsell* to justify me in departing from an authority which I am bound to say has settled the law upon this point; for I find modern text-books referring to it upon this point, and I apprehend the practice is founded upon it.

Declare, that the 2,500*l.* is a subsisting charge, and, together with interest from the death of the last tenant in tail and the costs of this suit, ought to be raised; and direct the same to be raised by sale or mortgage, at the discretion of the Judge at chambers.

STUART, V.C. } MACRAE v. ELLERTON AND
July 22, 24. } OTHERS.

Mortgage—Power of Sale—Sale—Costs.

A mortgagee of freeholds with power of sale, and, by deposit of deeds, of leasehold premises, having failed after repeated trials to sell under his power, filed his bill for foreclosure, or for a sale of the mortgaged property, against the executors and devisees in trust of the mortgaged premises under the will of the mortgagor. The plaintiff also went in and proved his debt in another suit, which had been instituted for the general administration of the mortgagor's estate. The fund, realized under a decree for sale made in the suit, was insufficient to pay the mortgage debt:—Held, nevertheless, that the defendants were entitled to their costs out of the fund.

This was a suit by a mortgagee in possession having a mortgage of freeholds with a power of sale and an equitable mortgage,

by deposit of deeds, of leasehold property, for an account and payment of what, upon taking such account, should be found due to him in respect of his mortgage debt, and in default of such payment praying for a foreclosure of all right and equity of redemption to and in the freehold and leasehold hereditaments and premises, and that the leaseholds might be assigned to him free from the equity of redemption; and praying in the alternative that, if it should appear necessary or proper, the property, both leasehold and freehold, might be sold under the direction of the Court.

The mortgage-deed contained a power of sale, with a covenant by the mortgagor to concur in any sale thereunder.

The bill was filed, after frequent ineffectual attempts by the plaintiff to sell under the power, and in which the defendants had refused to concur. It was provided by the mortgage-deed that this power should not prejudice the power of the mortgagee to foreclose the equity of redemption.

The defendants to the bill were the four persons named as executors in the will of the mortgagor. Of these one was specific legatee of the mortgaged leaseholds, another was devisee of the mortgaged freeholds; and two of them only proved the will.

By the decree, upon the hearing of the cause made in March 1854, the usual accounts were directed of the mortgage debt, and a sale was ordered of the freehold estate first, and in case the produce of such sale should be insufficient to pay what should be found due, the deficiency was to be raised by the sale of a sufficient part of the leasehold hereditaments. Under this decree both the freeholds and leaseholds in question were sold, but the proceeds of both fell far short of the amount of principal and interest certified to be due to the plaintiff.

Upon the cause coming on for further directions, the question arose whether the defendants, the devisee of the freehold hereditaments, the legatee of the leasehold premises, and the other defendants, the two other executors of the will, were entitled to be paid their costs out of the proceeds of the sale of the mortgaged premises.

It appeared that there was also a suit pending for the general administration of

the mortgagor's estate, in which the plaintiff had proved his debt.

Mr. Busk, for the plaintiff, submitted, that he was entitled to the whole fund realized by the sale, and to prove in the administration suit for the balance of his debt, together with the amount of his costs of suit; the defendants, on their side, being left to claim the amount of their costs of this suit in the administration suit.—

Brocklehurst v. Jessop, 7 Sim. 438.

Upperton v. Harrison, Ibid. 444.

Price v. Carver, 3 Myl. & Cr. 157.

Hutton v. Sealy, ante, 263.

Geary v. Geary, Seton on Decrees, 2nd edit. 173.

Parker v. Lord Wentworth, Ibid. 201.

Smith v. Nelson, Ibid. 213.

Barnes v. Racster, 1 You. & C. C.C. 401; s. c. 11 Law J. Rep. (n.s.) Chanc. 228.

Kenebel v. Scrafton, 13 Ves. 370.

Wild v. Lockhart, 10 Beav. 320; s. c. 16 Law J. Rep. (n.s.) Chanc. 529.

Carr v. Henderson, 11 Ibid. 415; s. c. 18 Law J. Rep. (n.s.) Chanc. 39.

Wright v. Kirby, 23 Ibid. 463.

Tompsett v. Wickens, 3 Sm. & Gif. 171.

Ford v. Lord Chesterfield, 21 Beav. 426.

Mr. Kay and *Mr. Surridge*, for the defendants, argued, that as the plaintiff sought a sale instead of foreclosure, and also had gone in to prove for his debt in the administration suit, he must be considered as suing not in the character merely of mortgagee, but for the benefit of creditors generally, and that the costs of all parties whom he had found it necessary to bring before the Court were the first charge upon the fund realized.—

Brace v. the Duchess of Marlborough, Moseley, 50.

White v. the Bishop of Peterborough, Jacob, 402.

Armstrong v. Storer, 14 Beav. 535.

Clare v. Wood, 4 Hare, 81.

Wontner v. Wright, 2 Sim. 543.

Cooke v. Brown, 4 You. & C. 227.

Siffken v. Davis, Kay, App. xxi.

STUART, V.C. said that if the plaintiff

by his bill, after praying for foreclosure or sale, had gone on to pray a general administration of the mortgagor's assets, he would, according to the ordinary practice, have had to pay the costs of all the parties to the suit out of the estate. The reason was, that being unable to realize the whole of the mortgagor's assets, without the assistance of the Court in a suit to which the executors and those interested in a fiduciary character were parties, the mortgagee pays the price of that assistance in the ordinary way, by paying the costs of those who were brought before the Court for his purposes. The same rule would seem to apply where, as in the present case, the plaintiff came for the assistance of the Court, to realize part of the assets to which he had a right to resort. Upon that principle, and upon the authority of the cases of *Brace v. the Duchess of Marlborough*, *Wontner v. Wright*, and *Clare v. Wood*, he was of opinion that he could not refuse the defendants, who were in a fiduciary position, their costs of the suit out of the money realized by the sale. The case of *Hutton v. Sealy*, which had been referred to, was not, he considered, an authority upon the present occasion. If anything, it was rather against than in favour of the plaintiff.

STUART, V.C. } GRESLEY v. MOUSLEY
July 7, 8, 9, 10. } AND OTHERS.

Attorney and Solicitor — Purchase by Solicitor from Client — Inadequate Consideration — Acquiescence — Payment of Purchase-Money — Evidence.

By deed, dated in February 1837, Sir R. G. conveyed in fee to M, solicitor, certain manors, lands, and the minerals under the same, the purchase-money being about 7,000l., M. was, at the time, the confidential solicitor of Sir R. G. but the purchase was transacted through other solicitors, acting on behalf of Sir R. G. Sir R. G. died in October 1837, having devised all his property to trustees, upon trusts for sale, and, subject thereto, to convey upon trust for his wife for life, and then to the use of his children in tail, and on failure of issue, to the use of W. N. G. for

life, with remainder to the use of his first and other sons successively in tail, with remainders over. The testator left no issue, and W. N. G. died in 1847, leaving the plaintiff, Sir T. G. his eldest son, who attained twenty-one in January 1852. M. continued to act as confidential solicitor for Sir R. G. until his death, and afterwards for the trustees of his will, for whom he acted in an administration suit instituted against them. M. died in January 1853, having devised all his estates to his two sons. The only evidence of the purchase-money having been paid by M. was a receipt indorsed on the deed of conveyance to him, and signed by Sir R. G. :— Held, upon bill filed in 1855, that the transaction must be set aside, the devisees of M. being repaid the amount of purchase-money appearing upon the receipt with interest thereon.

By indentures of lease and release, dated respectively the 17th and 18th of February 1837, certain manors or lordships, and other lands and premises, in Derbyshire, belonging to Sir Roger Gresley, and all the mines, veins and beds of coal, iron, ironstone, and other minerals of the said Sir Roger Gresley, under the same, were conveyed by the said Sir Roger Gresley to William Eaton Mousley, to the usual uses to bar dower. The consideration for the said conveyance was stated to be 6,940l., a receipt for which sum was indorsed on the deed of conveyance and signed by Sir Roger Gresley.

Sir Roger Gresley, by his will, dated in May 1837, devised all his manors and freehold hereditaments which, as owner, or in execution of any power, he was competent to dispose of by will, with the appurtenances, to the trustees therein named, their heirs and assigns, upon trust to sell, for the purpose of paying his debts and mortgages, and in aid of his residuary personal estate, and, subject thereto, such hereditaments as should not be sold were to be settled upon trust, during the life of the Right Hon. Dame Sophia Gresley (the testator's wife), to pay her the rents and profits for her separate use; and, after her death, to the use of his (the testator's) children in tail; and on failure of such issue, to the use of the Rev. William

Nigel Gresley and his assigns for life, with remainder to his first and every other son successively, and the heirs male of his body, with remainders over.

The testator, Sir Roger Gresley, died on the 12th of October 1837, without issue. The said Rev. William Nigel Gresley had issue, Sir Thomas Gresley, his eldest son, who attained his age of twenty-one in January 1852. The Rev. William Nigel Gresley died in September 1847. In 1839 the Right Hon. Dame Sophia Gresley intermarried with Henry William des Vœux. William Eaton Mousley died in January 1853, having, by his will, devised all his estates in Great Britain unto and to the use of his two sons, the Rev. William Eaton Mousley and John Hardcastle Mousley, their heirs and assigns, upon the trusts therein mentioned.

The bill was filed in April 1855, and on the grounds that William Eaton Mousley, at the date of the above-mentioned purchase by him from Sir Roger Gresley, was the confidential solicitor of the said Sir Roger Gresley, and had obtained such purchase at an undervalue, it prayed that it might be declared that such purchase, and the conveyance of the 17th and 18th of February 1837, were fraudulent and void.

The plaintiff was the said Sir Thomas Gresley, Bart., the eldest son of the Rev. William Nigel Gresley. The defendants were the devisees in trust of the will of William Eaton Mousley, and the trustees and surviving *cestuis que trust* (other than the plaintiff) of the will of the said Sir Roger Gresley, deceased.

The heir-at-law of Sir Roger Gresley was not made a party to the suit.

From the admissions in the answer of the defendants W. E. Mousley and J. H. Mousley, and the evidence in the cause, the following facts were proved:—The said W. E. Mousley, deceased, did not act as solicitor for Sir R. Gresley on or about the treaty for the purchase sought to be set aside, but other solicitors acted for him on that occasion. The said W. E. Mousley was, however, at the date of the said purchase, and had been for many years previously, the solicitor of Sir R. Gresley; he continued to act as the confidential soli-

citor of Sir Roger up to the time of his death; and after his death for the defendants, his devisees in trust, having acted for them in a suit instituted in 1841 for the administration of Sir R. Gresley's estate. The price paid by W. E. Mousley, deceased, for the purchase, was at the rate of 13*l.* per acre, though he had previously been informed by a coalmaster well acquainted with the character of the property purchased, that the minerals under it were worth 100*l.* per acre at least. It was not shewn that this information had ever been communicated by him to Sir Roger, whose receipt was the only evidence relied on of the payment of the purchase-money.

Mr. Roll, Mr. Malins and Mr. G. L. Russell, for the plaintiff, cited—

Holman v. Loynes, 23 Law J. Rep. (N.S.) Chanc. 529; s. c. 4 De Gex, M. & G. 270.

King v. Savery, 1 Sm. & G. 271.

Barnard v. Hunter, 2 Jur. N.S. 1213.

Sir R. Bethell, Mr. Amphlett and Mr. C. Hall, for the defendants, the devisees in trust under the will of W. E. Mousley, referred to evidence in the cause tending to shew that the value of the coal under the purchased property had greatly increased since the purchase of it by W. E. Mousley, not only from the increased consumption and improved method of working it, but in consequence also of the construction of a railway from Burton to Leicester, opened in 1849, and which could not be foreseen in 1837; and that Sir Roger Gresley was an active man of business, and perfectly acquainted with the real value of his property. They submitted that the case was analogous to the class of authorities in which it had been held, that where a person not having the legal interest in property stands by and waits to see the result of great expenditure and risk, he will not be allowed afterwards to set up his claim. They contended also, that whereas in this case the solicitor did not act for his client *in hâc re*, the ordinary rule relied upon by the plaintiff did not apply.—

Cane v. Lord Allen, 2 Dow, 289.

Edwards v. Meyrick, 2 Hare, 60 ; s. c.

12 Law J. Rep. (N.S.) Chanc. 49.

Montesquieu v. Sandys, 18 Ves. 302.

Hesse v. Briant, 2 Jur. N.S. 922.

And further that, after so great a lapse of time, the defendants ought to be considered as having acquiesced in the transaction—

Beckford v. Wade, 17 Ves. 99.

Baker v. Read, 18 Beav. 398.

Champion v. Rigby, 1 Russ. & M. 539 ;

s. c. Tamlyn, 421: affirmed by Lord

Cottenham ; 9 Law J. Rep. (N.S.) Chanc. 211.

Lord Selsay v. Rhodes, 2 Sim. & S.

41 ; s. c. 1 Bligh, N.S. 1.

Spencer v. Topham, 22 Beav. 573.

Parkes v. White, 11 Ves. 209.

Mr. Bacon and Mr. Osborne, for the other defendants.

STUART, V.C. (without calling for a reply) said that, from the evidence in the cause, it appeared that Mr. Mousley, the solicitor for Sir Roger, had been told by a competent judge, that the property which he shortly afterwards purchased from his client for 13*l.* an acre, was worth 100*l.* an acre. According to the law as laid by Lord Eldon, in *Cane v. Lord Allen*, and recognized by all subsequent authorities, this information ought to have been communicated to Sir Roger by Mr. Mousley before the completion of the transaction ; and the burthen of proving and of preserving evidence that such communication had been made rested with Mr. Mousley and those who, through him, claimed the benefit of the transaction. No evidence to that effect had, however, been adduced. Although, as had been urged in the course of the argument, such evidence might possibly have been produced, if the transaction had been questioned earlier ; still, the mere lapse of time was insufficient as a ground for presuming the communication to have been made ; and there was not anything in the other circumstances of the case which went to justify such a presumption. Upon the evidence before the Court the transaction, if recent, would clearly have to be set aside. For, upon the evidence of the value of the property, it appeared clearly that Mr. Mousley had obtained an advantageous bargain from his client, having at the time information

as to the value of the property purchased, not known to his client. It was proved, in fact, that a very small portion of the minerals comprised in the purchase, had afterwards been disposed of at a sum greatly exceeding the whole amount of the purchase-money alleged to have been paid by Mr. Mousley to Sir Roger. It had been argued that, as the trustees of Sir Roger's will had neglected for so long a period to file their bill, they and their *cestuis que trust* ought to be treated as having acquiesced in the transaction. It appeared, however, that after the death of Sir Roger, his solicitor, Mr. Mousley, became the solicitor of the trustees of his will, and acted for them in that character, in a suit instituted against them for the administration of the estate of Sir Roger. That circumstance seemed to be conclusive against the argument founded upon acquiescence ; for on the face of it it appeared to be impossible to bring home to the trustees a knowledge of their right to question the transaction impeached by the bill. As to Lady Sophia de Vœux, there had been no attempt to shew that, at any time before the filing of this bill, she knew or heard of the transaction at all, and in the absence of notice she could not be held to have acquiesced. The same remark was applicable to the plaintiff, who, moreover, did not attain his majority till 1852, the bill having been filed in 1855. Those seemed to be the only grounds which, with the evidence before the Court, could be insisted upon by way of defence to the plaintiff's bill. Had it been proved in evidence that Mr. Mousley paid the sum of 6,940*l.*, being the purchase-money for which Sir Roger signed a receipt upon the deed of conveyance, that might have had more or less weight in support of the defendants' case. It might very well be supposed that in the repositories of Mr. Mousley, his banker's account, and the banker's account of Sir Roger, to which he in all probability had access, the means were at hand of shewing that the purchase-money had been paid ; but, notwithstanding this, the fact of such payment had been left unsupported by any evidence other than the receipt before mentioned. This omission was not calculated to convey a favourable impression of the caution or accuracy of Mr. Mousley's proceedings in

the transaction. Upon the whole, he thought there ought to be a decree in favour of the plaintiff, setting aside the transaction complained of. As to the purchase-money, although there was no satisfactory evidence—indeed, no evidence at all, except the receipt signed by Sir Roger—of the payment of such purchase-money, the Court could not do otherwise than treat Sir Roger's estate as bound by his receipt. To direct an inquiry as to the payment of the purchase-money would only give rise to delay and expense, which could lead to no good result, for it was not probable that the presumption arising from the signature of the receipt could be removed by any evidence which could be adduced. The decree, therefore, would provide for repayment to the trustees and executors of Mr. Mousley of the amount of purchase-money for which Sir Roger signed a receipt on the deed of conveyance, together with interest thereon at the rate of 4*l.* per cent. per annum. The costs of the suit must be taxed, and paid by the executors and trustees of Mr. Mousley out of their testator's estate.

LORDS JUSTICES. }
 July 29. } NELSON v. BOOTH.

Mortgage—Mortgagee in Possession—Practice—Adding to Decree—Statute, 15 & 16 Vict. c. 86. s. 54.—Order of 16th of October 1852, No. 20.—Annual Rests.

A mortgagor filed a bill for redemption against a mortgagee in possession, and the usual decree for accounts was directed, but no direction was given as to annual rests. After the decree annual rests were directed under the above-mentioned section and order, but, upon appeal, the decision was reversed.

The rule as to the directing of annual rests against a mortgagee in possession stated by Lord Justice Turner.

This was an appeal from a decision of Vice Chancellor Stuart. A decree had been made by his Honour in the above-named suit, which was for redemption against a mortgagee in possession, directing the usual accounts, but there was no direction as to annual rests. It appeared

that, in 1842, the interest on the mortgage money was in arrear a year and a half, and the defendant thereupon entered into possession, and so continued up to the present time.

The plaintiff took out a summons before the Vice Chancellor in chambers, asking that the decree might be added to by a direction that the chief clerk should take the accounts with annual rests, and his Honour adjourned the hearing into court, and after argument, he made the order. From this alteration of the decree the defendant appealed.

The Chancery Amendment Act (15 & 16 Vict. c. 86. s. 54.) enacts that the Court may by the decree directing an account, or by any subsequent order, give such special directions as it may think fit, with respect to the mode in which the account shall be taken; and the 20th Order of the 16th of October 1852 directs, that if in the prosecution of an order in chambers, it shall appear to the Judge that it would be expedient that further accounts should be taken or further inquiries made, he may order the same to be taken or made accordingly; or if desired by any party, may direct the same to be considered in open court.

Mr. Wickens, for the defendant, the appellant, said, that the 54th section was not intended to apply to such a case as this. All that the legislature intended was, to direct the manner of carrying an order into effect or to alter the form of taking an account; but here the Vice Chancellor had altered a decree, which could not be done—*Partington v. Reynolds* (1). He also insisted that as the interest on the mortgage-money was in arrear at the time the mortgagee took possession, annual rests could not be directed. On this point he cited—

Davis v. May, 19 Ves. 382.

Latter v. Dashwood, 6 Sim. 462; s.c. 3 Law J. Rep. (N.S.) Chanc. 149.

Finch v. Brown, 3 Beav. 70.

Wilson v. Cluer, Ibid. 136.

Dobson v. Laud, 4 De Gex & Sm. 575; s.c. 19 Law J. Rep. (N.S.) Chanc. 484.

(1) 4 Drew. 253; s.c. ante, p. 505.

Neesom v. Clarkson, 4 Hare, 97.

Thornycroft v. Crockett, 16 Sim. 445;
s. c. 2 H.L. Cas. 239.

Mr. Pemberton argued, that the mode of taking accounts had always been in the discretion of the Court. The intent of the statute was to enable the Court to do substantial justice; and in this case when the mortgagee had received the rents for fifteen years, if annual rests had been directed, it would appear that more than double the amount of the interest had been received. He referred to the 7th and 8th rules of the 42nd section of the act, and to the following authorities:—

Gould v. Tancred, 2 Atk. 533.

Robinson v. Cumming, Ibid. 410.

Shepard v. Elliot, 4 Madd. 254.

Scholefield v. Ingham, C.P. Cooper, 477.

Donovan v. Fricker, Jac. 165, 168.

Binnington v. Harwood, Turn. & R. 477.

Heighington v. Grant, 5 Myl. & Cr. 258; s. c. 10 Law J. Rep. (N.S.)
Chanc. 12.

Wilson v. Metcalfe, 1 Russ. 530.

Spence's Eq. Jurisd., 810.

Mr. Wickens was heard in reply.

LORD JUSTICE KNIGHT BRUCE.—I am not certain that I should not have been better pleased to have read the 54th section of the New Procedure Act as it has been read by the learned Vice Chancellor. In fact, I almost regret that I cannot do so; but it appears to me that that section cannot be so extended as to apply to this case. It authorizes "the Court in any case where any account is required to be taken, to give such special directions (if any) as it may think fit with respect to the mode in which the account should be taken or vouched, and such special directions may be given either by the decree or order directing such account, or by any subsequent order or orders." This applies only to the mode of taking or vouching the account, but the effect which the plaintiff now seeks to give to this section is to vary the account itself. I apprehend that such a construction of the act of parliament is not to be justified. It is therefore unnecessary to consider the principle of the Court as to directing the ac-

count with annual rests. Again, I am of the same opinion with respect to the 20th Order of the 16th of October 1852, which does not, according to my view, apply to a case of this description. I am afraid, therefore, that the plaintiff must prosecute her right, if she has any, in some other manner.

LORD JUSTICE TURNER.—I have come to the same conclusion, and think that the case does not fall within the section of the act referred to. That section applies to the mode of taking or vouching an account, and not to a substantial variation of a decree which has previously been made. And I think that the subsequent clause of the section shews that this is the true construction. The section proceeds: "and particularly it shall be lawful for the Court, in cases where it shall think fit so do, to direct that in taking the account the books of account in which the accounts required to be taken have been kept, or any of them, shall be taken as *prima facie* evidence of the truth of the matters therein contained, with liberty to the parties interested to take such objections thereto as they may be advised." This clause throws additional light upon the previous part of the section, and shews that only the form and mode of taking the accounts was intended to be affected. It is to be observed also, that in another section of the act (the 42nd) there is express power given to persons served with notice of the decree to come in and apply to the Court to add to the decree. Generally, with respect to the right of the plaintiff to annual rests, I may observe (although in the present instance it is not necessary to decide the question), that I have always understood it to be the settled practice of the Court that there should be no direction to take the account with annual rests, unless where at the time when the mortgagee enters into possession of the premises, there is no arrear of interest due to him. And the principle of the distinction I conceive to be this: that a mortgagee is not obliged to receive the debt due to him by dribblets; but where he enters into possession when no arrear is due, he is supposed to have waived his right to one entire payment, and to have elected to receive his money by dribblets. If, however,

the interest is in arrear at the time of entering, then there would be no election, the thea ccount would, therefore, go on until and whole debt had been satisfied. I have often had occasion to consider this point, and I was under the impression that it had been actually decided by the Court, although, indeed, no authority to that effect has been cited.

LORD JUSTICE KNIGHT BRUCE.—On this part of the case I have expressed no opinion, and I wish to be understood as saying nothing either assenting to or dissenting from the remarks of my learned Brother.

STUART, V.C. }
July 12. **BYRE v. BARROW.**

Attorney and Solicitor — Professional Privilege from Attachment.

An attorney and solicitor of the Court of Chancery while on his direct road to transact professional business, first in the Insolvent Debtors Court, and next in the Taxing Master's Office, was arrested on an attachment issued against him for contempt of an order of the Court of Chancery; the Court, on motion, ordered his discharge and gave him his costs of the application.

This was a motion, on behalf of the defendant Barrow, that he might be discharged out of the custody of the sheriff of Surrey, as to this suit and all subsequent detainers, on the ground that when he was arrested he was privileged from arrest.

The motion was founded on evidence shewing the following facts:—On the 8th of July 1858 the defendant Barrow, who was an attorney of the superior courts of common law, and in the Court for the Relief of Insolvent Debtors, as well as a solicitor of the Court of Chancery, was arrested, on an attachment for non-payment of certain sums which, by a decree made in the cause, he and another had been ordered to pay into court.

At the time of the arrest the defendant was proceeding on the direct road from his residence to attend several professional appointments. The first of these was at the Insolvent Debtors Court, for the pur-

pose of acting there professionally on behalf of certain insolvent petitioners; and he had also an appointment to attend, at the Taxing Masters' Offices, Staple Inn, a taxation of costs in a suit in Chancery.

An application for his discharge was made, in the first instance, at the common-law Judges' chambers, but Erle, J. had declined to interfere.

Mr. W. Foster appeared in support of the motion.—He cited—

Moore v. Booth, 3 Ves. 350.

Ex parte Ledwich, 8 Ibid. 598.

Gascoygne's case, 14 Ibid. 183.

The Attorney General v. the Leather-sellers' Company, 7 Beav. 157.

Mr. Malins, for the plaintiff, opposed the motion, on the ground that the defendant was arrested on his road to the Insolvent Court, at which he was to attend in the first instance, and, therefore, could not be said to be proceeding "without delay or deviation" to attend the Court of Chancery, out of which the attachment, under which he had been arrested, issued—*Castle's case* (1).

STUART, V.C. made an order for the defendant's discharge, and gave him the costs of the motion.

L.C. }
July 21, 24. **CHEALE v. KENWARD.**

Specific Performance—Agreement—Consideration.

A. B. agreed to transfer to C. D. certain shares in a railway company, upon which no deposit or other sums had been paid, and C. D. agreed to accept the same, and to do all acts necessary to relieve A. B. from liability in respect of the shares. A. B. filed a bill for specific performance of the agreement. C. D. demurred for want of equity:—Held, reversing the decision of the Master of the Rolls, who had allowed the demurrer, that the demurrer must be overruled.

This was an appeal from a decision of

(1) 16 Ves. 412.

the Master of Rolls, allowing a demurrer to the bill.

The case made by the bill was as follows:

In 1857 an act of parliament for the construction of a railway from Lewes to Uckfield was passed.

During the formation of the company the plaintiff, Alexander Cheale, who was a large landed proprietor at Uckfield, agreed to subscribe 500*l.* towards the capital of the company, upon the assurance that the proposed site for the station at Uckfield should be re-considered.

After the passing of the act, the capital of the company was divided into 1,000 shares of 50*l.* each, and the plaintiff became the registered owner in the books of the company of ten such shares.

The station at Uckfield was, without investigation or inquiry, constructed on the site originally selected; and the plaintiff thereupon, at a meeting of the directors, expressed his wish to retire from the company and to sell his shares. The defendant, William Kenward, who was also present at the meeting, and a shareholder in the company, in consideration of the plaintiff agreeing to transfer the shares to him, agreed to take the same, and to accept and execute a transfer thereof, and to do all acts necessary to relieve the plaintiff from all liability in respect of the said shares, it being well known to the defendant, as the fact was, that the plaintiff had not then paid anything, by way of deposit or otherwise, in respect of the said shares. The agreement for the transfer of the shares was made with the privity of the directors, and it was understood between the plaintiff and the defendant that Mr. Smith, the secretary to the company, would do what was necessary to carry the same into effect.

Some months afterwards, namely, in December 1857, Mr. Smith, the secretary, wrote to the plaintiff, calling upon him to pay the deposit and two calls upon the ten shares held by him. The plaintiff thereupon communicated the contents of the said letter to the defendant, and, according to the arrangement then made between them, the defendant wrote the following letter to the secretary of the company:—

“At a meeting, held at the Star Inn, Lewes, I then had agreed to take twenty shares. Mr. Alexander Cheale at that time

had taken ten shares, and immediately I agreed to take them, making mine up to thirty shares. Mr. Alexander Cheale tells me you have not transferred them to me, although you have charged me with them. I must therefore beg that this be done. This is your authority to transfer.”

The secretary having disregarded this letter, the plaintiff executed a transfer of the ten shares in the mode prescribed by the act, and tendered the same to the defendant for his execution, but the defendant refused to execute such transfer.

The bill alleged that, by reason of such refusal, the plaintiff would be compelled to pay the deposit upon the shares and the calls already made and to be made upon the same.

The bill prayed that the said agreement might be specifically performed, and that the defendant might be ordered to execute a proper transfer of the said shares, and to have the same duly registered, the plaintiff being ready and willing to perform the agreement on his part, and to execute the said transfer; that the defendant might be ordered to pay the deposit and calls then due, and any further calls which might become due upon the said ten shares, and to pay the costs already incurred and to be incurred by reason of the defendant not having executed such transfer, and not having procured the same to be duly registered, and not having paid the said deposit and calls pursuant to the said agreement.

The defendant demurred to the bill; and the Master of the Rolls, on the 22nd of April, allowed the demurrer (1).

(1) The judgment of the Master of the Rolls was as follows:—“This suit cannot be sustained. The only question is, whether there was sufficient consideration to support the contract. I thought at one time that the case might have been put upon the ground of a promise made by one party, upon which the other had been induced to act. But the facts here are not such as to render that principle applicable. No acts are alleged to have been done by the plaintiff in consequence of the defendant's undertaking to accept the shares. The plaintiff subscribed for shares, but had paid no deposit or calls, and had not been required to do so. If any money was due at the time, it is not alleged, and I must assume the fact against the plaintiff. The surrender of a contract or the transfer of shares is, no doubt, good consideration, but the consideration must be mutual. The cases cited are quite distinct from this. In one, the benefit of a contract to pur-

Mr. Lloyd and *Mr. Pole*, in support of the demurrer, contended that this agreement, of which specific performance was sought, was *nudum pactum*. The consideration was merely a liability in respect of the subject-matter of the contract, and this was not sufficient—*Shaw v. Fisher* (2), *Wynne v. Price* (3).

[The LORD CHANCELLOR referred to *Haigh v. Brooks* (4).]

In that case there was the giving up of a right. This contract must be construed as at the time when it was entered into, and there must be something in the way of consideration *dehors* the subject-matter of the contract. The assignment of a lease for the rent not due was voluntary—*Crabbe v. Moxhay* (5).

The LORD CHANCELLOR said that the only question here was whether this was *nudum pactum*.

Mr. R. Palmer, for the plaintiff, acknowledged that if this were *nudum pactum* it could not be performed in this court.

Mr. Pole then cited—

Antrobus v. Smith, 12 Ves. 39.

Searle v. Law, 15 Sim. 95; s. c. 15 Law J. Rep. (n.s.) Chanc. 187.

Dillon v. Coppin, 4 Myl. & Cr. 647; s. c. 9 Law J. Rep. (n.s.) Chanc. 87.

Weale v. Olive, 17 Beav. 252.

Mr. R. Palmer and *Mr. Osborne*, in support of the bill, said that, according to

chase was sold for 40*l.*; and so here, if the contract had been that one party should pay the other a sum of money either for the shares or for taking the shares off the other's hands, there would have been good consideration. But I do not know to what extent the doctrine would go, if the fact that certain obligations are connected with property given up is to be regarded as supplying consideration for the surrender. There are some duties or obligations attaching to every species of property. This is the case, not only with shares, but with leasehold, and even with freehold, property. It is impossible to lay down the rule that the undertaking of the liabilities which naturally attach to property can furnish good consideration for giving up that property. This is an attempt to create a consideration for a transfer out of part of the thing itself, which is the subject of the gift. The demurrer must be allowed."

(2) 2 De Gex & Sm. 11.

(3) 3 Ibid. 310.

(4) 2 P. & D. 477; s. c. 10 Ad. & E. 309; 9 Law J. Rep. (n.s.) Q.B. 99.

(5) 1 Weekly Rep. 226.

the defendant's argument, unless the shares were at a premium the plaintiff could make no contract. There was clearly mutuality in this contract, which would enable the defendant to enforce specific performance—

Duncuft v. Albrecht, 12 Sim. 189.

Doloret v. Rothschild, 1 Sim. & S. 590.

What happened after the contract was merely the maturing of those liabilities which previously existed. As to the sufficiency of consideration they cited—

Ford v. Stuart, 15 Beav. 493; s. c. 21 Law J. Rep. (n.s.) Chanc. 514.

Hewison v. Negus, 16 Ibid. 594; s. c. 22 Law J. Rep. (n.s.) Chanc. 655.

Mocatta v. Franco, 3 Dougl. 11.

Richardson v. Mellish, 2 Bing. 253.

Penn v. Lord Baltimore, 1 Ves. 444.

The consideration from the plaintiff must be looked for when he sought the performance of the contract.—

Price v. Seaman, 4 B. & C. 525; s. c. 4 Law J. Rep. K.B. 3.

Cartwright v. Cooke, 3 B. & Ad. 701; s. c. 1 Law J. Rep. (n.s.) K.B. 261.

Mr. Lloyd, in reply, as to the consideration, cited—

Lyth v. Ault, 7 Exch. Rep. 669; s. c. 21 Law J. Rep. (n.s.) Exch. 217.

Underwood v. Hithcox, 1 Ves. 279.

Bower v. Cooper, 2 Hare, 408.

Walker v. Bartlett, 18 Com. B. Rep. 845; s. c. 25 Law J. Rep. (n.s.) C.P. 156, 263.

As to the mutuality of remedy, he referred to—

Lawrenson v. Butler, 1 Sch. & Lef. 13.

Flight v. Bolland, 4 Russ. 298.

The LORD CHANCELLOR said that, at the close of the argument for the defendant, he had formed an opinion contrary to that of the Master of the Rolls; but out of respect for His Honour's judgment, he had determined to hear the argument to the end. Having done so, however, no impression had been made upon the opinion he had in the first instance formed. His Lordship then stated the facts of the case, and said that the questions raised on the demurrer were two: first, whether there was a sufficient consideration moving from the plaintiff to the defendant to support

the agreement; and secondly, if so, whether there was a mutuality in the agreement, that is, whether each party could enforce the agreement against the other. There was now no doubt as to specific performance of a contract for railway shares being capable of being enforced. Any such doubt was set at rest by the case of *Duncuft v. Albrecht*, where the Vice Chancellor said, "As no decision has been produced to the contrary, my opinion is, that railway shares are a subject with respect to which an agreement may be made which this Court will enforce." But the defendant said, that although an agreement for the transfer of shares might, as a general principle, be enforced, yet this particular agreement was void for want of consideration, and for want of mutuality. The plaintiff was the owner of ten specific shares in a railway company, subject to certain liabilities in respect of deposit and future calls. Whether the shares were of value or valueless at the time of the agreement no one could know, as persons held different opinions upon it. The plaintiff, however, was willing to divest himself of the ownership of the ten shares and the liability in respect of them, and the defendant was willing to accept them and to undertake the liabilities connected with them, and to indemnify the plaintiff therefrom. It was impossible to deny that an agreement to transfer property which might or might not turn out to be valuable might be formed, and that it was in fact a substantial consideration. Cases of gift, as in *Antrobus v. Smith* and *Searle v. Law*, were out of the case here. In them there was nothing that could be called an agreement; it was all on one side. A donor could not force a gift on the donee; and, on the other hand, a donee could not compel the completion of a gift, as there was nothing of reciprocity on his part. But where there was an agreement to transfer property in consideration of the transferee's agreement to do something or to undertake a liability, that was a complete agreement. It was said that these shares were worthless, as nothing had been paid, and all the liabilities in respect of them existed. But they might become of value, and the possibility of their becoming of value might form a good considera-

tion. His Lordship had mentioned *Haigh v. Brooks*, where it was doubtful whether the giving up of a guarantie was good as a consideration or not; and that, it was contended, depended on whether the guarantie was valuable or not. It was there held, that the paper on which the guarantie was written having been given up, that alone was consideration for a promise. In this case it must be taken that the plaintiff had agreed to relinquish these shares in favour of the defendant; and therefore, if *Haigh v. Brooks* was to be considered of authority, the present case was not distinguishable from it, even if there had been more uncertainty as to the value. As to the consideration, therefore, the plaintiff having property marked and distinguished, although subject to liabilities, and having agreed to give up this property, which might be of more value than the liabilities, there was, upon principle and according to the authorities, a good consideration to support the agreement. Then, as to the mutuality of the agreement, that is, whether the defendant could enforce it against the plaintiff, that depended on whether there was a consideration moving from the defendant. It was said by the bill that the defendant undertook "to accept and execute a transfer of the shares, and to do all acts necessary to relieve the plaintiff from all liability in respect of the said shares." It was contended that this liability would follow from the transfer without any undertaking, and therefore it was creating a consideration out of the subject-matter of the agreement, and that there must be a consideration *dehors* the thing itself. His Lordship must say that he could not perfectly understand this argument. The consideration on the part of the plaintiff was the agreement to transfer, and on the part of the defendant the agreement to undertake the liability. If so, the question of consideration, so far as the defendant was concerned, amounted to this, whether the agreement to undertake the legal liability of another was a good consideration. Such an agreement was, in his Lordship's opinion, a perfectly good consideration, which would render it competent for this defendant to file a bill for specific performance. It might be assumed that the plaintiff was merely desirous of

divesting himself of the shares, but that the defendant was desirous of becoming possessed of them, and was willing to take the liabilities upon himself. That would have been a consideration as much as if the plaintiff had paid the amount on the shares, and the defendant had paid to him such amount. It was said, that if money had been paid on either side, it would have rendered it a good agreement. But what difference, in principle, was there? Supposing the plaintiff had paid the deposit and the defendant had paid that amount to him and undertaken the liabilities, that would have been good; but his Lordship could not see the difference between that and the present case, where no money passed, but the whole consideration was an agreement to undertake the liabilities. Under these circumstances, the order of the Master of the Rolls must be reversed.

M.R. }
July 27, 31. } BYNE v. BLACKBURN.

Legacy—Life Interest—Implication.

A testator gave a sum of money to trustees to pay the income to his then unmarried daughter for life, and after her decease to permit her husband to receive the income for his life, nevertheless, to be by him applied for the maintenance, education or benefit of the children of his daughter. The daughter afterwards married, and her husband subsequently took the benefit of the Insolvent Act; his wife afterwards died, leaving her husband and two children surviving:—Held, that he took beneficially a life interest in the legacy.

Quintin Blackburn, by his will, dated the 17th of November 1812, gave to John Ridley, and to his son Quintin Blackburn, the sum of 15,000*l.*, in trust to invest the same sum in or upon government or real securities; and the testator declared that the trustees should stand possessed of the 15,000*l.*, as to one-third part thereof, in trust, during the life of his daughter, the defendant Margaret Byne (then Margaret Blackburn) to pay the dividends thereof to her, for her separate use; and after her

decease, in trust to pay to, or otherwise to authorize or permit, the husband of his said daughter Margaret to receive the dividends, interest and yearly proceeds of such third part of the trust-money during his life; nevertheless, to be by him applied for or towards the maintenance, education or benefit of the child or children of his (the testator's) said daughter; and from and after the decease of the survivor of his said daughter and her husband the testator directed that such third part of the money should be in trust for all and every the child or children of his said daughter, in equal shares if more than one, and payable as therein mentioned, with benefit of survivorship and accruer as therein mentioned. The testator died on the 17th of September 1813.

On the 25th of August 1818 the testator's daughter Margaret intermarried with Charles Poyntz Byne. There was issue of the marriage six children, four of whom attained twenty-one, but two died unmarried. Two were living at the time of the institution of the suit.

Margaret Byne died in December 1857. Her husband, in 1826, took the benefit of the Insolvent Act; and the question now raised was, whether he took a life interest beneficially in the fund, or whether the income, or some part thereof, ought not to be applied for the benefit of his children.

Mr. Selwyn and Mr. Williamson, for Charles Poyntz Byne, the petitioner, cited *Hammond v. Neame* (1).

Mr. Follett and Mr. Osborne, for the provisional assignee.—This is not a trust that the Court can enforce.—

Browne v. Paull, 1 Sim. N.S. 92; s. c.

20 Law J. Rep. (N.S.) Chanc. 75.

Andrews v. Partington, 2 Cox, 223.

Bowden v. Laing, 14 Sim. 113.

Thorpe v. Owen, 2 Hare, 607; s. c.

12 Law J. Rep. (N.S.) Chanc. 417.

Mr. Lloyd, for the children, referred to—*Cooper v. Thornton*, 3 Bro. C.C. 96; *Crockett v. Crockett*, 2 Phill. 553; s. c. 17 Law J. Rep. (N.S.) Chanc.

(1) 1 Swanst. 35.

230: 1 Hare, 451; s. c. 11 Law J. Rep. (N.S.) Chanc. 279.

Costobadie v. Costobadie, 6 Hare, 410; s. c. 16 Law J. Rep. (N.S.) Chanc. 259.

Wetherell v. Wilson, 1 Keen, 80; s. c. 5 Law J. Rep. (N.S.) Chanc. 235.

Camden v. Benson, 4 Law J. Rep. (N.S.) Chanc. 256.

THE MASTER OF THE ROLLS.—*Hammond v. Neame* is the first of the class of cases within which this falls; and they may be divided, first, into cases where property is given to a parent, directly as a trustee, for children, and where it is given to a parent, with a direction that the parent should perform those duties, which, in the case of a father, are a legal as well as a moral obligation upon him to perform; and in the case of a mother are a moral obligation, assuming, of course, that they possess the requisite means. In *Crockett v. Crockett* it was considered difficult to determine exactly the interest of the children in those cases; but I think the claim by the father to a beneficial interest is stronger in his case than in the case of a person who is not under a legal obligation to perform the duties there specified: as it has been well observed that—"When you give a fund to a man, to aid him in the performance of a duty which he is already bound to discharge, you are giving him an additional fund for the performance of that duty"; and in that view the gift must be considered as for the beneficial interest of the donee. Here trustees have been appointed; the testator does not mean, therefore, merely to appoint a new trustee because he had any doubt of the trustees previously appointed acting for the benefit of the children of his daughter; and if he had intended the children to take direct and positive interests, he would simply have said that the trustees were to give a fund to the children of his daughter in such manner as he should direct; but, on the contrary, he directs his trustees to pay the whole of the fund over to the husband of the daughter, so that he would be entitled to give a valid discharge to the trustees for the fund, and the trustees would be completely discharged from any breach of their obligations. The fund is

to be given for the maintenance, education or benefit of the children: the first two he was clearly bound to attend to. The fund, therefore, was given to him, to be used at his discretion, for the performance of what may be called his parental duties, and he was to determine in what manner those duties could be best performed. It was a discretion which was not to be controuled by any Court; but subject to that discretion, the fund was given for his own benefit and use. I must, therefore, declare him entitled to a life interest, and make the order asked. The costs of all parties must be paid out of the fund.

LOKDS JUSTICES. } THE ATTORNEY GENERAL
June 10, 11. } v. WEST.

Charity—Usage—Charge on Land—Partition under Act of Parliament.

By long custom four measures of corn were distributed to the poor of two parishes by the owners of the M. estate. In 1795 a bill for partition was filed, and subsequently an act of parliament to effect the same was passed, and lot 2. in the schedule was allotted to W, and in the same schedule the above measures of corn were mentioned as attaching to that lot, though it was not expressly said that they were a charge on the land. For thirty years the owner of lot 2. paid a sum of money in respect of the measures of corn, and on F. W, the son of W, succeeding to lot 2, he refused further payment, though for two years later the money had been paid by the agents of F. W. On an ex officio information being filed against F. W, he insisted that the payments had been all along merely voluntary, and for the last two years without his authority; but the Master of the Rolls declared the value of the measures of corn were a charge on the land in lot 2, which was affirmed, on appeal.

This was an appeal, presented by the defendant, against a decree of the Master of the Rolls, made on the hearing of an *ex officio* information, filed to obtain a judicial declaration of the trusts of a certain charity, and for a scheme for its future management.

The information stated, that ancient charities, the origin of which were unknown, but supposed to have been founded by Sir Thomas Myddelton, Bart., called the "Myddelton Charities," had long existed for the benefit of the poor of the parishes of Glynn Traian and Llangollen, in Denbighshire; that Richard Myddelton, of Chirk Castle, male representative of that family, died in 1795, leaving three daughters his co-heiresses, one of whom, Maria, married the Hon. Frederick West, the father of the defendant, and upon the happening of that event her share was settled.

By an act of parliament, 59 Geo. 3. c. iv., a partition of the estates was directed, and Commissioners for the purpose appointed, who allotted a portion in severalty to the uses of the settlement of Mr. and Mrs. West, subject to the following payments:—

"Two measures of corn, to be made into bread, and given fifty weeks in the year to twenty poor persons of Glynn Traian, averaging per annum 30*l.*; the like to twenty poor persons of Llangollen, ditto 30*l.*; yearly payment to the poor of Glynn Traian at Easter, 1*l.*"

The information stated, that the total outgoings in respect of this allotment were 98*l.* 9*s.* 6*d.*, which had been taken into account in valuing the fee simple of the allotment.

In 1849, the fact that Mr. West had withheld the distribution of bread was brought to the notice of the Charity Commissioners, who commenced a correspondence with the solicitors of that gentleman, which lasted down to 1853; and in December 1856 the information was filed to establish the charity, for a scheme, and that this allotment might be charged with the above-mentioned payments. The Master of the Rolls made a decree in favour of the informant, the Attorney General, and directed Mr. West to pay the costs. From this decree he now appealed.

The decree declared that the average annual value of fifty measures of corn, and fifty measures of corn made into bread, and the sum of 1*l.* per annum, were the yearly sums payable in respect of the ancient charities, called the "Myddelton

Charities," and by virtue of the act of parliament, and other documents mentioned, the same duly became charged and chargeable upon the entirety, or some part of the allotment of Mr. and Mrs. West now remaining unsold, and that Mr. West should execute assurances for securing the same. And it was ordered, that he should, on or before the 31st of March 1858, pay 300*l.* in respect of the arrears of the said measures of corn up to Midsummer-Day, 1857, and 6*l.* in respect of the arrears of the payment of 1*l.* up to Easter, 1857.

Mr. Terrell, for the Attorney General, supported the decree of the Master of the Rolls, and observed that all the defendant thought fit to say in his answer was, that he had sold the greater part of the property, and therefore took no great interest in the parishes. It was a fact, as stated in the information, that the value of the outgoings was taken into account in the allotment of the West share of the estate, and the money had been regularly paid down to 1851, two years after the defendant succeeded to his portion of the estates. In short, the defendant, to express the matter shortly, had the charity in his pocket.

Their Lordships called upon the appellant's counsel.

Mr. Roundell Palmer and *Mr. Eddis*, for the defendant, said that although from 1819 the distributions had been regularly continued to the year 1849 by the father of the defendant, and when the defendant came into possession of the estates in the year last mentioned, by a family arrangement, the distributions had been continued till 1851, Mr. West positively alleged that the payments of those two years had been made by his agent without his sanction or knowledge; that these had been throughout merely voluntary payments, and not binding on the defendant; that the act did not recite that the property sought to be made chargeable was really chargeable with these payments, nor did it even recite the charges now attempted to be fixed upon it. The schedule to the act alone mentioned them, and this did not amount to a charge, or to any evidence of one; and the most that could be said was, that a certain number of measures of corn

had been long distributed amongst the poor. There was not a word as to any land out of which it issued. The facts that did appear did not shew any valid charge before the Statute of Mortmain of 1736, which was wholly insufficient to support the case. Even if this Court should be of opinion that the charity was more than voluntary, still the decree of the Master of the Rolls was erroneous in directing the payment of the 300*l.*, as it should have directed an account to be taken of the amount in value of the arrears. It was to be observed, that Mr. West did not even know of the payments which had been made, they being made by his agent without authority, until he had made a sale of part of the allotment.

Mr. Terrell was not called on to reply.

LORD JUSTICE KNIGHT BRUCE said, that, as he understood it, the case rested on the act of parliament, and the acquiescence of the parties entitled to the estate by payments for upwards of thirty years. That being so, the existence of a charge as a charge upon the land was too clear for argument, too plain for dispute; and he was surprised at such an appeal being brought. If the appellant required an account, he was entitled to it, and would have it. He (the Lord Justice) considered that the order at the Rolls meant "fifty measures of corn made into bread, and fifty other measures of corn made into bread;" and that corn meant half wheat and half barley, which he supposed would be agreed to.

LORD JUSTICE TURNER entirely concurred, and expressed his great regret that such an appeal should have come before their Lordships. They did not disturb the costs down to the hearing, which had been given, with the greatest propriety, against Mr. West. The subsequent costs had been reserved by the Master of the Rolls, and those costs were left for his Honour to deal with as he might think fit; but the appeal would be dismissed, with costs.

FULL COURT
OF
APPEAL.

March 11, 13,
20, 24, 27.

COUNTESS OF MORNINGTON
v. KEANE.

Covenant — Construction — Charge on Lands.

The Earl of M., by articles of separation between himself and his wife, covenanted that he would, on or before the 1st of February 1835, either by a charge on freehold estates to be situate in England or Wales, or by an investment in the funds, or by the best means which might then be in his power, secure the payment of an annuity to a trustee for his wife:—Held, that this did not create a charge on the lands of which the Earl was seized on the 1st of February 1835, but was a personal covenant providing for the doing of a certain act whereby a charge might be created.

By articles of agreement for separation between the plaintiff and her husband, the late Earl of Mornington, dated the 21st of June 1834, the Earl, then the Hon. W. P. T. L. Wellesley, covenanted that he would, "on or before the 1st of February 1835, well and effectually, either by a charge on freehold estates of inheritance to be situate in England or Wales, or by an investment of an adequate sum of money in some of the stocks or funds of Great Britain, or by the best means which may then be in his power, secure the payment," to the trustee therein named, during the life of the plaintiff, of an annuity of 1,000*l.*, payable quarterly: and it was thereby agreed, that the said trustee should stand possessed of, and interested in the said annuity in trust for the plaintiff, for her separate use. At the date of these articles, the plaintiff's husband was seized or entitled in fee simple in possession of or to a moiety of a house in Saville Row, and also seized or entitled in fee simple in reversion or remainder expectant on the decease of Catherine then Countess of Mornington, of or to the remaining moiety. In May 1839 the plaintiff filed a bill for the specific performance of the articles, and that her husband might be decreed to charge the annuity upon the interest reserved to him in the surplus of

a sum of 462,000*l.*, which, under indentures dated in December 1834, was to be raised by trustees for the payment of certain debts, and upon a charge of 31,731*l.* 5*s.* agreed to be kept up for his benefit, and upon the estate limited to him in the lands comprised in the said indentures of December 1834. The trustees of these indentures of December 1834 were made defendants to this bill, and they demurred for want of equity and for want of parties. On the 24th of July 1839 the Vice Chancellor of England held, that the demurrer for want of equity was insufficient, but allowed the demurrer for want of parties, giving leave to amend. The bill having been amended, the demurrer was brought before Cottenham, L.C., and he overruled the same (4 *Myl. & Cr.* 554, 561). By the decree made in that suit of *Wellesley v. Wellesley* (1), it was declared that the annuity of 1,000*l.* was, in equity, a charge upon the property vested in the Earl by the indentures of December 1834, and in conformity with this decree, a deed to secure the annuity was approved by the Master and executed, whereby the Earl's interests were vested in a trustee, to secure the annuity and arrears. No portion, however, of the annuity had been paid to the plaintiff, by reason of prior incumbrances which had been created. On the 24th of May 1847, the plaintiff's husband mortgaged his interest in the Saville Row house, which had not been the subject of the previous suit, to the defendant Daniel Keane; Keane subsequently charged the same in favour of the other defendants. The bill, in the present case, prayed that it might be declared that by force and virtue of the articles of agreement of the 21st of June 1834, a charge was created in favour of the plaintiff, for her annuity upon the house in Saville Row and the late Earl of Mornington's interest therein, in priority to any charge, incumbrance, estate or interest therein, which had been created in favour of, or was vested in, the defendants, or either of them.

Mr. Rolt and *Mr. Freeling*, for the plaintiff, contended that there was a valid charge

(1) 10 Sim. 256; s. c. 9 Law J. Rep. (n.s.) Chanc. 21.

in her favour, which would affect the property in Saville Row. If a man contracted to charge an annuity on lands which he might have on a given day, that would be enforced as a lien upon his lands on that day—*Roundell v. Breary* (2). All the cases which apparently conflicted with this proposition were cases where there was no particular time fixed for the performance of the covenant.—

Metcalfe v. the Archbishop of York, 6 Sim. 224; s. c. 1 *Myl. & Cr.* 547; 6 Law J. Rep. (n.s.) Chanc. 65.

Watson v. Sadlier, 1 Moll. 585.

Freemount v. Dedere, 1 P. Wms. 428.

Jackson v. Jackson, 4 Bro. C.C. 462.

Ravenshaw v. Hollier, 7 Sim. 3; s. c.

10 Law J. Rep. (n.s.) Chanc. 119.

Wellesley v. Wellesley, 10 Sim. 256; s. c. 9 Law J. Rep. (n.s.) Chanc. 21.

Deacon v. Smith, 3 Atk. 323.

Lyde v. Mynn, 1 *Myl. & K.* 683.

Lyster v. Burroughs, 1 Dru. & Wal. 149.

The defendant Keane, in taking his mortgage, had full notice of this charge, as was shewn by the various items in his bills of costs; and the other defendants, the sub-mortgagees, were clients of Keane's, and no other solicitor had been employed by them.

Mr. Druce, for the representatives of the late Earl of Mornington, took no part in the discussion.

The Solicitor General and *Mr. De Gex*, for the defendant Keane, contended, first, that the covenant on which the plaintiff relied did not create any lien on the property; secondly, that if it did originally create a lien, it was the duty of the plaintiff, on the breach of the covenant, to have asserted her equitable claim with promptness, whereas she had lain by for twenty years all but six days, and was therefore barred by lapse of time; thirdly, that in May 1839 she had filed a bill for the specific performance of the covenant on which she now relied, and her case then was, that she was entitled at her election to a charge on certain other property: she did this knowing of her rights against the Saville

(2) 2 Vern. 482.

Row house, and she, therefore, discharged those rights; fourthly, that if the previous propositions were wrong, at all events, after the decree, the Saville Row house, in the hands of third parties, continued liable only secondarily, and that, in place of enforcing the decree against the property primarily liable, she relinquished it for an additional annuity of 500*l.* per annum and the existing arrears. She, therefore, discharged any property which was only secondarily liable. Besides commenting upon the cases previously cited, they referred to—

Gardner v. the Marquis of Townshend,
Coop. 301.

Berrington v. Evans, 3 You. & C. 384.

Mr. Willcock, for the defendant Keane's incumbrancers, referred to *Thompson v. Simpson* (3), where Lord St. Leonards said, "It seems to me that where, upon the whole of the articles, it is plain what construction the Court would have put upon them, had it been called upon to execute them about the time they were made, they should be enforced, however difficult the construction may be, even as against a purchaser with notice; but not after a lapse of time where there is anything so equivocal or ambiguous in them as to render it doubtful how they ought to be effectuated."

Mr. Roll, in reply, cited—

Lewis v. Maddocks, 8 Ves. 150.

Lechmere v. the Earl of Carlisle, 3 P. Wms. 211.

Coventry v. Coventry, 2 Ibid. 222.

Shannon v. Bradstreet, 1 Sch. & Lef. 52.

The LORD CHANCELLOR, after stating the object for which the bill was filed, said, that there were various questions discussed during the argument, but the only one upon which the Court thought it necessary to express an opinion was upon the construction of the articles of the 21st of June 1834, whereby, after reciting that in consequence of differences which had arisen, and then subsisted, between the said Earl and the plaintiff, they had agreed to live separate and apart from each other,

the Earl covenanted for himself, his heirs, executors and administrators, that he would, on or before the 1st of February 1835, well and sufficiently, either by a charge on freehold estates of inheritance, to be situate in England or Wales, or by an investment of an adequate sum of money in some of the stocks or funds of Great Britain, or by the best means which might then be in his power, secure the payment of an annuity of 1,000*l.* as therein mentioned. The question was, whether this covenant created at the time a lien on all the property of the earl, whether real or personal, and whether then in possession or afterwards acquired. The Earl of Mornington, at the date of these articles, was seised or entitled in fee simple in possession of or to a moiety of a house in Saville Row, and was also seised or entitled in fee simple in reversion or remainder expectant on the death of his mother, Catherine Dowager Countess of Mornington, of or to the remaining moiety. That being so, by indentures dated in December 1834, certain estates were limited to trustees, on trust to raise the sum of 462,000*l.*, which was to be applied by the trustees upon certain trusts for the payment of debts, and, as to the ultimate surplus, for the benefit of the Earl of Mornington himself. The Earl having neglected to perform his covenant of June 1834, and neglected to pay the plaintiff her annuity, she, in May 1839, filed her bill for specific performance of the articles of the 21st of June 1834. To this bill the trustees demurred for want of equity. The question was argued before the Vice Chancellor of England, and was reported in 10 *Sim.* 256. His Honour, however, expressed no opinion as to the covenant creating a lien on all the Earl's lands, but held that the articles and deeds of December 1834 were all parts of the same transaction; that they ought to be taken in connexion with each other; that the powers given to the Earl by the deeds of December 1834 were given for the purpose of enabling him to perform his covenants contained in the articles; and, therefore, that the plaintiff was entitled to have them specifically performed. He overruled the demurrer as to want of equity, but allowed it for want of parties; and the bill having been amended, by introducing a statement that the

(3) 1 Dru. & W. 459, 491.

arrangement of 1834 was entered into by the Earl for the purpose of enabling him to secure the annuity and in part performance of the articles of separation; the trustees demurred to the amended bill for want of equity, and the case came before the Lord Chancellor (Lord Cottenham), who was of opinion that the articles amounted to a contract to charge the annuity upon such lands as the Earl had power to charge in February 1835. The Lord Chancellor, in his judgment (4 *Myl. & Cr.* 577), adverted to the statement in the amended bill, said, "Therefore there is a covenant to charge lands on a certain day; the purchase of lands before that day for that purpose, and in part performance, and a promise, after the lands acquired to effect the change, and a refusal to do so, and acts tending to defeat the security so acquired and promised to be charged." It was now alleged that Lord Cottenham decided the question as to the covenant creating a general charge on all the Earl's lands, but it appeared to his Lordship that the general question was not raised on the demurrer; and it appeared from the report in 17 *Sim.* 59, that the decree ultimately proceeded upon the ground that the deeds of December 1834 were the means by which the covenant could be satisfied. The plaintiff, therefore, could derive no aid from this case for what she contended; no benefit was obtained by the decree in her favour. The present bill stated that only shortly before this suit was instituted, the plaintiff discovered the fact that the Earl had, on the 1st of February 1835, an interest in the premises in Saville Row. This statement was, however, different from her evidence. If, however, she had in law a charge on these premises, the fact of knowledge was wholly immaterial. The question, however, was, whether the covenant did create any such general charge as was contended for. In his Lordship's opinion the covenant was, in its terms, apparently of a personal nature providing for doing an act whereby a charge would be created. The Earl covenanted to settle lands to be situate in England, &c. The covenant did not point to property to be afterwards acquired to the exclusion of his present property, or at any particular property, but only to the species of property which he

was to settle. This was different from putting a stop upon every portion of his property, and preventing his dealing with it. No doubt this was a covenant which would entitle the plaintiff to file her bill for specific performance, or to bring an action for damages, or to take any other proceedings to make good her annuity out of any property which the Earl had acquired; but meanwhile, it would be a difficult thing to prevent this covenantor from dealing with such property. There was a distinction between cases where an actual charge was created and where there was a covenant to create a charge, or a covenant to do an act at a future day which was to create the charge. A covenant to charge generally, was an agreement which the Court would enforce; but the case was not the same where the covenant was to do an act at a future day to create a charge. No doubt a covenant might be so framed as to operate as a charge when a future day named had arrived, or upon the death of a party; but in this case there were no words creating an actual charge at the time when it was executed; there was only a personal covenant. His Lordship then commented on several of the cases cited in the course of the argument, and said that *Roundell v. Breary* was the only case creating any difficulty. But from the examination into the case by Lord Justice Turner, there was strong ground for believing that that report was not accurate. It was, however, no authority, as the decree was the subject of a compromise. His Lordship was not prepared to say, that even if this had not been so, he should have felt himself bound by it. In the important case of *Freemoult v. Dedire* the distinction was taken between a covenant to charge specific lands and a covenant to charge the covenantor's lands generally. The words of the covenant in the present case intended no more than to bind the covenantor to create a charge upon his lands on or before a certain day. There was no doubt that by apt words the Earl could have fettered his estates with this covenant, but neither the articles of separation nor the cases shewed that this was the effect of the covenant; and his Lordship was of opinion that the plaintiff was not entitled to assert a charge on the house in Saville Row, as against the defendants,

except the Earl, and, therefore, that her bill must be dismissed.

LORD JUSTICE KNIGHT BRUCE was also of opinion that according to the true construction of the agreement, although a day was fixed, which the late Earl survived, it did not create a charge or lien on any part of his property.

LORD JUSTICE TURNER said, that he was of the same opinion. The case was resolved into this simple question: was there an agreement to charge the property sought to be charged? The answer to that must depend upon the language of the deed. In considering the language, it was important to consider whether the covenant was to have immediate operation, or was to operate by virtue of a future act to be done by the covenantor. In the latter case all the questions were left open as to the mode of effecting it. In the present case the words were as indefinite as well could be. The covenant was, that he would "on or before the 1st of February 1835, well and effectually," &c. *Prima facie* the intention of the covenant could not be of itself to create a charge; it referred to the future. There was no act here which evidenced an intention to comply with the covenant. The Earl was then entitled to this property, which was not in terms included in the covenant, and the Court was called on to fix a lien on all the property of which the Earl was seised on that day. His Lordship had looked into all the authorities cited, and many others, but there was none which supported that proposition, excepting *Roundell v. Breary*. Had that case been as it appeared in the report, it would have been very important. But upon examining the record, it appeared to be quite a different case from that stated in the report, and it came to the same as *Watson v. Sadlier*. In the absence, therefore, of any authority to create a lien on the lands of the covenantor on a particular day, the plaintiff's case wholly failed, and the bill must be dismissed, but without costs.

WOOD, V.C. }
June 30; } LANGDALE v. WHITFIELD.
July 1. }

Legacy—Construction—"Monies."

A married woman having a power of appointment over trust funds, and being also entitled to considerable sums of money, consisting partly of cash at the bank, and partly of money held by the bankers on deposit-notes, gave, by her will, certain pecuniary legacies, which she directed to be paid out of any monies of or to which she might be possessed or entitled at the time of her decease, and then gave all the residue of the monies of which she might, at the time of her decease, be absolutely possessed to B. and K. absolutely:—Held, that the residuary bequest carried not only the cash at the bank, but also the money held on deposit.

Mary Ann Haire, the wife of Thomas Haire, having, under her marriage settlement, in default of issue, and subject to her husband's life interest, a power of appointment over certain mortgage debts and sums of money, bonds, bills, notes, securities, produce of the sale of a messuage and other property comprised in the schedules to her marriage settlement, made her will, dated the 13th of December 1845, and thereby, in exercise of her power, bequeathed all and singular the said trust monies, property and other her personal estate in manner therein expressed. She then proceeded to give pecuniary legacies to various persons and to different charities, the whole of such legacies to be paid within twelve calendar months next after the decease of the survivor of her husband and herself; and amongst the legacies so bequeathed were a legacy of 500*l.* to Robert Thomson, to be paid to him if and when and so soon after the period before mentioned as he should attain the age of twenty-one years; two legacies of 100*l.* each to her god-daughters Mary Octavia Burnet and Florence Mary King, to be paid in like manner if and when they should respectively attain twenty-one years, and a legacy of 100*l.* to her cook, Maria Ford; and after giving certain specific legacies she proceeded as follows:—"And

as to all the residue of my monies, securities for money, goods, chattels, effects and personal estate not by me hereinbefore otherwise disposed of, I give the same to my friend Mary Ann Langdale (the plaintiff) before Mary Ann Jackson, spinster, absolutely."

By a codicil, dated the 7th of August 1849, the testatrix revoked the legacy of 500*l.* to Robert Thomson, and the legacies of 100*l.* a-piece to Mary Octavia Burnet and Florence Mary King; and gave to R. Thomson the sum of 300*l.*, and directed that as well the said last-mentioned legacy as the before-mentioned legacy to Maria Ford should be paid to the said legatees respectively out of any monies of or to which she might be possessed or entitled at the time of her decease, and within twelve calendar months next after such decease, and proceeded as follows:—"And I do hereby give all the residue of the monies of which I may at the time of my decease be absolutely possessed unto and equally between the said Mary Octavia Burnet and Florence Mary King, their executors, administrators and assigns absolutely, share and share alike, and in all other respects I ratify and confirm my said will."

The testatrix died on the 10th of May 1854; and at the time of her death her personal estate consisted, first, of securities comprised in the schedules to the marriage settlement, amounting to 7,700*l.*, in which her husband was entitled to a life interest; secondly, of mortgage debts, bonds, bills, notes, cash in the house, and cash at her bankers, arising from the savings out of her income amounting to 2,838*l.*, and about 300*l.*, being the arrears of rent and interest due to her and outstanding at her decease, in respect of her settled property and private securities; and, thirdly, of various household furniture, plate, linen, coins, books, trinkets, wearing apparel and other goods and chattels.

The 2,838*l.* above-mentioned consisted partly of cash in the house and a cash balance at the bank, and partly of money held by the bankers on deposit at interest.

The plaintiff, who was the residuary legatee named in the will, claimed to be entitled to the whole of the residuary personal estate, except the excess of cash

in the house and cash in the bank over the amount of the testatrix's debts, funeral and testamentary expenses, and the two legacies of 300*l.* and 100*l.*; and the question was, what passed to the defendants Burnet and King under the residuary bequest in the codicil?

Mr. Willcock and *Mr. Springall Thompson*, for the plaintiff, contended that nothing passed under the residuary bequest in the codicil, except cash in the house and cash at the bank; money on deposit did not come within the bequest.

Lowe v. Thomas, Kay, 369: s. c. on appeal, 5 De Gex, M. & G. 315; 23 Law J. Rep. (N.S.) Chanc. 453, 616.

Manning v. Purcell, 2 Sm. & G. 284; s. c. 7 De Gex, M. & G. 55; 23 Law J. Rep. (N.S.) Chanc. 423: 24 Ibid. 522.

Vaisey v. Reynolds, 5 Russ. 12; s. c. 6 Law J. Rep. Chanc. 172.

Larner v. Larner, 26 Law J. Rep. (N.S.) Chanc. 668.

Barrett v. White, 24 Ibid. 724.

Earl of Shaftesbury v. the Duke of Marlborough, 7 Sim. 237.

Mr. Rolt and *Mr. Hislop Clarke*, for the defendant King; and—

Mr. Daniel and *Mr. Hobhouse*, for the defendant Burnet, contended that the whole of the residuary personal estate passed by the bequest, including the property over which she had a power of appointment.

Rogers v. Thomas, 2 Keen, 8.

Dowson v. Gaskoin, Ibid. 14; s. c. 6 Law J. Rep. (N.S.) Chanc. 295.

Glendening v. Glendening, 9 Beav. 324.

Lynn v. Kerridge, West. temp. Hardw. 172.

Mr. W. M. James and *Mr. Renshaw*, for the executors.

Mr. Willcock, in reply.

WOOD, V.C.—I have no difficulty whatever upon the first point in this case, viz., as to the effect of the codicil upon the property over which the testatrix had a power of appointment only. The form of the will is this:—The testatrix having a

power of appointment over a very large amount of property, which is carefully specified in the will, recites that she has this power; and then in exercise and execution of the power to her given, and of all other powers enabling her, gives and bequeaths all and singular the said trust monies, property and other her personal estate in manner thereafter mentioned. That, of course, would carry everything which she had power to dispose of. She then gives certain pecuniary legacies, the payment of which is postponed till twelve months after the death of her husband, and after several specific legacies she proceeds to make this residuary bequest. "And as to all the residue of my monies, securities for money, goods, chattels, effects and personal estate not by me hereinbefore otherwise disposed of, I give the same to my friend Mary Ann Langdale, before Mary Ann Jackson, spinster, absolutely." Of course, therefore, Mary Ann Langdale is residuary legatee of everything of which she had power to dispose by will. Then, by the second codicil, she revokes the legacy of 500*l.* to Thomson, and the two legacies of 100*l.* to Misses Burnet and King. She then refers to, but does not revoke the legacy of 100*l.* to her cook; and then she gives Thomson 300*l.* instead of the 500*l.* given by the will, but she makes no substitution in this place for the legacies given by the will to her god-daughters; she then directs that "as well the said last-mentioned legacy to the said R. Thomson as the said before-mentioned legacy to the said Maria Ford shall be paid to the said legatees respectively out of any monies of or to which she may be possessed or entitled at the time of her decease, and within twelve calendar months next after such decease;" and then she goes on to say, "And I do hereby give all the residue of the monies of which I may, at the time of my decease, be absolutely possessed, unto and equally between the said M. O. Burnet and F. M. King, their executors, administrators and assigns absolutely, share and share alike, and in all other respects I ratify and confirm my said will." It is clear that she makes a distinction between property which she has power to deal with after the death of her husband, and property over which she

has an immediate power of disposition. She evidently places the latter in opposition to that fund which she could not deal with till twelve months after her husband's death. It is clear, also, that there is an express revocation of certain pecuniary legacies and an implied revocation to some extent of the residuary bequest, and subject to this there is an express confirmation of the will in every respect. The real difficulty is as to the extent of that implied revocation of the residuary bequest, and this depends upon the meaning to be attached to the word "monies." The cases have clearly settled that the primary meaning of the word is ready money, which, in *Parker v. Marchant* (1), was held to include cash in the bankers' hands; and really that case does not carry it beyond ready money; but in *Manning v. Purcell* money at the bank on a deposit account, for which interest was paid, was held to pass. In *Lowe v. Thomas* I felt bound to hold that money in the public funds did not pass under the description, and that decision was affirmed, on appeal.

In this case the question is brought to this, whether the word "monies" is to be confined to money which is actually in hand and ready to be disposed of, or is to be extended to money which is due to the testatrix on security. Now, looking to the whole codicil, it is clear that the first object is, the acceleration of the legacies to Thomson and the cook, and the diminution of the legacy to Thomson? Whether she thought 300*l.* in hand equal to 500*l.* twelve months after her husband's death I do not know, but clearly these legacies were to be paid immediately. Also, it is clear that she does not revoke the legacies to her god-daughters for the purpose of depriving them of any bounty which they would take under the will, but to give them something else, the enjoyment of which is to be accelerated. This seems to be the real clue to the codicil, and therefore one would be surprised, that being the primary object, to find any indication of an intention that her bounty to these ladies should depend upon such a mere accident as there happening to be

(1) 1 Phill. 356; s. c. 12 Law J. Rep. (N.s.) Chanc. 385.

sufficient money either in the house or at the bank. Then, although the primary meaning of the word "money" is "ready money," it is admitted that the meaning is capable of expansion, just as the words, child, son, &c., are capable of expansion, and that being so, I think there is enough in the codicil to justify me in giving it a wider signification, because, in describing the fund out of which the legacies to Thomson and Maria Ford are to be paid, she directs them to be paid out of any monies of or to which she may be possessed or entitled; and further than that, there is a direction to pay these legacies within twelve months after her decease. It is true the policy of the law has been always to allow twelve months for the payment of legacies, but I think she may be well supposed to give that time for realizing such of her assets as might not be immediately available. Finding, however, that the principal object of the codicil is to accelerate the benefits given by the will, and that she describes the fund out of which the legacies are to be paid as money of or to which she may be possessed or entitled, I think I am authorized to say that the extent of the word "monies" is sufficiently indicated by the mode in which she desires the legacies to be satisfied. She says, instead of the fund out of which they are payable under the will, I now desire that they should be paid out of the money which will be realizable at my death; and it seems to be the reasonable construction of the will to hold that the gift of the residue of her monies applies to the residue of this fund. Mr. Willcock pointed out that, though the legacies given to Thomson and Ford are payable out of the monies of or to which the testatrix may be possessed or entitled, yet in the residuary bequest the words "entitled to" are left out; and if those words had been omitted in describing the fund the case might have been stronger in favour of the plaintiff; but it would be absurd to draw a distinction between the fund, out of which those legacies are given, and the "residue" of the money of which she may be absolutely possessed.

The only other difficulty in the way is, that in her will the testatrix distinguishes between "money" and "securities for

money," shewing that she was acquainted with the difference between the two; but it seems to me that the explanation of that is, that in the will she intends to enumerate in a scientific manner the whole of the property over which she has a power of disposition, while in the codicil she naturally refers in shorter language to the monies which may be got in within twelve months after her death.

Declare, that the legacies of 300*l.* and 100*l.* are payable out of all monies of or to which the testatrix was possessed or entitled at the time of her decease, whether the same consisted of money actually in hand, or monies due upon security, or otherwise; and that Burnet and King are entitled to the residue of the same monies, but not to any of the settled funds.

Wood, V.C.
July 7.

In the matter of THE JOINT-STOCK COMPANIES WINDING-UP ACTS, 1848 AND 1849, AND THE ATHE-NÆUM LIFE ASSURANCE COMPANY, *ex parte* THE PRINCE OF WALES LIFE ASSURANCE COMPANY.

Company—Policy of Assurance—Liability of Individual Shareholder.

*By the deed of settlement of the A. Life Assurance Company it was provided, that in every policy granted by the company there should be contained a reference to the deed, and a proviso limiting the scope and effect of the contract thereby created, so that the same should take effect and be satisfied only out of such funds and property of the society as should be at the disposal of the directors in that behalf, and negating an unconditional liability; provided, that nothing in the deed or in such contract contained should limit the liability of any shareholder as to the performance of such contract, or prejudice the rights of any person or persons against any shareholder by virtue of the statute 7 & 8 Vict. c. 110. The A. Company granted to the P. Company a policy of insurance, containing a proviso that the capital stock of 100,000*l.*, and other the property of the society remaining, at the time*

of any claim or demand made, unapplied and undisposed of and inapplicable to prior claims, should alone be liable to make good all claims and demands upon the society, or otherwise, under the policy; and that no director, officer or shareholder of the said society should be in anywise personally liable beyond the amount unpaid of his shares, nor longer than he should retain the same shares. The P. Company having recovered judgment against the A. Company in an action on the policy,—Held, that they were precluded by their contract from issuing execution against a shareholder personally; and that the clause in the deed did not give them the right.

This was an application, on the part of the Prince of Wales Life and Educational Assurance Company, for liberty to issue execution, or take proceedings against James Andrew Durham, Esq., one of the shareholders of the Athenæum Life Assurance Company, in respect of the sum of 11,695*l.* 5*s.*, which the said Prince of Wales Company lately, in the Court of Queen's Bench, recovered against the official manager of the Athenæum Company. The facts were as follows:—The Prince of Wales Company having received proposals by a Mr. Trulock to assure the life of a Mr. Jodrell for 11,000*l.*, proposed to the Athenæum to effect a re-assurance with that office for 10,500*l.* This proposal was accepted by the Athenæum Company, and three policies of assurance were accordingly granted to the Prince of Wales Company on Mr. Jodrell's life, for sums amounting to 10,500*l.* Mr. Jodrell died in November 1855, and the Prince of Wales Company were subsequently compelled to pay to Mr. Trulock the amount of their policies; and they claimed from the Athenæum Company the amount re-insured in their office.

An order having been made to wind up the Athenæum Company, a claim was made by the Prince of Wales Company for the amount of the policies; and the Judge having admitted the proof as a claim only, an action was brought against the official manager of the Athenæum Company, which resulted in a verdict for the Prince of Wales Company. Judgment was accordingly entered up for 11,695*l.* 5*s.*

for debt, interest and costs, and execution was issued for the amount, but nothing could be realized under the execution; and the Prince of Wales Company then applied by summons at chambers for leave to proceed against Mr. Durham, who was the holder of a thousand paid-up shares in the Athenæum Company, and had been settled on the list of contributories.

The 28th clause in the deed of settlement of the Athenæum Company was as follows:—“That every policy, endowment, grant of annuity, or other instrument required in any of the transactions aforesaid shall be given under the hands of not less than three of the directors, and be sealed with the common seal of the society, and that there shall be contained therein, and in every other contract to be entered into on behalf of the society, in or about the premises, a reference to these presents, and a proviso limiting the scope and effect of the contract thereby created, so that the same shall take effect and be satisfied only out of such funds and property of the society as under the provisions hereinafter contained shall, at the time at which such liabilities shall accrue, be at the disposal of the directors in that behalf, and negating an unconditional liability. Provided always, that nothing herein or in such contract contained shall limit the liability of any shareholder as to the performance of such contract, or prejudice the rights of any person or persons against any shareholder under or by virtue of the aforesaid statute.”

In pursuance of this clause the following proviso was inserted in the policies granted to the Prince of Wales Company:—“Provided also, that the capital stock of 100,000*l.*, and other the stock, securities, funds and property of the said society remaining, at the time of any claim or demand made, unapplied and undisposed of, and inapplicable to prior claims and demands, in pursuance of the provisions of the said deed of settlement, shall alone be liable to answer and make good all claims and demands upon the said society or otherwise, under or by virtue of this policy; and that no director, officer or shareholder of the said society, his heirs, executors or administrators, shall by reason of this policy be in anywise individually or per-

sonally liable, or subject to any such claim or demand, or be in anywise charged by reason thereof beyond the amount unpaid of his shares in the said capital stock, nor longer than he shall retain the same shares."

The case was argued by—

Mr. Daniel and *Mr. Graham Hastings*, in support of the application.

Mr. Roll and *Mr. W. D. Lewis*, for the official manager of the Athenæum Company; and—

Mr. Amphlett and *Mr. H. Stevens*, for *Mr. Durham*.

The authorities cited were:—

Halkett v. the Merchant Traders' Association, 13 Q.B. Rep. 960; s. c. 19 Law J. Rep. (N.S.) Q.B. 59.

Hassell v. the Merchant Traders' Association, 4 Exch. Rep. 525; s. c. 19 Law J. Rep. (N.S.) Exch. 183.

Evans v. Coventry, 3 Drew. 75.

Hallett v. Dowdall, 18 Q.B. Rep. 2; s. c. 21 Law J. Rep. (N.S.) Q.B. 98.

Ex parte Greenwood, 3 De Gex, M. & G. 459; s. c. 23 Law J. Rep. (N.S.) Chanc. 966.

Lord Talbot's case, 5 De Gex & Sm. 386; s. c. 21 Law J. Rep. (N.S.) Chanc. 846.

7 & 8 Vict. c. 110. s. 68.

20 & 21 Vict. c. 78. s. 7.

WOOD, V.C. — The whole question arising upon this case is now before me, upon an application against an individual shareholder, who, it appears to me, has been summoned here, and is entitled to have the question determined, whether he is or is not to be sued upon this contract. Now, if there had been any case put forward which required the assistance of a jury, I ought to let the question of fact be tried; but if it is reduced to a mere question of law, as to whether the individual shareholder is liable on a contract, I have only two courses open to me: one is to determine it myself, and to say that, seeing there is no right whatever (if that is the conclusion that I come to on the matter) to attack this particular shareholder, or to have any relief as against him, in case any legal proceedings shall have been instituted,

the application ought to fail; and the other is to say that, inasmuch as this is a question of law, I ought to be assisted by a Judge of a court of common law. That course I should have taken if I had not the advantage of so many opinions repeatedly expressed upon the question; but in that state of circumstances it would be an idle formality, and wrong in me to request any Judge to attend here to repeat what has been decided by a Court of error in the Exchequer Chamber in several cases. It would be wrong in every respect towards the parties to put them to any further expense, for I cannot distinguish this case in principle from all those cases which have been decided as regards the right against an individual shareholder — I am not speaking now of the right of this individual creditor to have a call made. As regards this individual shareholder the matter stands thus:—The contract on which the Prince of Wales Life Assurance Society sued and recovered at law was a policy of assurance, by which, in consideration of 308*l.* paid by them for premiums to the Athenæum Society, the Athenæum agreed, on the death of *Mr. Jodrell*, to pay 6,500*l.* to the Prince of Wales Assurance Company. There was contained in that policy a proviso "that the capital stock of 100,000*l.* sterling, and other the stock, securities, funds and property of the said society, remaining, at the time of any claim or demand made, unapplied and undisposed of, and inapplicable to prior claims and demands, in pursuance of the provisions of the said deed of settlement, shall alone be liable to answer and make good all claims and demands upon the said society or otherwise, under or by virtue of this policy; and that no director, officer or shareholder of the said society, his heirs, executors or administrators, shall by reason of this policy be in anywise individually or personally liable or subject to any such claim or demand, or be in anywise charged by reason thereof beyond the amount unpaid of his shares in the said capital stock, nor longer than he shall retain the same shares."

Now, independently of that question raised about the representation of the amount of capital, it would stand thus:—Here is a contract to pay out of the avail-

able assets of the company alone, and without any recourse to the individual shareholders beyond the amount of their shares. Now, upon a contract founded on that proviso to pay out of the assets alone, the Courts have held, in that case (1) to which I have been referred, and which has been confirmed by the Exchequer Chamber, that there was no recourse, independently of these calls, to the individual shareholder at all. There is no recourse against the individual shareholder, because the contract was to pay out of the assets alone, and therefore an individual shareholder, although he had not paid his call, was not liable to be sued. Then, when that case came under the consideration of this Court in the winding-up matter of the same company, the Court held, that the shareholder was liable to calls in the company; and when those calls had been obtained they became assets of the company, and having become assets of the company, they were applicable to the payment of a debt (2). Possibly, some question of that sort may arise hereafter in this case. There are other cases before the Courts of law of contracts containing this second branch of the proviso, viz. "that no individual shall be answerable in respect of any such claims or demands beyond the amount of his shares." That may give a creditor something of a greater right at law than the previous stipulation in the policy about assets alone, because it would give him a right to go against every individual shareholder to the amount of his shares, which according to the previous provision he could not do. Therefore, the whole contract, thus modified with the proviso, would be this:—The original contract would be a general contract limited by the first proviso, which says it shall be paid out of the assets of the company, and that no single individual shareholder shall be proceeded against by *scire facias*, because it is merely to be paid out of the assets of the company. But add to that the proviso, that no shareholder shall be liable beyond the amount of his shares, and then you introduce a proviso that as to that amount you may proceed against that individual

shareholder. Then, this second contract, which limits the liability of the individual shareholder to the amount of his shares, has been upheld by several decisions of the Courts of law, as being a contract in law to protect the shareholders; and that having been determined, so far as that part of the case is concerned, unless there is something special in the deed or arising out of the statement of the capital stock being 100,000*l.*, the whole case as against Mr. Durham is concluded by repeated decisions.

Then the two remaining points are, first, whether any difference is made by this provision in the 28th clause of the deed:—"That in every policy, endowment, &c. there shall be contained a reference to these presents, and a proviso limiting the scope and effect of the contract thereby created, so that the same shall take effect and be satisfied only out of such funds and property of the society as under the provisions hereafter contained shall, at the time at which such liability shall accrue, be at the disposal of the directors in that behalf, and negating an unconditional liability." Now, if that clause had stopped there, it might perhaps have been a question whether the only proper contract to be made would not be one which would limit the remedy, according to the first portion of this proviso, solely to the assets of the company, as they existed in that case which was referred to, when Lord Talbot was sought to be charged at law. Then comes the proviso:—"Provided always, that nothing herein contained shall limit the liability of any shareholder as to the performance of such contract, or prejudice the rights of any person or persons against any shareholder under or by virtue of the aforesaid statute." Now, if you read that literally, it really makes the whole thing utterly unintelligible, because if the payment is limited to be made out of the assets of the company, and yet the rights against any shareholder are not to be limited, the two principal things are inconsistent. Then arises the observation of one of the Common Law Judges in *Hallett v. Dowdall*. I observe there that Cresswell, J. comments upon a section not entirely like this, but one which has considerable bearing upon it. He says he has to consider what the

(1) *Halkett v. the Merchant Traders' Association*.

(2) *Ex parte Talbot*.

effect of it would be; and if it is inconsistent with the deed it must be rejected. That is the only conclusion one could come to. Of course, one would not think of rejecting any portion of the deed; but if it provides that there is not to be unconditional liability, and also provides that every shareholder shall be fully liable, the two things are so inconsistent that I should be obliged to reject the proviso. But I think it may be reconciled in the way in which Mr. Amphlett suggested, namely, that there shall not be an unconditional liability; that there shall only be a liability with respect to the assets of the company; but, at the same time, it shall not limit the liability of the shareholders to pay to the full amount of their shares. You are to make payment out of the assets, but you are also to take care that the shareholder shall be made responsible to the full amount of the responsibility which under this deed he has incurred. The liability under the deed is a liability to contribute upon every individual share. It says, the policy shall contain a proviso, making the money payable out of the assets, but not so as to prevent any shareholder from being personally responsible to the full amount of his calls. That is the form of the deed; but if I were to construe the clause otherwise, it would only come to this: that the contract was not according to the deed, and was not a contract therefore which the Prince of Wales Company could sue upon. But their argument has been, that it is a contract entirely within the scope of the deed; and you must import into your contract everything that the deed says you must put into it. I apprehend it never could be insisted on for the benefit of the party who takes his contract as he finds it; he cannot complain; he has got everything that he has bargained for. He might say, "If I had known of your deed, I might have bargained for something better, and got something more put into my contract than I have got." The contract that he has got is all that he is to look to, and all that he has a right to recover upon. That being so, as regards the contract in the present form, every authority is distinctly against them, and the question is concluded by repeated authority.

Then, as regards the 100,000*l.*, the proviso is, that the capital stock of 100,000*l.*, and other the stock, securities, funds and property of the said society, remaining, at the time of any claim or demand made, unapplied and undisposed of, and inapplicable to prior claims and demands, in pursuance of the provisions of the said deed of settlement, shall alone be liable: it is not an averment that the capital stock is 100,000*l.* Now, if this be a fraud at all, the right course would be to proceed against the whole company, and not against Mr. Durham in particular, in respect of the fraud. Whether that course would have been successful or not, after the case which has been cited before Kindersley, V.C., it is impossible for me to say. The policies in that case did not, I think, express anything about the capital; they relied on prospectuses previously issued, which represented the capital to be of that amount, and that was alleged as a fraud against the directors. Supposing that the directors have represented this, does it give any special equity against Mr. Durham to have an execution against him under this contract? The contract is, you are not to sue me beyond the amount of my shares. That is the contract, upon which these cases have been decided at law. If they had said, in so many words, "we hereby say the capital is 100,000*l.*," it would not be sufficient for me to say thereupon that I am to hold Mr. Durham liable beyond the amount which he stipulated to be liable for; that is, the amount of the calls which remain unpaid in respect of the individual shares.

Therefore, as regards him, I must refuse the application, and allow him the costs of the application, because he is brought here at his own expense. Then, as between the creditor and the official manager, it is right something should be done. I quite agree with Mr. Daniel that it is right that a creditor, who has established his claim, should have every rational means of enforcing it. I am willing to listen to whatever suggestions may be made at chambers, as to any proposals for raising a further call, or in order to assist this creditor's rights, either of having calls made or of marshalling calls. Of course, I do not think it right to make Mr. Daniel's

client pay any costs. As regards the company, I think it is right that the question should be discussed.

The only order as to this part of the case is, that Mr. Durham should have his costs; and I should preface the order by saying, "The Court being of opinion that there is no such individual liability under the policy as will authorize the issuing of an execution against him, or proceeding by way of *scire facias* against him individually under a judgment."

M.R.
1857.
May 23.

{ *In re* THE COMMERCIAL AND
GENERAL LIFE ASSURANCE,
ANNUITY, FAMILY ENDOW-
MENT AND LOANS ASSOCIA-
TION, *ex parte* JOHNSON.

Company—Directors' Fees.

In winding up a company the directors will, as against the shareholders, be allowed their fees for attendance at board and other meetings, when the same have been sanctioned at the general annual meetings of the shareholders, though in the result the dealings of the company were unfavourable.

This company was established for the assurance of lives, for the grant of annuities, and for advancing money on loan. It commenced business on the 19th of October 1841, and it was then resolved, that the qualification of a director should be at least fifty shares.

The following is a statement of the company's proceedings with reference to the remuneration of the directors, a claim to which was now the subject of discussion in the winding up of the company.

1841, Oct. 27. It was resolved, that every director who should attend either of the committees or the general board, should be entitled to receive one guinea, provided to such minute of attendance the signature of the director should have been made in the attendance-book before a quarter-past twelve o'clock. All directors attending after that time were not to be entitled to a fee, and these fees were to commence on the 1st day of December 1841.

1841, Dec. 15. It was resolved, that those directors who had paid the deposit on fifty shares at the least, being Messrs. Duff, Edwards, Evans, Green, Gordon, Neville, Pye, Rose and Tye, form the board of directors, with power to add to their number, and to make such laws for the formation and government of the institution as they should see fit; and it was also resolved, that the directors should have for every attendance at board or committee 1*l.* each, provided, after — years, the prosperity of the office should warrant such a charge.

1841, Dec. 22. A general purposes committee was formed, and on the 29th of the same month, at a meeting of the directors, this committee brought up their report, in which (*inter alia*) was the following statement:—"Your committee are also of opinion, that those directors who may qualify previous to the commencement of public business shall hold their position permanently, subject to their wish to retire, and in order that they may be remunerated for their services, they shall be entitled to the sum of one guinea for each attendance at the general board, and half-a-guinea at committees, such sums to be carried to their respective accounts, to be received when the majority of the directors see fit; such attendances to be entered from the 1st of December 1841."

1842, Jan. 3. It was resolved that the chairman should receive two guineas for such attendances, either at general board or committees, to be paid upon the same understanding as the other directors.

1842, March 16. The qualification of directors was increased from 50 to 150 shares.

1842, April 20. It was resolved, upon a motion of Mr. Edwards, seconded by Mr. Pope, that every director now engaging to 100 additional shares to increase his qualification to 150 shares, be entitled to transfer 100 shares to any member or members of his family, without being disqualified as a director.

Messrs. Pope, Evans, Edwards, Duff and Green, directors, took up the additional 100 shares, and paid 980*l.*

1842, June 29. The amount for directors' attendances was ordered to be made up to the end of June, and commuted into

shares of company's stock, to be vested in the name of parties to be named at the next meeting.

1842, July 6. At a meeting of directors cheques for one amount of the directors' attendances to the 30th of June were drawn, and the following shares were disposed of, and among other names there was Edward Evans, for twenty shares.

1842, Dec. 14. The future qualification for a seat in the direction was reduced to 100 shares, and it was resolved that the present directors, who had qualified by taking 150 shares, should be reduced 100 shares, and that all shares above the 100 held by the present directors as part of their respective qualifications, should be considered as a loan by them to the company, and for this purpose that the several shares mentioned in the note set opposite to the names of the persons mentioned be cancelled, and notice given thereof, and the amount paid on each of such shares was to be carried to the credit of such parties respectively, and bear interest at 5*l.* per cent. per annum.

The note or list of names referred to contained (*inter alia*) Edward Evans, fifty shares, No. 1056 to No. 1105, both inclusive.

1843, Jan. 12. At a meeting of directors the auditor's reports were read, and an item of 56*l.* 3*s.* 6*d.* appeared, entered under the head "Statement of the company's assets and liabilities," as directors' attendance fees not claimed, and also an item under the head of "Liabilities" of 208*l.* 19*s.*, as attendances of directors for the last half-year; and under the head "Recapitulation" were the following items:—

Annual income	£1,612	4	3
Annual working expenses	1,228	15	0
	£383	19	3

If directors paid in cash, as under:—

Annual income	£1,612	4	3
Annual expenses	1,728	13	0

Balance against the company ... £116 8 9

1843, March 2. It was resolved, that in lieu of committee meetings on the Monday, there be two board meetings in the week, on Tuesdays and Fridays, and that payment be made, according to attendances; and it was resolved at the next meeting, on the

7th of March, that the payment to directors for their attendance, at each board-day, should be one guinea, if the names were entered in the attendance-book within ten minutes of the hour fixed for the meeting.

1843, May 26. The deed of settlement was executed, and clause 4. ratified and confirmed all engagements that might have been entered into by or under the direction, or with the sanction of the then present directors, or of the acting committee thereinbefore referred to, on behalf of the company, and all salaries or wages that might have been paid or engaged for by them respectively, and also the hiring and taking the premises, 112, Cheapside, for the business of the company, and all other acts which might have been done by or under the direction, or with the approbation of the directors, for the purposes of the undertaking. Clause 9. *inter alia*, declared that, subject to the jurisdiction of a general meeting of the proprietors, the business, affairs and concerns of the company should at all times be under the controul of a board of directors, who should have the entire ordinary management and conducting of the company, and of the capital, stock, estate, revenue, effects and affairs thereof, and should also regulate and determine the mode and terms of carrying on and transacting the business of the company, conformably to the provisions contained in the deed. It then declared, that no shareholder other than a director should in any way meddle with the bills, cash, securities or other property of the company, or in the managing, ordering or conducting the business affairs or concerns thereof; but that they should fully and entirely commit, trust and leave the same to be wholly ordered, managed and conducted by the directors for the time being, and whomsoever they should under the deed appoint. Clause 10. named the directors. Clause 11. gave the directors power to add to their number until the annual general meeting of the proprietors, to be held in the year 1845. Clause 17. stated that, until the first general meeting of the company, the directors should receive such remuneration as the board of directors might from time to time fix for the actual attendance of directors respectively, at the principal place of business

for the time being of the company: provided nevertheless, that the directors should be entitled to receive any such further remuneration as might be awarded to them at any general meeting of the company. Clause 19. fixed 1845 as the year for a general meeting. Clause 21. declared, that no person should be eligible for or elected a director who should not be the holder in his own right of 100 shares, at the least, in the capital of the company. Clause 90. declared, that the general meeting should be held at the principal place of business for the time being, or at some convenient place in the city of London or Westminster, on the first Monday in February, or within fourteen days after, in every year during the continuance of the company; and after pointing out the mode of convening the meeting, it proceeds, "and the meeting so convened and holden shall be called 'the annual general meeting,' and the shareholders respectively qualified to act and vote therein according to the deed, might attend the same personally or by proxy, and should have full power and authority to decide upon all such matters and questions as by virtue of the deed should be brought forward at such meeting."

Clause 91. That at every general meeting the directors shall present the annual account and balance-sheet, attested by the auditor, or accompanied by their report of the property and state of affairs of the company, for the year ending the 31st of December next preceding such general meeting, and also such further statement and report, if any, of the then condition and probable future progress of the affairs of the company, as the directors shall deem expedient for the interest of the company to be made public, and every such account and balance-sheet shall be binding and conclusive on all the shareholders, their executors, administrators and assigns, unless some error shall be discovered therein and made known to the directors before the then next general meeting: in that case, such error so notified shall be corrected; and at every such annual general meeting all or any of the books and accounts of the company may be called for and referred to by any proprietor present and qualified to vote at such meeting.

Clause 97. provided, that all motions, questions and propositions (except as therein mentioned) should be decided by a majority of shareholders then present on a shew of hands.

1844, Feb. 2. The minute-book, No. 1, contained, *inter alia*, under the head "Working expenses," directors' attendance fees, 715*l.* 1*s.*; and under the head "Liabilities" it contained the following item:—"Attendances of directors actually due, and to Christmas—Mr. Ward, 99*l.* 8*s.* 4*d.*, Mr. Duff, 52*l.* 10*s.*, Mr. Evans, 115*l.* 10*s.*, Mr. Bastow, 46*l.* 8*s.* 6*d.*, Mr. J. Richards, 25*l.* 4*s.*, Mr. Saunders, 71*l.*, Mr. Aylwin, 84*l.* 6*s.*, Mr. Edwards, 76*l.* 1*s.*, Mr. Pope, 83*l.* 12*s.*, Mr. Meggy, 71*l.* 8*s.*, Mr. Cornfoot, 91*l.* 7*s.*, Mr. R. Bastow, 15*l.* 10*s.* 2*d.*; total, 782*l.* 7*s.* 6*d.*

1844, Feb. 9. The auditors' report was produced at a directors' meeting. It contained under the item "Payment," To directors, for attendance from 1st Jan. to 31st Dec., 164*l.* 12*s.* 6*d.*

1844, March 7. The directors resolved, that interest should be allowed on the attendance fees due to the 31st of December 1843.

March 11. In pursuance of the above resolution, at a meeting of the finance committee, the members of the board resolved upon a vote of thanks to the chairman, in his absence, for the benefit derived by the association from the assiduity and zeal, and constant attention bestowed by him on its affairs, notwithstanding the numerous calls on his time; and while dealing with the question, they proposed, first, that the amount due to each member of the board, for his attendance up to the 31st of December last, should be taken to be the sum stated to be due to him in Mr. Lawrence's statement of the working expenses: secondly, that the sum of 100*l.* appearing due to the chairman for such attendances, a draft for that amount be issued, and forwarded to him with the resolution of thanks: thirdly, that the payment of all sums of money due to the directors on account of such attendances, to be appropriated for the purpose of insurance of lives, endowments on payment of money for which any such director might, as a surety for others, have become responsible to the association, be confirmed; and

that the option be given to any directors, in like manner, to appropriate any sum of money now standing to the credit of any such director for such attendances, up to the 31st of December last: fourthly, that the money on such statement appearing due to each director, for such attendances to the 31st of December last, carry interest at 5*l.* per cent. per annum from such period, payable half-yearly at Midsummer and Christmas.

The committee then recommended the general board to pass the cheque for 100*l.* for the chairman.

1845, Feb. 6.—At a meeting of directors the general account or balance-sheet for the year 1844 was produced, and under the head “Liabilities” was entered “directors’ attendances and interest as per account delivered, 864*l.* 16*s.* 1*d.*”

1845, Feb. 17. The first general annual meeting of shareholders was held, and the report of the directors was read to shew the state of the company’s affairs, and, among other things, it stated that they were happy to have it in their power to continue the interest of 5*l.* per cent. hitherto paid on the paid-up capital. It also from that date reduced the original shares of 50*l.* each into five shares of 10*l.* each, and the qualification of a director was made 500 10*l.* shares instead of 100 50*l.* shares, as provided by clause 21. of the deed of settlement.

1846, Feb. 15. At an annual general meeting the balance-sheet was produced and read: it stated the pecuniary position of the company, and under the head “Liabilities” there was an item 1,207*l.* 6*s.* 3*d.* as due to the directors for attendances and interest, and there was no entry to shew that it was objected to. A dividend of 6*l.* per cent. was also declared for the paid-up capital for the half-year ending the 1st of January 1846. This was confirmed at a general meeting of directors.

1847, Feb. 11. At an annual general meeting a balance-sheet was produced, and a report read, and under the “Liabilities” was an item “Directors’ attendances, 1,249*l.* 6*s.* 1*d.*”; and there was no entry shewing that any shareholder objected to it; and, again, a dividend of 6*l.* per cent. was declared. This was confirmed by the directors at their next meeting.

1848, Feb. 17. At the annual general meeting a balance-sheet was produced and read and explained, and it was then resolved that the attendance fees of the directors for the present year be granted on the same scale as hitherto.

1849, Feb. 15. At the annual general meeting the balance of receipts was produced, and it was resolved that the attendance fees to the directors for the present year be granted on the same scale as hitherto.

1850, Feb. 14. At a annual general meeting a balance-sheet was laid on the table, and it was resolved that the attendance fees to the directors for the current year be paid on the same scale as hitherto.

1851, Feb. 11. The balance-sheet and auditors’ report were laid on the table, and it was resolved that the attendance fees of the directors for the current year be paid on the same scale as hitherto.

1852, Feb. 12. At an annual general meeting there was produced a balance-sheet and an auditor’s report, and the same resolution was passed.

1853, Feb. 17. A balance-sheet containing a large item for directors’ attendance fees and auditors’ reports was laid on the table.

July 11. A special general meeting was held, and in the balance-sheet under the head “Liabilities” was an item:—“Due to directors on attendance accounts and on old attendance account ... £689 6 3

New ditto 332 1 0

£1,021 7 3”

During this year it was stated that the directors sold the business relating to the life assurance and annuity family endowments, but that they retained the loan business as the purchaser refused to take it.

1854, March 9. At an annual general meeting a balance-sheet and auditors’ account were produced and adopted, and it was then resolved that this meeting approves of the proceedings taken by the directors, as well as the resolution passed at the two special general meetings of shareholders during the past year, and thereby confirms the same and the several acts done by the directors, or by their order, with reference to the business, funds and

property of the association, up to the 31st of December 1853.

1855, Feb. 19. At an annual general meeting the balance-sheet and statement of assets and liabilities of the company to the end of 1854 were unanimously adopted.

1856, Feb. 14. At an annual general meeting the balance-sheet and auditors' report for the year, with a statement of assets and liabilities, were sanctioned.

It was stated that the capital subscribed amounted to 16,000*l.*; that the premiums received on life assurances amounted to about 40,000*l.*, but that there were losses of about 2,686*l.* on the trading account; and as the whole of the capital was lost, an order was made for winding up the company.

Mr. Evans, as one of the directors, brought in a claim before the Master of 500*l.*, for attendance fees; this was opposed by Mr. Johnson, a shareholder: the chief clerk, however, allowed the claim, but it was subsequently adjourned into court.

Mr. Greene, for Mr. Johnson.—The question is, whether directors of an association can, as against the shareholders, claim upwards of 7,000*l.* for fees and allowances to themselves, when the whole paid-up capital, amounting to about 16,000*l.*, has been lost, and the association has been brought into court under the Winding-up Acts. The present case related to the fees of Mr. Evans only, who claimed a sum of 500*l.* There were, however, other claims behind. The services performed were, attendances at board and committee meetings of the directors. The resolutions of the directors provided that the attendance fees were to depend upon the prosperity of the association, but though the business commenced in 1841, and resolutions respecting fees were passed, it was not until 1843 that any deed of settlement was executed. The directors were parties to this deed, and the contract they then made was with themselves for their own benefit, but no resolutions had been passed which brought these fees within the provisions of the deed; they were however claimed, together with interest, and interest was also paid to the shareholders when the company was insolvent. The shareholders, however, never knew the

position of the company; the accounts were never explained to them. The company, therefore, could not sanction what they had no means of knowing, and they could not be bound by what proved to be fallacious and exaggerated, and which, as they negatived the prosperity of the association, disentitled the directors to any remuneration for services — *Evans v. Coventry* (1).

Mr. R. Palmer and Mr. Roxburgh.—Claims for two years' attendance fees arose before the execution of the deed of settlement; they were recognized and confirmed by the deed. Subsequently, the accounts included the charges for the fees of the directors, and they were recognized and confirmed by the general meetings of the association. It was said that nothing was to be paid unless the business was prosperous; the dealings, however, were fluctuating and unsettled; it was, however, beyond a doubt that the directors' contract was that they should be remunerated.

Mr. Greene, in reply.

The MASTER OF THE ROLLS. — The charges for directors' fees previous to the execution of the deed of settlement were determined by the deed itself: they had fixed on a guinea as the attendance fee for every meeting, and this was entered on the auditor's account and sanctioned without comment at every general meeting, when it was resolved that attendances were to be paid on the same scale as hitherto. How could the company contest this? No fraud existed. It was stated that the company had been a failure, and that the transactions had been unfavourable; but until the dealings by way of loan were ascertained it was by no means clear that the dealings of the company were unfavourable. It was, however, clear that the directors of the company intended to claim some remuneration, and even sums were allowed prior to the deed of settlement which would cover the costs of such attendances; the company, therefore, could not dispute the fact that it had the benefit of the time and knowledge of the directors. The chief clerk, therefore, was right in allowing one guinea for each attendance of Mr. Evans.

(1) 25 Law J. Rep. (N.S.) Chanc. 489.

I shall not give Mr. Johnson any costs of bringing this question into court, neither shall I make the respondent pay any costs.

KINDERSLEY, V.C. }
July 6. } ORANGE v. PICKFORD.

Power, Execution of—Will—Instrument in Writing.

By a marriage settlement power was given to the wife to appoint certain real property at any time or times during her life, by any deed or instrument in writing, with or without power of revocation, to be sealed and delivered in the presence of and attested by two or more witnesses. The wife executed the power, by will, dated before the Wills Act, and it was expressed in the attestation clause to be signed, sealed, published and declared, and also sealed and delivered in the presence of, and attested by, three witnesses:—Held, that the power was well executed.

The will was thirty years old from the date of execution, and came from the custody of the person in whose favour it was executed:—Held, that this was sufficient evidence of the fact of due execution.

A question was raised in this case as to the due execution of a power. By a settlement made upon the marriage of Hannah Flint, afterwards Hannah Orange, certain real property therein described was conveyed "to the use of the said Hannah Flint, her heirs and assigns, until the solemnization of the said intended marriage, and upon and after the solemnization thereof, to the use of such person or persons, for such estate or estates, upon such trusts, intents and purposes, and subject to such charge or charges, annuities, rent-charges, sums of money, powers, provisions, conditions and limitations as the said Hannah Flint, notwithstanding her intended coverture and as if she were a feme sole, shall at any time or times during her life by any deed or instrument in writing, with or without power of revocation, to be sealed and delivered by her in the presence of and attested by two or more credible witnesses, direct, limit or appoint."

Hannah Orange made her will, dated the 23rd of April 1828, whereby, after adverting to the above power, she devised the estate comprised in her marriage settlement, which was the subject of the power; and the attestation clause in the will was in the following terms:—"signed, sealed, published and declared, and also sealed and delivered by the said Hannah Orange the testatrix as and for her last will and testament, or instrument in writing, in the presence of us who at her request, in her sight and presence, and in the sight and presence of each other, have hereunto subscribed our names as witnesses attesting the due execution thereof." This was signed by three witnesses.

Mr. Bazalgette and Mr. Welford submitted that the will was a good execution of the power; and that it had been decided that a will was an instrument in writing, and if so, all the other requisites followed. The will was capable of revocation; and it was expressly stated in the attestation clause that it had been sealed and delivered as a will or instrument in writing. That clause must have been prepared expressly to meet the requisites of the power, and the execution by three witnesses, instead of two, could be of no consequence, since the power expressly stated two or more witnesses.

Mr. Glasse and Mr. W. D. Lewis contended, contra, that the power could only be executed by deed. The words were those which were always used as applicable to appointments by deed, and the subsequent words always inserted by conveyancers relating to wills were altogether omitted; it must therefore have been the intention of the draftsman to limit the execution of the power to a deed. It was to be by any deed "or instrument in writing," but these were the usual surplus words following the description of a deed, not a will. The words "sealed and delivered" could only be applied to deeds, and "with or without power of revocation" would be absurd if applied to a will, which was always revocable. Then, the settlement was executed at a period when wills required three witnesses; that alone was sufficient to shew that the clause was not intended to apply to an execution by will,

or three witnesses would have been mentioned, as was usual when giving a power of execution by will.

The following authorities were cited:—

Edwards v. Edwards, 3 Mad. 197.

Bucknell v. Blenkhorn, 5 Hare, 131.

West v. Ray, Kay, 385; s. c. 23 Law J. Rep. (N.S.) Chanc. 447.

Man v. Rickets, 7 Beav. 93.

Collard v. Sampson, 4 De Gex, M. & G. 224; s. c. 22 Law J. Rep. (N.S.) Chanc. 729.

Sugden on Powers, 6th ed. 276.

KINDERSLEY, V.C.—It appears to me that upon the authorities the will in the present case is a good execution of the power. The cases may be divided into two general classes; those which turn upon the mere question of words, and those which are decided upon the want of formality. That a will or testamentary instrument is within the meaning of the words "by any deed or instrument in writing," or "by any deed or writing," was decided very long ago, and there is no authority or dictum which can be considered as throwing a doubt on that question. There is, however, so much force in the arguments for the defendants, that if the question were *res integra*, there might be a doubt upon it. The mere question, whether a will which is not to operate until the death of the party comes within the words "deed or writing," or "instrument in writing," has been decided in the affirmative. There is only one case of the second class: a case which was decided by Sir James Wigram, and followed by the Master of the Rolls, who, however, expressed his dissatisfaction with it, the decision being that, because it was a testamentary instrument, one of the requisites, the sealing, might be dispensed with, which this power prescribed. It is a matter of surprise that so careful a Judge as Sir James Wigram should so have decided. The case was afterwards cited before the Lords Justices, and they refused to act upon it. The question before me is, whether all the requisites prescribed by the power have been observed in this instrument. First, it must be "during her life." The contention against its being

a good execution is, because the fact of its being a will prevented it from coming into operation during her life. Now, when it is once determined that a testamentary instrument is "an instrument in writing," as such an instrument must be executed during the life of the party, so far it is a good appointment. The words "at any time or times during her life," are applicable to a testament as well as a deed, because, of course, she might make a new will as often as she chose. Next, it is to be "with or without power of revocation," and it has been justly argued that as applied to a will this is absurd, because a will is in its nature revocable; but the answer to that is, that these words were not used in connexion with a will, but a deed, for although it is true that the words "or instrument in writing" also occur, and these words by the decisions *reddendo singula singulis* are applicable to a will, yet here they apply to a deed or will. Then the instrument must be "sealed and delivered," and it has been also fairly argued that those words are not appropriate adjuncts to a will, which is good without them; but a will may be sealed and published, and publication is delivery, and then it would be an "instrument in writing sealed and delivered," though that may be unnecessary for a will. A will, therefore, is capable of being sealed and delivered, and I assume in this case that those requisites were complied with. Then come the words "in the presence of two or more credible witnesses." The will being made before the Wills Act, three witnesses would have been necessary to a will, and the power required two only; but if more than two witnesses, of course that would not invalidate the appointment. The question whether the instrument assuming the form of a will and being attested by two witnesses only, would be inoperative, is not now under consideration; but the words here are "two or more," that is, by two, if a deed, and if a will by more than two. There is nothing to limit the appointment, if by will, to an attestation by two witnesses only, and in all respects this instrument does satisfy all the requisites named in the power. It is an instrument in writing, executed during her life, with power of revocation from its

nature, sealed and delivered, and in the presence of three witnesses; it is, therefore, upon the authorities sufficiently within the power.

The only other question then is, as to the evidence that it was sealed and delivered in the presence of three witnesses. The will is thirty years old from the time of execution, and is produced from the proper custody, namely, the person in whose favour it was executed. That is sufficient evidence of the fact of execution, containing as it does a clause of attestation, which evidently referred specially to the terms of the power, and was framed with that object. I think under these circumstances, that the evidence is sufficient as to the execution and attestation, and the authorities are conclusive on the point of compliance with the terms of the power. The will is, therefore, a good execution of the power.

M.R. }
July 9, 10. } HARTSHORNE v. NICHOLSON.

Charity—Bequest—Implication—Mortmain.

*A testator gave the interest of to establish a charity in the parish of M, leaving in blank the space for the sum. In a subsequent part of his will he gave an annuity of 15*l.* to J. for life; and after his decease he gave "to the minister and churchwardens of the parish aforesaid the said sum of a year, in addition to the two sums before mentioned":—Held, that the gift not only referred to the 15*l.* a year given to J. for life, but also to the charity established in the previous part of the will.*

Held, also, that the charity was valid, and that it did not necessarily contemplate bringing land into mortmain.

Joshua Williams, by his will, dated the 6th of April 1819, after several pecuniary legacies, made the following bequests:—"I give and bequeath to the minister and churchwardens of Minsterley, in the parish of Westbury, in the county of Salop, the interest of for ever, to establish a school for educating the poor of the aforesaid parish of all

denominations, and to provide a schoolmaster, who must be of a good moral character, and to remain as schoolmaster as long as he shall behave himself well in the aforesaid office, or during their the aforesaid minister and churchwardens' pleasure. I give and bequeath to Hannah Gough, daughter of Isaac Gough, late of Minsterley, in the aforesaid parish and county aforesaid, an annuity of 5*l.* a year, of lawful money of Great Britain, to be paid to her half-yearly during her natural life; and after her decease, then it is my will I give and bequeath to the minister and churchwardens of Minsterley aforesaid the said sum of 5*l.* a year for ever, in addition to the before-mentioned sum of a year, for educating the poor children of the parish aforesaid. I give and bequeath to my good friend, John Johnson, sackmaker, of Great Scotland Yard, London, an annuity of 15*l.* a year during his natural life, for the trouble he may be at in managing my affairs. After his decease, then it is my will I give and bequeath to the minister and churchwardens of Minsterley aforesaid the said sum of a year for ever, in addition to the two sums before mentioned." The testator then gave to J. Johnson and Richard Whiteaves, whom he appointed his executors, all the residue of his estate, upon trust to get in the same, and invest it in one fund in government securities.

The testator died on the 12th of February 1820. A sum of 666*l.* 13*s.* 4*d.* was invested by his executors to answer the two annuities of 5*l.* and 15*l.*

John Johnson survived his co-executor, and died on the 21st of August 1841; and Ann Guy, his personal representative, now claimed the fund so set apart.

Ann Hartshorne, the personal representative and next-of-kin of Joshua Williams, also claimed the fund, and the residuary estate of the testator, for her own benefit.

Emilius Nicholson, the minister, and John Everall, the chapel-warden of Minsterley—which was a chapelry or ecclesiastical district—also claimed the fund set apart as a charitable bequest.

Mr. R. Palmer and Mr. J. H. Palmer, for Ann Hartshorne, the plaintiff.

Mr. Murray, for Ann Guy.

Mr. Tripp, for John Penny, who held a part of the residuary estate of the testator.

Mr. Wickens, for the Attorney General.

THE MASTER OF THE ROLLS.—The first bequest being in blank gives nothing, and no question can arise upon it. The third bequest, however, makes its validity as establishing a charity material. The second bequest is valid; it gives 5*l.* a year for educating the poor of the parish. The third bequest being in blank, I at first conceived it was void for uncertainty, the same as the first, but the 15*l.* having been given to J. Johnson for life, and after his decease, then the *said* sum of is given in addition to the two other sums; this, therefore, must apply to the 15*l.* per annum. This sum, then, is given to the minister and churchwardens of the parish for the purpose before mentioned. The first bequest, therefore, being void for uncertainty will not affect this. The second bequest is good; the purpose of the first bequest, therefore, must be considered as if it had been again introduced after this bequest; that is, as if it had said, after the decease of J. Johnson I give the 15*l.* a year for ever to establish a school for educating the poor children of the aforesaid parish of all denominations, and to provide a schoolmaster, who shall be of good moral character, and who shall continue to remain schoolmaster as long as he behaves himself well. Is that bequest then void? In *Trye v. the Corporation of Gloucester* (1) I gave a *résumé* of the decisions, which hold that every bequest, which contemplates the putting of land into mortmain, is void under the statute; and, consequently, it has been repeatedly decided that if a person gives a sum of money to erect a school-house, that will involve the purchase of land for that purpose: it is necessarily so to be inferred, and therefore it must be void under the statute. But the question is, whether, to establish a school, necessarily involves the purchase of land; in fact, whether it necessarily involves the building a school-house? A school may be established by hiring a

room, or by getting the loan of a room; it does not necessarily involve the purchase of land; it is not, therefore, for me to declare that it is void because one of the modes in which it could be carried into effect would be by the purchase of land. This case is by no means free from authority. In *Johnston v. Swann* (2), the marginal note states that the bequest was of 7,100*l.*, to be laid out in the funds, and the interest and dividends to be applied in providing a proper school-house. Sir John Leach held that to be a good charitable bequest. If that is so, it goes much further than this case, because that was to provide a school-house, and this is merely to establish a school. Sir John Leach says, "With respect to the school, the single question is whether, to execute the expressed purpose of the testator, land must be purchased for erecting a school. The testator has directed only that a proper school-house should be provided, which may be by hire; and it is some evidence of his intent that land should not be bought, that the trustees are only to apply the dividends, and no part of the principal, to the expense of providing a school-house. It is said he meant the charity to continue for ever, but this intent may be executed without a necessity for the purchase of land." Now, that, in every respect, is applicable to the present occasion, and this case has never been doubted. It has been explained in *Giblett v. Hobson* (3), in which it is observed—"Before I observe upon the words I must first of all mention,"—I may state that that bequest was clearly void under the Statute of Mortmain. It was a case in which the testator bequeathed 5,000*l.* to a charitable institution, towards building almshouses; it was held to be void, and that was affirmed by the Lord Chancellor,—"I must first of all mention that the authorities which I have stated are not, in my opinion, at all affected by what was decided by Sir John Leach, in *Johnston v. Swann*, because, in that case, the testatrix had directed that the interest of so much only of the larger fund which she directed to be applied for charitable purposes as should not exceed

(2) 3 Madd. 457.

(3) 5 Sim. 651; s. c. 4 Law J. Rep. (N.S.) Chanc. 41.

(1) 14 Beav. 173; s. c. 21 Law J. Rep. (N.S.) Chanc. 81.

600*l.* should be applied for providing the school-house." That sets right any error there was in the marginal note of the former case; therefore, I thought it not necessary to do more than refer to this comment upon it. "It is perfectly obvious, therefore, that that direction never could be meant to be a direction to build, for there could only be an annual sum of 18*l.* applied. I mention that because it does not appear from the printed report of the judgment that Sir John Leach took notice of that fact; but His Honour seems to suppose that the interest of the whole of the fund was applicable, and the marginal note so treats it; whereas, in point of fact, it was only the interest of so much of the fund as should not exceed 600*l.* that was applicable to providing the school-house." I cannot say I am quite satisfied with the grounds upon which that rests, whether the greater or the less amount of the dividends could make a bequest void or not under the Statute of Mortmain, and I rather prefer putting it on the former ground, on which Sir John Leach placed it. But if that ground is a just one, and applicable at all, it is strictly applicable to the present case, because it is 15*l.* a-year only which is to be applied for the purpose of establishing a school, and which would make it certainly very difficult to purchase land and erect a school-house for that purpose, unless it was accumulated for a great number of years, for which there is no direction whatever given in the will. These questions underwent consideration in *Philpott v. St. George's Hospital* (4). There the testator had devised eight acres in Newland to a particular person, Charles Scott, and then, contemplating endowing almshouses, he directs that if any person should, within twelve months after his death give a suitable piece of land in Newland as the site of the almshouses, his executors should pay the trustees 60,000*l.* to be devoted to the purposes of the charity. Mr. Scott, who was one of the executors, devoted the eight acres of land to the charity, and the question was, whether the bequest was void or not? It was considered void, because it contemplated, though not directly, but indirectly,

(4) 21 Beav. 184; a. c. 25 Law J. Rep. (n.s.) Chanc. 33; 6 H.L. Cas. 338; ante, 70.

bringing land into mortmain. The House of Lords, however, held that the charity was a good one, and that, although a person anticipated that some one else might bring land into mortmain, yet there was nothing to prevent that being a good charity. These cases go much further than the present case: this, therefore, is a good charity, and it must be so declared, and the directions consequent upon that must be made part of the decree.

L.C. }
May 27, 28. } PARKER v. TASWELL.

Specific Performance—Agreement for Lease—Uncertainty.

An agreement for letting a farm for ten years, though void at law, under the 8 & 9 Vict. c. 106, as a lease, was held to be valid as an agreement, and specific performance of it was decreed.

The insertion of "&c." in some of the terms of the agreement did not produce such uncertainty as to render the agreement incapable of specific performance, where the property, the rent, and the other material points in the lease were sufficiently described and ascertained.

This was a suit for the specific performance of an agreement to demise to the plaintiff, and for an injunction to restrain an action of ejectment commenced by the defendant Taswell.

In and previously to December 1855 the plaintiff was tenant to the defendant Taswell of two farms, called "Wether Hill" and "Moory," under a holding, which would expire at May-day 1856; and on the 24th of December 1855, an agreement was entered into, which was (so far as necessary to state) as follows:—

"Conditions of letting Wether Hill and Moory Farms.—An agreement made between John Wood, agent for and on behalf of George Morris Taswell, of the one part, and Robert Parker the younger and Robert Parker the elder, of the other part. The said J. Wood agrees to let and the said R. Parker the younger and R. Parker the elder agree to take, for a term of ten years, commencing at May-day 1856, the farms

above mentioned, and now in their occupation The leading of all materials required for buildings proposed to be built, or may hereafter be built, or for the of buildings to be done at the expense of the tenant Gates, buildings, &c. to be left in repair by the tenant, the landlord finding new gates when required The landlord reserves to himself all customary rights and reservations, such as liberty to cut and plant timber, search for and work mines or minerals, &c., allowing the tenant for any reasonable damage that may accrue."

This agreement was signed by R. Parker, jun., R. Parker, sen., and John Wood, as agent for and on behalf of G. Morris Taswell, Esq. The elder Parker was a party to the agreement as a surety only.

The buildings referred to in the agreement were, as alleged by the bill, certain buildings which Taswell had, through his agent, previously stipulated to erect on the farms, and a dispute arose as to the plaintiff being entitled to obtain stone for the buildings from quarries within the farms, the defendant Taswell's agent requiring that he should "lead" the stone from Dun House Quarry, which was situated three miles and a half from the farms.

In January 1857 the defendant commenced an action of ejectment, for the recovery of the farms, and the plaintiff being advised that, under the agreement of December 1855, he had no defence to the action, instituted this suit for specific performance of the agreement, and to restrain the action.

On the 14th of January Vice Chancellor Stuart made a decree for specific performance, without costs on either side; and his Honour, in consequence of some evidence as to the understanding between the parties, directed that the lease should contain a covenant by the tenant to pay the title commutation rent-charge.

From this decree the plaintiff appealed as to the direction that he should pay the rent-charge, and as to his costs; and the defendant appealed as to the specific performance.

Mr. Malins and *Mr. Prendergast*, for the plaintiff.—The first question was whe-

ther this was a valid agreement, the specific performance of which could be enforced. That depended, in the first instance, upon the 8 & 9 Vict. c. 106, which enacted that a lease required by law to be in writing of any lands or tenements, made after the 1st of October 1854, should be void at law unless made by deed. The terms, however, of this agreement shewed that it was intended to be executory; the commencement of it was "Conditions of letting." *Fenner v. Hepburn* (1) was conclusive that a Court of equity would enforce such an agreement. Then had the plaintiff committed any breach of his agreement so as to disable him from having specific performance?—*Dowell v. Dew* (2). Such breaches, if alleged, must be material—*Gregory v. Wilson* (3). As to the alleged uncertainty of the agreement and part performance they cited—

Mundy v. Joliffe, 5 Myl. & Cr. 167; s. c. 9 Law J. Rep. (N.S.) Chanc. 95.

As to the tenants paying the tithe rent-charge they referred to—

6 & 7 Will. 4. c. 71. s. 80.

Powell v. Lovegrove, 2 Jur. N.S. 791.

Pain v. Coombes, 1 De Gex & J. 34.

Mr. Dart (with whom was *Mr. Bacon*), for the defendant.—The Statute of Frauds required an agreement to be in writing, or if by parol, evidence in writing to substantiate it—*Leroux v. Brown* (4). The statute did not invalidate a parol agreement, but it was a mere question of evidence. This explained many of the cases—*Gregory v. Mighell* (5). Here no parol agreement was alleged, but the plaintiff put his case entirely on the written agreement. The 8 & 9 Vict. c. 106. had made this document void as a lease, it not being by deed, and it could not be enforced as an agreement—*Stratton v. Pettit* (6). The uncertainty also of several of the terms of the agreement, and particularly as to the

(1) 2 Y. & C. C. C. 159.

(2) 1 Ibid. 345; s. c. 12 Law J. Rep. (N.S.) Chanc. 158.

(3) 9 Hare, 683; s. c. 22 Law J. Rep. (N.S.) Chanc. 259.

(4) 16 Jur. 1021; s. c. 22 Law J. Rep. (N.S.) C.P. 1.

(5) 18 Ves. 328.

(6) 16 Com. B. Rep. 420; s. c. 24 Law J. Rep. (N.S.) C.P. 182.

"&c." introduced into some of them, rendered it incapable of specific performance.

Price v. Griffith, 1 De Gex, M. & G. 80; s. c. 21 Law J. Rep. (N.S.) Chanc. 78.

Williamson v. Wootton, 3 Drew. 210.

Vansittart v. Vansittart, 4 Kay & J. 62; s. c. ante, 222, 289.

Taylor v. Portington, 7 De Gex, M. & G. 328.

Stapylton v. Scott, 13 Ves. 425, 427.

Manser v. Back, 6 Hare, 443.

Mr. Wiglesworth, for another defendant.

Mr. Malins, in reply.

The LORD CHANCELLOR—[After stating the circumstances of the case and the object of the two appeals]—said, that it would be the better course, in the first instance, to consider the plaintiff's right to demand specific performance. The first objection was founded on the nature of the agreement, and it was said that as the agreement contained words of present demise, it was void by the 3rd section of the 8 & 9 Vict. c. 106; and it was insisted, on the part of the defendant, that, if it were void as a lease, it was not good as an agreement. Certainly, in no sense, even if it were under seal, could it be considered a lease, it not having been executed by the landlord himself; and therefore the landlord could not be bound by its covenants. But, assuming that it had been signed by the landlord, and contained words of present demise, and was void at law as a lease, under the 3rd section, was it void for every other purpose? *Stratton v. Pettit*, which was so much relied upon by the defendant, was merely an authority that when the language used by the parties shews that the meaning of the instrument was, that it should operate as a lease, a present demise, it should be void as a lease at law. The Court did not there consider whether the instrument was good as an agreement or not. The language of the 3rd section was very cautious. A lease required by law to be in writing was to be "void at law," unless made by deed. If the legislature had intended that the instrument should not be available for any purpose, it would have said that it should be void both at law and in equity, or

to all intents and purposes. This was precisely the case in which equity ought to carry into effect the obvious intention of the parties. As to the objection which went upon the uncertainty of the subject-matter—the difficulty of arriving at the meaning of the parties as to the building materials, repairs, the customary rights reserved to the landlord, &c., there appeared to be no difficulty in construing the agreement with sufficient certainty. There had, moreover, been a part performance, in favour of which this Court would strain its jurisdiction. The agreement, in reference to the buildings, was not that the tenant himself would do the work, but the whole effect of it was to throw the expense of the buildings on the tenant, by whomsoever done; and if the work was not done by the tenant, the landlord might do it at the tenant's expense. The "&c.," where it occurred in the agreement, was of easy interpretation; the "gates, buildings, &c.," which were to be kept in repair by the tenant, included all those things the repair of which, according to the custom of the country, were thrown upon the tenant; and the "&c." of the customary rights and reservations, reserved to the landlord, were such as liberty to cut and plant timber, and so on. There was no uncertainty in the subject to which all these stipulations referred—the farms were described; neither was there any question as to the rent, which was ascertained; nor as to the term, which was defined; on these material points the agreement was definite. As to the plaintiff's appeal against that part of the Vice Chancellor's decree which directed that the lease should contain a covenant for payment by the tenant of the tithe commutation rent-charge, it was admitted that the agreement, as it now stood, would not entitle the landlord to claim any part of such rent-charge. The 80th section of the Tithe Commutation Act (6 & 7 Will. 4. c. 71.) enacted that any tenant who should occupy any lands by any lease or agreement made subsequently to the commutation, and who should pay such rent-charge, should be entitled to deduct the amount thereof from the rent payable to his landlord. If nothing had been said on the subject of the tithe rent-charge between

landlord and tenant, the latter paid it and deducted it from his rent. It was said by the defendant Taswell, however, that, in this case, there was an understanding that the tenant should pay it; but there was nothing in the evidence to shew that this subject ever entered into the contemplation of the parties prior to, or at the time of the agreement. In all cases of mistake there must be clear evidence that the parties were under a mistake, and there was no such evidence here. The best course, in cases like the present, was to stand on the agreement. That part of the Vice Chancellor's decree, therefore, which directed the insertion of a covenant for the payment by the plaintiff of the rent-charge, would be altered, and the Vice Chancellor ought to have given the plaintiff costs.

M.R. }
July 7. } MOLLETT v. ENEQUIST.

Practice — Injunction — Affidavit of Merits.

Upon an application for an injunction to restrain proceedings at law, an affidavit of merits must be made by the plaintiff, though he had no personal knowledge of the facts stated in the bill. An affidavit by the solicitor, who had investigated the case, is not sufficient.

Mollett, the plaintiff, was the consignee of five casks of gold, valued at 40,000*l.*; they were shipped on board the *Eagle*, bound from Cronstadt to Hull. On the 5th of November the ship was wrecked on the island of Gottland. Through the aid of Mr. Thompson, the leader of a body of men who employ themselves in giving assistance to ships in distress and in saving wrecks, the gold was brought on shore, and, subsequently, forwarded to England by Enequist, who is the British Vice Consul, and Lloyd's agent, at Gottland, with a claim of 4,000*l.*, alleged to have been paid to Mr. Thompson, under an agreement made between them in respect of the salvage of the gold; he also added the amount of his charges and commission. The plaintiff declined to pay the amount until after

the claim made by Mr. Enequist had been investigated. He, however, invested 5,120*l.* in the joint names of himself and the defendants, Messrs. Rew & Quincey, to whom Enequist had consigned the gold, with instructions to deliver the same to the plaintiff on payment or acceptance of his draft of the amount claimed.

The plaintiff instructed his solicitors to investigate the claim, and they, after examining the parties on board the *Eagle* at the time of the wreck, and ascertaining what services were rendered towards the salvage, advised the plaintiff that he had a defence to the claim.

Mr. Enequist afterwards brought an action against the plaintiff for the 4,678*l.*, which comprised the sum paid for salvage and also his charges for watching, carriage, and safe-keeping of the gold, and for average charges, commission, and forwarding the gold to London.

The plaintiff then filed this bill against the defendant, to obtain a discovery of the facts attending the salvage, and to restrain Mr. Enequist from proceeding with the action.

The defendant put in an answer to the bill, and, on the 28th of June last, exceptions were taken to its insufficiency, some of which were allowed.

The solicitor then made an affidavit of merits; and, upon this, the plaintiff moved for an injunction to restrain the defendant from proceeding with the action.

Mr. R. Palmer and Mr. Druce, in support of the application.

Mr. Selwyn and Mr. Piggott.—The plaintiff, by the 15 & 16 Vict. c. 86. s. 58, is required to verify the allegations in the bill, stating that he believed the discovery to be obtained by the further answer was material.—

Lovell v. Galloway, 17 Beav. 1.

Senior v. Pritchard, 16 Ibid. 473.

Mr. Druce, in reply.—It was impossible for the plaintiff, under the circumstances, to make an affidavit of the truth of the facts. He was without any personal knowledge; the solicitor who had investigated the facts had made an affidavit; the practice, therefore, established by the late statute was substantially complied with.

THE MASTER OF THE ROLLS.—The plaintiff might have made an affidavit, verifying such of the facts as were within his knowledge; he might also have stated on oath his belief as to the truth of those statements, which rested on the information of others. Without such an affidavit it is impossible to grant an injunction; I must, therefore, refuse the motion, and I shall make the costs of the defendant costs in the cause.

STUART, V.C. }
July 6. } TAYLOR v. MOGG.

Administration—Costs—Undisposed of Residue.

A testator, by his will, directed his executors to pay so much of his residuary personal estate as they could by law dispose of for charitable purposes to the Lincoln Penitent Female Home, and made no further disposition of such residuary personal estate:—Held, that the costs of a suit to administer the testator's estate ought to be paid out of the residuary personal estate, inapplicable by law to the payment of the legacy to the charity, and, consequently, undisposed of by the will.

This suit was for the administration of the estate of a testator who, after bequeathing a legacy, gave by his will all his personal estate to his executors, to collect and get in the same, and thereout to pay his debts, funeral and testamentary expenses and legacy, and then to pay so much as they could by law dispose of for charitable purposes to the Lincoln Penitent Female Home. The testator did not make any further disposition of his personal estate.

The question in the suit was, out of what fund the costs ought to be paid, whether *pro rata* out of the pure and impure personal estate, or out of the impure personal estate alone.

Mr. Amphlett and Mr. Nalder, for the next-of-kin, contended, that the Court was dealing with a general residue, a portion of which, viz. the pure part, was bequeathed to a charity, the other portion being undisposed of; and that the costs ought to be paid *pro rata* out of both portions of the residue. They submitted that

the circumstance that part of the residue was undisposed of did not affect the rule that the whole residue was to bear the costs.

Eyre v. Marsden, 4 Myl. & Cr. 231; s. c. 7 Law J. Rep. (n.s.) Chanc. 220.

Nisbett v. Murray, 5 Ves. 149.

Mr. Hallett, for the charity, contrà, contended, that the costs ought to be thrown upon the residue undisposed of, alone—*Howes v. Chapman* (1).

STUART, V.C. said, that the present was a case in which part of the residue was undisposed of, and that the undisposed of residue ought to bear the costs of the suit. He thought that the costs of the suit ought to be paid out of the impure personal estate, which, being undisposed of, devolved upon the next-of-kin, and that the pure personal estate bequeathed to the charity ought not to bear any part of the costs.

KINDERSLEY, V.C. }
Aug. 2. } BAILEY v. DUNKERLEY.

Practice—15 & 16 Vict. c. 86. s. 20.
—*Production of Documents—Voluntary Answer.*

A suit was commenced by bill to which no interrogatories were filed and no answer was required. The defendant obtained leave to file a voluntary answer, and moved, before putting in such answer, that the plaintiff might be ordered to produce documents:—Held, that as no discovery was prayed by the bill and no answer required, the defendant was entitled to the order.

This suit was commenced by bill, to which no answer was required and no interrogatories were filed. The defendant appeared on the 13th of July 1858.

On the 24th of the same month an order was made in chambers, upon summons taken out by the defendant, that the defendant might be at liberty to file a voluntary answer, and a month's time was given for the purpose; the defendant then took out a summons in chambers for production of documents by the plaintiff, and an order

for production was made accordingly by the chief clerk on the 31st of July.

Mr. Bovill now moved to discharge that order, on the ground that it was contrary to the provisions of the Chancery Amendment Act, 15 & 16 Vict. c. 86. s. 20. The words of that section were: "It shall be lawful for the Court, upon the application of any defendant in any suit, whether commenced by bill or by claim, (but as to suits commenced by bill where the defendant is required to answer the plaintiff's bill, not until after he has put in a full and sufficient answer to the bill, unless the Court shall make any order to the contrary,) to make an order for the production by the plaintiff in such suit, on oath, of such of the documents in his possession or power relating to the matters in question in the suit as the Court shall think right, and the Court may deal with such documents when produced in such manner as shall appear just." Under this section no order for production could be made upon the plaintiff until a full and sufficient answer had been put in, and if production were allowed it was evident that the defendant might take advantage of the contents of the documents in the plaintiff's possession, in order to shape his answer accordingly.

Mr. Ellis opposed the motion on behalf of the defendant.

KINDERSLEY, V.C.—If the plaintiff is in possession of documents which will shew the truth of his case, I do not see why the defendant may not have production of them. The spirit of the Chancery Amendment Act with respect to such cases is, that where a defendant is required to give discovery he shall not have the benefit of an order for production of documents by the plaintiff until that discovery is given; but where there is no discovery required, as in this case, there is no reason why the defendant should not have production. The language is, where the defendant is required to answer he shall not have production until he has put in a full and sufficient answer; but here no answer was required, and the section does not apply to the case of a voluntary answer. The plaintiff did not ask for discovery, neither did he call

upon the defendant for an answer, but it was the defendant who required and obtained leave to give the plaintiff an answer. This is not a contravention of either the language or the spirit of the act. The defendant comes forward to combat the plaintiff and make a statement by way of answer, and that does not come within the section referred to, nor is it contrary to the spirit of the act. The motion must, therefore, be refused.

M.R. } DUBAUF & THE PROFESSIONAL
July 9. } LIFE ASSURANCE COMPANY.

Insurance on Lives—Forfeiture of Policy—Suicide—Assignment.

A policy of assurance contained a proviso that in case the assured should commit suicide the policy should be cancelled by the return of the premiums, except the policy should have been legally assigned:—Held, that the policy was forfeited, though the assured committed suicide while in an unsound state of mind.

Held, also, that a deposit of the policy by the assured, as a security for monies advanced, amounted to a legal assignment within the meaning of the policy.

The Professional Life Assurance Company, by a policy, dated the 3rd of March 1851, assured the life of James Laird, then of Ireland Island, Bermuda, a surgeon in the Royal Navy, on his own proposal, in the sum of 300*l*.

The policy *inter alia* provided "that if the assured shall, during the continuance of this policy, go beyond the limits of Europe, and die on the high seas (except in time of peace in passing or repassing by land or sea, in decked or steam vessels from one part of Europe to another, or to or from Canada, Nova Scotia, New Brunswick, Australasia, Bermuda, Madeira, Cape of Good Hope, or Prince Edward's Island, or to or from any port or ports of Great Britain, inclusive), or being or becoming a military or naval man, shall enter into actual service, without the licence of the board of directors previously obtained, or shall commit suicide, or die by duelling or the hands of justice (when the policy

or policies shall be cancelled by the return of the premiums, except the policy shall have been legally assigned), this policy shall be void, and all monies paid in respect thereof, shall be forfeited to the company." It also contained a declaration that the same was indisputable, except in case of personation.

On the 2nd of April 1853, James Laird, being indebted to the plaintiff, Frederick Dufaur, deposited the policy with him, as a security for all monies then due, and which at any time thereafter might become due to him on a balance of accounts. No notice of any assignment or equitable deposit of the policy was ever made to the company.

On the 20th of January 1857 J. Laird died intestate, and upon an inquisition held, the jury, on view of the body, found "That J. Laird, not being of sound mind, memory or understanding, but lunatic or distracted, did hang, strangle and suffocate himself."

The policy, from the day of the deposit to the death of J. Laird, had remained in the custody of the plaintiff, who, as the agent of J. Laird, had received his pay and made advances and payments to him and on his account; he had, moreover, paid all the premiums which became due, for keeping the policy on foot; and upon a balance of accounts a sum of 172*l.* 8*s.* 7*d.* remained due to him. F. Dufaur took out letters of administration to the estate of J. Laird, and applied to the company for the payment of the full amount of the policy on the ground that J. Laird, being lunatic and distracted, did not commit suicide within the meaning of the policy; should this be refused, he asked for the amount due to him as an equitable mortgagee of the policy.

The company, however, insisted that Mr. Laird committed suicide, and that no claim could be made upon them. They also refused to recognize the claim of the plaintiff, on the ground that they had received no notice of any assignment or equitable deposit during the lifetime of the deceased; but they stated that they were prepared to repay the amount of premiums received on a due surrender of the policy.

F. Dufaur then filed this bill, and now sought to obtain payment of the full amount

of the policy. The bill, however, only prayed for an account and payment by the company of what was due to the plaintiff, for principal and interest, on a balance of the account between him and J. Laird, and for general relief.

Mr. R. Palmer and Mr. J. S. Godfrey, for the plaintiff. — Death overtook the plaintiff while in an unsound state of mind, but though it was caused by his unconscious act, still it was not suicide within the meaning of the words of the policy. But, assuming it to be void, still the plaintiff was entitled to the amount due to him on the security made by the deposit of the policy. —

Dormay v. Borrodaile, 10 Beav. 335, 342; s. c. 16 Law J. Rep. (N.S.) Chanc. 337.

Clift v. Schwabe, 3 Com. B. Rep. 437; s. c. 2 Car. & K. 134; 17 Law J. Rep. (N.S.) C.P. 2.

Borrodaile v. Hunter, 5 Man. & G. 639; s. c. 5 Sc. N.S. 418; 12 Law J. Rep. (N.S.) C.P. 225.

Cook v. Black, 1 Hare, 390; s. c. 11 Law J. Rep. (N.S.) Chanc. 268.

The Amicable Life Assurance Office v. Bolland, 4 Bligh, N.S. 194.

THE MASTER OF THE ROLLS. — After the cases which have been cited, I can come to no other conclusion than that the assured committed suicide; they clearly decide that the state of mind of the party was immaterial. Suicide could not be distinguished from dying by his own hands; I must, therefore, consider the policy as forfeited, but I will hear the case on the question of assignment.

Mr. W. W. Cooper, for the company. — No claim could be implied against the company, contrary to the proviso in the policy. No assignment had been made. No notice had been given; and no claim could arise against the company by a transaction to which they were neither party nor privy. The possession of the policy, however, was full notice to the holder that possession alone gave no security or lien — *Gibson v. Overbury* (1).

(1) 7 Mee. & W. 555; s. c. 10 Law J. Rep. (N.S.) Exch. 219.

THE MASTER OF THE ROLLS. — The plaintiff's case seems scarcely to be disputed on the provision in the policy. Whether the policy has been legally assigned depends upon the meaning to be given to the word "legally." This, however, must be construed most strongly against the office, as they inserted it for their own protection. At law a policy cannot be assigned to any one but the Crown. The word "legally," however, is used as opposed to the rule of law; it does not seem to express the meaning intended to be put upon it by the company; neither can it be used in a legal sense in contradistinction to equity. The word "legal," however, is frequently used in these courts in a technical sense, as opposed to equitable. But then it is generally used as equivalent to something which the law as administered in courts of law and equity will recognize. These Courts, however, use the word "legal" in speaking of a legal right as opposed to an equitable right, but that is not its meaning in familiar discourse; and whoever prepared this proviso used the word not in a technical sense, but as meaning that the policy should be validly and effectually assigned. Evidence, therefore, may be gone into to determine whether this has been done or not, and in this case it has not been gone into, but the fact of the policy being deposited with the plaintiff as a security for advances made by him, for the benefit of the assured, has not been disputed. It was therefore validly and effectually assigned, and the plaintiff is entitled to an account of what is due to him for principal and interest in respect of such advances, upon a balance of accounts, not exceeding the amount of the policy, and the defendants must pay what is so found due, together with the costs of the suit.

M.R. }
 1857. }
 Feb. 11, 12; } GREEN v. NIXON.
 March 27. }

Company—Directors—Concurrent Liabilities of Shareholders.

A creditor obtained a judgment against a company by default; he then proceeded at

law against several of the shareholders, among whom was the plaintiff, individually; from some he obtained various sums of money, from others nothing. Upon this bill being filed for an injunction to restrain the proceedings at law,—Held, that the plaintiff, as he had not proved either fraud or collusion, could not question the debt, or the validity of the judgment at law; that a tradesman employed by the directors of a company was not bound to inquire whether they were acting ultra vires; that the creditor was bound to give credit to the shareholder for the sums received from the others, but that this Court would not direct any account of such monies, or of the payments made out of them in satisfaction of costs of proceedings against shareholders, from whom nothing was obtained (1).

The bill in this case was filed, by Mr. Green, one of the shareholders of the Kilkenney and Great Southern Railway Company, praying for an injunction to restrain the defendant, Charles Nixon, who had recovered a judgment against the company, from proceeding in the action against the plaintiff by *sci. fa.*

The company was incorporated by the 9 & 10 Vict. c. ccclx. The compulsory powers to take land expired in 1851. At that time no land had been purchased, and the power of completing the railway expired in 1855, by effluxion of time.

In 1853 an application was made to parliament to extend the time, and to authorize a deviation in the line of railway.

The defendant, C. Nixon, was employed as engineer by the directors, and an agreement was entered into between them, fixing the remuneration he was to receive, whether the application failed or was successful. The first application to parliament failed.

In 1854, a second application was made, but this bill was withdrawn in March in the same year. The directors immediately afterwards made a call of 10s. per share upon the shareholders. Mr. Nixon then made several applications to the directors for payment of his demand, and not being paid he commenced an action against the company, on the 4th of April 1855. The directors made no defence to

(1) Nixon v. Brownlow, 26 Law J. Rep. (n.s.) Exch. 12, 273.

the action, and judgment was entered up by default, on the 26th of April 1855, for 505*l.* debt, and 3*l.* 8*s.* costs. Under a *fi. fa.* an execution was issued against the company, and a return was made of *nulla bona*.

On the 23rd of May following, the defendant Nixon caused to be served on the plaintiff notice, not only of the judgment, but also of an application for a rule *nisi*, to shew cause why judgment should not be entered up against him as a shareholder in the company. On the same day the plaintiff paid his call and transferred his shares, but as the call was not paid or the transfer registered until after the rule *nisi* had been obtained, the Court of Exchequer held that Mr. Nixon, the plaintiff at law, was not debarred from proceeding against Mr. Green, the plaintiff in this suit.

On the 26th of May Mr. Green obtained a rule *nisi*, calling on Mr. Nixon to shew cause why the judgment should not be set aside.

On the 9th of June 1855 the matter came on to be heard before the Court of Exchequer, when the plaintiff, Mr. Green, contended that the directors had no power to bind the shareholders, and that the defendant, Mr. Nixon, could not recover against the company. He also contended that the judgment obtained by Mr. Nixon was fraudulently and collusively obtained. The Court, however, discharged the rule of the plaintiff, and made the rule of Mr. Nixon absolute.

On the 3rd of July 1855 a declaration in *sci. fa.* was served on Mr. Green, and on the 31st of July he pleaded three pleas: first, that he was not a shareholder of the company at the time of serving the writ of *sci. fa.*, and thirdly, that he was not a shareholder when the rule was made absolute. The second plea was as follows:—That the said C. Nixon ought not to have execution against him, because the action in which the said judgment was so recovered was brought for or in respect of a demand for or in respect of which he was not, nor was the said company, by law liable, as he and the said directors for the time being of the said company well knew at the commencement of the action. And the defendant says that the directors did,

on the day and year in the declaration in that behalf alleged, fraudulently and deceitfully, and by connivance with him, suffer and allow the said judgment to be recovered, and he did then recover the same against the said company, in order and with the intent and purpose that he might thereupon proceed against the plaintiff as a fraudulent shareholder of the company, and might obtain payment of the amount of such judgment from the plaintiff. The plaintiff at law demurred to the first and third of these pleas, and, on the 16th of January 1856, the demurrer was allowed.

On the 18th of January 1856 notice of trial was given, and an order was obtained to try it by a special jury.

On the 29th of January 1856 Mr. Green filed the present bill against the company, and against Messrs. Anderson and Hulse, and he stated that Mr. Nixon had recovered much more than was due to him upon the special agreement, that the judgment had been obtained by fraud and collusion, and that the directors had allowed the judgment to be obtained by default, without any investigation of Mr. Nixon's claims, in order that it might be used to compel the payment of calls, which were at that time disputed, in a suit of *Horn v. the Kilkenny Railway Company* (2). He then said that the judgment was not binding in equity, either upon the company, or himself, or the shareholders, as they were no parties to the proceedings, but that notwithstanding he had by proceeding at law recovered considerable sums of money, for debt and costs, and that if anything was due on the judgment it was very little.

The bill then prayed that the defendant might be restrained from further proceeding at law. It also prayed for a declaration that Mr. Nixon had no right to recover anything upon the judgment from the plaintiff. He also prayed for all proper accounts of what, if anything, was due to Mr. Nixon, and that, if anything should be found due, the plaintiff might be indemnified by the company, and, if necessary, by George Anderson and Charles Hulse, the acting directors of the company, personally.

(2) 1 Kay & J. 399; s. c. 21 Law J. Rep. (n.s.) Chanc. 241.

In April 1856 an injunction was granted to restrain further proceedings at law until the hearing, and the cause now came on upon a motion for a decree.

Mr. R. Palmer and Mr. Amphlett, for the plaintiff.—The directors had no authority to apply to parliament for an extension of the line. It was neither sanctioned by the act nor by the company, and Mr. Nixon when he entered into the agreement with the directors was aware that they had no power to incur any such expenses. He was, therefore, a party to the committal of a breach of trust. Courts of law would remedy a legal fraud, but in this case equity alone could interfere, and it could make the judgment at law subservient to its jurisdiction, especially as new facts were brought to the attention of this Court. Mr. Nixon also was bound to account for the sums he had received, the produce of actions against other shareholders; they were applicable only to the debt. It was a strange doctrine that permitted a creditor to attach individual shareholders of a company through a judgment obtained against the directors; and it would be still more strange if creditors were allowed to sue insolvent shareholders and make those who were solvent pay the costs of those whom he had ineffectually sued: it would, in effect, be giving a premium to sue paupers:—

Ware v. the Grand Junction Waterworks Company, 2 Russ. & M. 470; s. c. 9 Law J. Rep. Chanc. 169.

Munt v. the Shrewsbury Railway Company, 13 Beav. 1; s. c. 20 Law J. Rep. (n.s.) Chanc. 169.

Stevens v. the South Devon Railway Company, Ibid. 48; s. c. 20 Law J. Rep. (n.s.) Chanc. 491.

The Great Western Railway Company v. Rushout, 5 De Gex & Sm. 290.

The Attorney General v. the Guardians of Southampton, 17 Sim. 6; s. c. 18 Law J. Rep. (n.s.) Chanc. 393.

The Attorney General v. the Mayor of Wigan, Kay, 268; s. c. 23 Law J. Rep. (n.s.) Chanc. 429; 5 De Gex, M. & G. 52.

The Attorney General v. the Corporation of Norwich, 16 Sim. 225; s. c. 21 Law J. Rep. (n.s.) Chanc. 139.

The Attorney General v. Andrews, 2 Mac. & G. 225; s. c. 2 Hall & Tw. 431; 19 Law J. Rep. (n.s.) Chanc. 197.

Philipson v. Lord Egremont, 6 Q.B. Rep. 587; s. c. 14 Law J. Rep. (n.s.) Q.B. 25.

Taylor v. Hughes, 2 Jo. & Lat. 24.

Bargate v. Shortridge, 5 H.L. Cas. 297; s. c. 24 Law J. Rep. (n.s.) Chanc. 457; and nom. *Shortridge v. Bosanquet*, 16 Beav. 84; 22 Law J. Rep. (n.s.) Chanc. 48.

Mr. Lloyd and Mr. Piggott, for C. Nixon.—Neither fraud nor collusion was proved. Mr. Nixon was a creditor of the company, and, as such, he had obtained the judgment at law. This Court would consider that was rightly obtained, and would not question it in this suit.

Mr. Follett and Mr. Surrage, for the company and Messrs. Anderson and Hulse, referred to *Rowley v. Adams* (3).

Mr. Amphlett, in reply.

The MASTER OF THE ROLLS.—I have to consider whether a judgment against the company can be treated in this court differently than at law. *Philipson v. Lord Egremont* establishes that such a judgment as this may be disputed at law in an action of *sci. fa.*, on the ground of fraud, and that fraud, if established, will vitiate it. In all courts fraud is the same, but such expressions as constructive fraud are inaccurate. Judges may, no doubt, differ as to what precisely constitutes fraud; and, without attempting a definition, it implies a wilful act on the part of one whereby another is sought to be deprived by unjustifiable means of what he is entitled to. Courts of equity will sometimes set aside proceedings for fraud when Courts of law will not. It is difficult to distinguish definitely between that which is considered fraud at law and fraud in equity. In *Philipson v. Lord Egremont* fraud was held to vitiate a judgment. There the defendant, to a declaration in *sci. fa.*, pleaded

(3) 4 Myl. & Cr. 534; s. c. 9 Law J. Rep. (n.s.) Chanc. 34.

that the original action was brought against the registered officer for a demand, on which neither the defendant in *sci. fa.* nor the packet company was by law liable, as the plaintiff at the commencement of the action knew that the registered officer fraudulently and by connivance with the plaintiff suffered the judgment to go by default, that the plaintiff might sue for and recover the amount against the defendant in the *sci. fa.* In *Taylor v. Hughes* the action, though brought by a creditor, was manifestly the action of the company. The plaintiff had, many years before, disposed of his shares, but he had been placed on the list of shareholders by the directors, and though it was nominally the action of the creditor, it was in reality the action of the company. The question in this case is, whether this was a concerted or collusive judgment. The bill says, that the judgment was allowed to go by default upon some understanding and agreement between Mr. Nixon, the directors, the solicitors and secretary of the company, or some of them, that the judgment should only be made use of to enforce payment of over-due calls from the shareholders. An express promise was accordingly made on the part of the company to Mr. Nixon that any calls paid by shareholders in consequence of proceedings on the judgment should be handed over by the company to Mr. Nixon. It states, moreover, that it was arranged or understood, that Mr. Nixon should not proceed on the judgment against the solicitors, secretary or directors, all of whom held shares in the company. Then it states that these facts were evidenced by a letter of Mr. Nixon to the solicitor of the company, dated the 22nd of May 1855. The letter, however, does not bear out this allegation; on the contrary, it negatives the charge, which rests on these grounds—first, that, on the 25th of April 1855, the directors determined not to defend the action; secondly, on the same day, they disqualified themselves to act as directors, and elected two others, Messrs. Anderson and Hulse, who knew nothing about the matter, and that since then there has not been a sufficient number of directors to form a meeting of the company, and also that there was both concert and collusion between the directors

and Mr. Nixon to make use of the judgment to enforce the payment of calls from other shareholders. Upon the first charge, of the directors declining to defend the action of Mr. Nixon, there is no evidence of concert or collusion. The directors had no legal defence to the action. If they had not, it was not their duty to defend it and thereby increase the costs. No legal defence has been now suggested which could have been urged, except that of the illegal application of the funds of the company, and that the defendants could not successfully have averred. The solicitors of the company also expressly told the directors that they had no defence to the action. The further evidence to prove concert or collusion wholly fails; the correspondence does not prove it; there is an express denial, and it is disavowed by the solicitors of the company and the secretary in their affidavits. Neither *Bargate v. Shortridge* nor *Taylor v. Hughes* therefore applies to this case. Not only is there no collusion, but the evidence shews that the action of Mr. Nixon against the plaintiff was brought, not to assist the company at all, but to obtain payment of his own debt, without any reference to the state of the company. This Court, therefore, will not consider whether the original debt was valid, or discuss whether it was one which could or could not have been successfully resisted in a court of law by the company. If such a question could be gone into now, the discussion would never end, and the question would never be set at rest. Suppose an action was brought for goods sold and delivered to the company and a judgment obtained, and the sheriff on the execution returned *nulla bona*, could one of the shareholders, in an action upon a *sci. fa.* dispute the validity of the debt, or the delivery of the goods, or the price? If he could, it is clear that great difficulties might arise when, from the subsequent failure of evidence, or the different views which juries might take of the same case, contradictory decisions might be come to; the creditor might thus succeed against some shareholders, and fail as to others. Then it is said, that the application to parliament was an illegal use of the funds of the company, and that the company was not established for the

purposes sought by the proposed bill, and that it was obviously not within the scope of their trust or the original act to apply the funds for that purpose, so the refusal of the legislature to entertain the proposal was conclusive proof that this case was a misapplication of the funds of the company. It is alleged that Mr. Nixon was aware of this fact, and that as he had knowledge that the directors were applying the funds of the company for an unauthorized purpose, his claim could not be enforced. I do not concur in this argument. I assume, for the purpose of this question, that the directors had no authority to apply the funds of the company for the purpose for which Mr. Nixon was employed. I do not think that persons employed by the directors of the company can be required to investigate the objects for which they are employed, and to ascertain whether the objects are, or are not, in accordance with the trusts reposed in the directors by the deed or the act of parliament, of both of which they had notice. If the law was that they were bound to make such investigations it would cripple the necessary powers of the directors of any company to employ tradesmen, nor would tradesmen enter into any contract with directors at the risk of its being void as regarded the shareholders if the goods furnished were not within the act of parliament, of which, without having seen it, the tradesmen must be held to have had notice. If that were so, a person employed by directors would become involved in all the intricacies respecting notice, and a casual conversation, which he considered immaterial, might involve him in the consequences of notice of the purposes and objects for which the money and goods were intended to be applied. The principle upon which this Court grants injunctions to restrain directors from pursuing objects at variance with the original scope of the company would seem to imply that they would bind the assets and the shareholders of the company, and it is this which gives the shareholder so strong an interest to prevent the directors from misapplying the funds of the company. It is also by no means clear that Mr. Nixon could be held to have had notice. In *The Great Western Rail-*

way Company v. Rushout the proposition laid down was, that an application by directors to parliament does not necessarily give notice that there was an intention to apply the funds of the company improperly. At all events, the objection, if at all, could never be urged at law in an objection to the validity of the judgment, and if it would not prevail there, it would not prevail here, where the judgment had not been obtained by collusion, fraud or deceit. In fact, the rights of the shareholder in cases where fraud, collusion and concert are all excluded, are these: he may, if he is sufficiently diligent, stop beforehand the misapplication of the funds or credits of the company by an application to this Court. If he does not adopt this course, or is, from want of knowledge, unable to adopt it, he is entitled to call the directors to account for all the monies received and paid by them for or on behalf, or for the purposes of the company, the application of which was entrusted to them, and these sums, which have been misapplied, will be disallowed to them on taking such account. In such an account the directors would be charged with all sums received, and would be compelled to make good to any shareholder any sums which he had been compelled to pay, and which were not properly due from him; and this is, in fact, provided for by the Company's Clauses Consolidation Act, sections 36, 37. The case of *Horn v. the Kilkenney Railway Company* was settled by arrangement; it is, therefore, not necessary to refer to it in detail. There was, however, clearly a concerted action and judgment, the action having been brought by the solicitors of the company against the company for the purpose of its being made use of against the shareholders. This, therefore, is not a case where the Court can be called upon to interfere to prevent the plaintiff at law from enforcing his judgment; the principal object of this bill therefore fails. The plaintiff, however, says he is entitled to an account, because the defendant has received from various other shareholders sums in part payment. This is information to which the plaintiff is entitled, whether he receives it at law or in equity. Mr. Nixon cannot recover more than is actually due to him, but if

such an account were taken in this cause I should not disturb the appropriation made of parts of the monies towards the payment of costs incurred by the defendant Mr. Nixon in enforcing his claim against other persons, or the part that was employed for the payment of the debt, nor should I hold that the plaintiff was entitled to insist that the whole amount recovered was to be applied towards the liquidation of the debt. I do not know whether this was distinctly in evidence, but it was stated at the hearing—(if the facts are disputed I will allow it to be mentioned again)—that these actions were compromised on certain terms, by which the defendants in such actions, with full knowledge of such circumstances, agreed to pay a sum to Mr. Nixon for costs incurred by him and another sum for the debt, I should not disturb such arrangements, nor allow the plaintiff here to convert them into different arrangements that he might have the benefit of them. In saying this, I assume that such costs had been *bonâ fide* incurred by Charles Nixon in his endeavour to obtain payment from those persons, and in which he had failed, from their inability to pay. This being my opinion, probably the best course for both parties to adopt would be that the defendant should verify by affidavit the sums received by him in respect of the debt, and what remains due thereon; and that an order should be made on the plaintiff to pay that amount to the defendant at a certain time, as I presume that neither party wishes the proceedings at law to continue. Still, the plaintiff is entitled to make out a defence to the *sci. fa.*, if he thinks he can, and to insist that it should be heard. But, taking the view I do of the circumstances, the plaintiff must pay the costs of the suit up to the hearing. If the plaintiff should elect to proceed in the action at law, I shall simply dissolve the injunction and dismiss the bill, with costs.

The injunction was finally dissolved, and the bill was dismissed, with costs.

KINDERSLEY, V.C. }
July 28.

LEE v. LEE.

Legacy—Ademption.

A testator bequeathed all the personal estate of which he should die possessed, except such share as he should become entitled to in the property of A. B., to his wife absolutely; and he bequeathed all his share in A. B.'s property upon certain trusts mentioned in his will. A. B.'s estate, which consisted of two separate sums of stock, came into the testator's possession after the date of his will, and the sums were transferred into his name. One of such sums of stock remained standing in his name at his death, but the other sum was sold out by him and applied for his own purposes:—Held, that there was an ademption of the legacy in respect of the stock sold out, it having been mixed with the testator's property and spent, but the stock transferred to him and continuing to stand in his name passed under the bequest.

A question was raised in this case upon the construction of the will of James Lee, dated the 21st of September 1852, which contained the following bequest:—"Of all my just debts and funeral and testamentary expenses, as soon as conveniently may be after my decease and subject thereto, I give and bequeath all the personal estate of which I may be possessed (except such share, proportion or interest as is vested in me, or to which I am or may become entitled in the property of the late Mary Tabitha Lee, as one of the next-of-kin, or as a party entitled in distribution of her personal estate) unto my dear wife Mary Lee, her executors, administrators and assigns; I give and bequeath all the share, proportion, or interest in or to which I am or may become entitled or interested in the personal estate of the said late Mary Tabitha Lee, as one of her next-of-kin, or otherwise, unto my nephew Richard Thomas Lee and William Holdsworth, their executors, administrators and assigns, upon trust, in the first place (in case the same shall not have become reduced into possession in my lifetime, either as soon as may be after my death or as soon as the same shall have been reduced into posses-

sion), to place out such a sum in their names in or upon government or real security (with power from time to time to alter such securities) as will produce the clear yearly sum of 50*l.*, and to pay the same annual sum, from time to time as the same shall be received, to Emma Sansome, in case she shall be in my service at the time of my death, but not otherwise, into her proper hands, free from the controul or engagements of any husband, and her receipts, notwithstanding coverture, shall be sufficient discharges to the said trustees; and from and after the decease of the said Emma Sansome I direct that the sum to be so set apart as aforesaid shall become and form part of the said share, proportion or interest to which I am or may become entitled out of or from the said personal estate of the said Mary Tabitha Lee, and go and be subject to the disposition or direction I have by this my will made thereof; and as to all the said part, share or proportion to which I am or may become entitled as aforesaid, I will and direct that my said trustees before named, their executors, administrators and assigns, shall pay thereout the sum of 500*l.* to my nephew Leonard Lee, the sum of 500*l.* to my niece Mary Jane Lee, and the sum of 500*l.* to my niece Emma Lee (the son and daughters of my brother Richard Leonard Lee); and as to the residue which may then remain of the said part, share or proportion, and also the said sum so to be set apart as aforesaid after the death of the said Emma Sansome, I will and direct that my said trustees, their executors, administrators or assigns, shall invest the same in their names upon some good and sufficient security, with power to alter securities at discretion, and pay the interest or income to arise therefrom, from time to time as the same shall be received, to my daughter Ann Lee for her life, and from and after her decease upon trust to pay and divide such residue, or the funds or securities on which the same may be invested, unto and equally between and amongst my next-of-kin, but exclusive of my said nephew Leonard Lee and my said nieces Mary Jane Lee and Emma Lee, according to the Statute for the Distribution of Personal Estates in case of a party dying intestate."

The testator died in January 1858, leav-

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ing his widow and the other legatees him surviving. After the date of his will two several sums of stock, amounting to 5,370*l.* and 1,100*l.*, which constituted his share in the personal estate of Mary Tabitha Lee, came into possession and were duly transferred to him by the administrator of her property.

In 1857 the testator sold out one of those sums of stock, namely, the 1,100*l.*, and the proceeds were mixed with his other monies and applied to his own uses. The remaining sum of 5,370*l.* had not been removed, but was standing in the testator's name at the time of his decease.

The question now raised was, whether the sum of 1,100*l.* ought to be replaced out of the general assets of the testator for the benefit of the parties who were entitled under his will to the bequest of the property coming to him from the estate of Mary Tabitha Lee, or whether the legacy to the extent of one or both the sums was adeemed.

Mr. Howe appeared for the trustees.

Mr. E. R. Turner, for the widow, contended, that there was an ademption of the two sums of stock. They both fell into his general estate, and the fact that he dealt with one of them proved that he did not intend the legacy to take effect. But if the Court should be of opinion that there was no ademption of the larger sum, then the sum of 1,100*l.* was adeemed and the legacy failed as to that sum.

Mr. Wickens and *Mr. Currie*, for the legatees, submitted, that there was no ademption of either sum of stock. The testator only intended to describe a certain amount of money arising from a particular fund. It was just the same as if he had bequeathed two sums of money amounting to 5,370*l.* and 1,100*l.*, and as he had sold out one of those sums that amount must be replaced from his general estate.

The following cases were cited:—

Dingwell v. Askew, 1 Cox, 427.
Le Grice v. Finch, 3 Mer. 50.
Pulseford v. Hunter, 3 Bro. C.C. 415.
Rawlins v. Burgis, 2 Ves. & B. 382.
Clark v. Browne, 2 Sm. & Gif. 524.
Clough v. Clough, 3 Myl. & K. 296.

KINDERSLEY, V.C.—My opinion is, that there is an ademption as to the 1,100*l.*, but not as to the 5,370*l.* According to the modern view, ademption, speaking strictly, is the destruction or cesser of existence of the thing, the subject of the bequest; and it is or may be utterly irrespective of the testator's intention. Suppose a testator gave his black horse Eclipse to A. B, if he died there was an ademption of the gift.—(His Honour having read parts of the will, continued)—The first question is, whether the transfer of stock is an ademption. My opinion is, that it is not a destruction or ceasing of existence, irrespective of any intention specified in the will in other points. In itself it is not a destroying or taking away of existence of the thing given. Suppose the testator, when the administrator of Mary Tabitha Lee was proposing to transfer to him the share which he was entitled to, had expressed a wish that it should not be transferred to himself but to A. B, a trustee for him, and that had been done, and the money had so remained at his death, would that have been a destruction of the thing given? Would it have ceased to be the share and proportion to which he was entitled in the estate of Mary Tabitha Lee? Suppose any one had said to the testator, "What stock is that?" he would have answered, "It is my share in the estate of Mary Tabitha Lee;" and he might have bequeathed it in those terms; and, therefore, it is not the fact of the money ceasing to be in the hands of the administrator of Mary Tabitha Lee which has the effect of destroying the subject of the bequest; but it would be necessary to maintain that, in order to make out an ademption. The testator had the stock transferred to him, and he retained the same identical stock not sold out; the sum of 5,370*l.* was never applied to his own use, and the ceasing to stand in the name of the administrator does not destroy it, but it remained in specie untouched in all its integrity and identity in the name of the testator, and there was no ademption of it by reason of such transfer. Upon the second question, it appears that the testator had sold out the 1,100*l.*, received the money, mixed it with his own, and for aught that appears he might have spent it, at all events dealt with it as part of his

cash, and it could not be further traced. This, then, is not a mere transfer, but it was sold and destroyed, and that is an ademption of it.

KINDERSLEY, V.C. } COOKE v. CHOLMON-
July 19. } DELEY.

Tenant for Life—Repair of Buildings.

A testator directed that his trustees should, during the life of the tenants for life, out of the rents and profits of his estate, keep the mansion house and all other buildings and messuages in good repair; rebuilding, if necessary, any farm buildings that might from time to time require it. The buildings were very dilapidated at the testator's death:—Held, that the repairs were to be effected out of the annual rents; that the rebuilding applied only to the farm houses and farm buildings, and not to the mansion house; and that only such repairs were to be effected as a surveyor should consider indispensable in order to make the buildings serviceable for the tenants, and no ornamental or unnecessary improvements to be included.

This suit was instituted for the administration of the estate of Sir Gregory Page Turner, and a question having arisen in chambers as to the amount to be expended upon the estate in repairs, the argument was adjourned into court. The testator, by his will, gave all his real estates to trustees, upon trust for his wife and daughter during their lives, and the life of the survivor, and after the decease of the survivor, then upon certain trusts mentioned in his will. The will, amongst other things, contained a direction to the trustees, out of the rents and profits of his real estates, to pay such of his debts and legacies, as his personal estate was insufficient to pay, and "out of such rents and profits to keep the mansion house and all other buildings and messuages in good repair, rebuilding, if necessary, any farm buildings that might from time to time require it." At the death of the testator the buildings on the estate were, many of them, in a very dilapidated state, and a question was raised between the tenants for life and the

remaindermen what repairs, having regard to the directions in the will, were to be done.

Mr. Jessel, for the tenants for life, contended that the trustees were not bound to put the property in more substantial repair than they found it in, but only to keep the buildings in a state of repair, and not to rebuild or beautify them, or to do more than was strictly necessary for the actual use of the buildings. These repairs were to come out of the rents and profits of the estate, and this expression could not be held to apply to rents only, but to any profits arising from the estates.

Mr. Freeling, for those in remainder, submitted that the mansion house and buildings must be put and kept in a good state of repair, let them be in what state they might at the time of the testator's death. If the trustees found the buildings dilapidated, it was their duty to place them in good repair, and to keep them so; and, if necessary, they were to rebuild any of the premises. And this was to be done out of the annual rents of the estate, for in that light only could the words "rents and profits" be taken. They cited—

In re Skingley, 3 Mac. & G. 221; s. c.

20 Law J. Rep. (N.s.) Chanc. 142.

Gregg v. Coates, 23 Beav. 33.

Payne v. Hains, 16 Mee. & W. 541;

s. c. 16 Law J. Rep. (N.s.) Exch.

130.

KINDERSLEY, V.C.—The sense in which the term "rents and profits" is used in this clause appears to me clearly to be annual rents; and whatever reluctance the Court may feel to do anything to diminish the income of the wife and daughter of the testator, they can take nothing except subject to the incumbrances specified by the testator, which are the payment of debts and the specified repairs. I must, therefore, give such directions with regard to repairs as may appear to me to be right within the express words of the will, and whatever the consequences may be, I must adhere to those directions. At the same time the Court will take care to protect the tenants for life from any undue expenditure of the rents upon repairs. It appears that there

is a large mansion house upon the property, and there are extensive farm buildings also. The direction to keep the buildings in good repair applies to the mansion house as well as the farm buildings, but the direction to rebuild, if necessary, cannot be applied to any but the farm buildings—certainly not to the mansion house; and the tenants for life have, I think, a right to see that this construction is put upon the clause in the will. If, therefore, there is to be any rebuilding, it must be confined to the farm buildings, unless by the consent of all parties interested under the will. It cannot otherwise be done. It has been argued that the buildings are not to be put into a better state of repair than they were in at the testator's death, but only to be kept in as good a state of repair. But it appears that they were in a very dilapidated state at this period, so the argument would amount to this: that although the testator has said the buildings are to be kept in good repair, they are, in fact, to be kept in bad repair. Repairs upon an estate may, no doubt, be of different degrees, and might entail a different amount of expense; but in this respect there must be such directions given to the surveyor as will bind him to do nothing that is not really necessary for upholding the premises. For instance, the barns must be put in such a state of repair as may make them properly serviceable to the tenants, just as an owner of an estate would do, but not to extend to ornamental repairs. It is, no doubt, very difficult to define the term "good repair," as it has a very flexible meaning, and the rebuilding would certainly not be sanctioned, unless it were absolutely necessary, and then it must be applied to farm buildings, and also farm houses. A farm house must be kept up for the purpose of letting the farm. There should, in fact, be no rebuilding unless the building is in such a state that it is incapable of being repaired, or in a case where the rebuilding would not be more expensive than the repairing. Regard must therefore be had to the nature, age, structure and dimensions of the building, and nothing is to be done by way of improvement which will create additional expense. The direction must, therefore, be, that the repairs and rebuildings should be effected

out of the annual rents and profits, and the surveyor must consider what is necessary to be done at once, and what may be postponed until further funds become available. The surveyor must also state the value of the timber requisite for the repairs or rebuilding which he recommends.

KINDERSLEY, V.C. }
June 29. } PARSONS v. COKE.

Legacy—Ademption.

*A testator gave to his brother absolutely certain collieries, and all debts which might be due to him at the time of his decease in respect of such collieries and works, but subject to the payment of all debts and engagements due and payable in respect of or connected with the said works; and for the better enabling his brother to carry on the collieries, the testator bequeathed to him 10,000*l*. Shortly before his decease the testator sold all his property in the collieries to his brother:—Held, that there was no ademption of the legacy of 10,000*l*., but that the direction as to receiving and paying debts could not be carried into effect.*

This suit was instituted to administer the estate of John Parsons, who, by his will, dated the 23rd of June 1852, gave and bequeathed to his brother William Parsons certain real estates in the county of Glamorgan, and also his collieries and the works in the same county, and all debts which might be due or owing to him at the time of his decease in respect of the said collieries and works, to hold the said freehold and leasehold hereditaments, premises, works, collieries and debts, unto his said brother, his heirs, executors, administrators and assigns, absolutely, subject nevertheless to the payment of the rents and royalties, and the performance of the covenants and agreements contained in the several deeds, leases or agreements under which the same were held, and subject also to the payment of all debts and other engagements due or payable in respect of or connected with the said works, collieries and premises at the period of his decease. And for the better enabling his said brother to

carry on the said works, collieries and premises thereinbefore bequeathed to him, the said testator gave and bequeathed unto the said William Parsons the sum of 10,000*l*. The testator gave the residue of his estate to trustees upon certain trusts contained in his will.

A short time previous to his death the testator sold all his property in the before-mentioned collieries to his brother William Parsons, and they were conveyed to him accordingly.

The question now raised was, whether this transaction effected an ademption of the legacy of 10,000*l*. given by the testator to his brother, and also whether the direction as to the receipt and payment of debts due from and to the estate was now to be carried into effect.

Mr. Glasse and Mr. Shebbeare, for William Parsons, contended, that the legacy was not adeemed, and that the direction as to the debts was to be carried into effect strictly according to the will. They cited—*Leche v. Lord Kilmorey*, Turn. & R. 207.

Knox v. Lord Hotham, 15 Sim. 82.

Barlow v. Grant, 1 Vern. 255.

Barton v. Cooke, 5 Ves. 461.

Mr. Greene and Mr. C. Hall, Mr. Anderson and Mr. Speed, Mr. Baily and Mr. W. Collins, and Mr. Martindale appeared for the residuary legatees and trustees, and cited—

Ex parte Smith, 1 Rose, 208.

Colleton v. Garth, 6 Sim. 19; s.c. 4

Law J. Rep. (N.S.) Chanc. 98.

KINDERSLEY, V.C.—The first question is, as to the 10,000*l*., whether William Parsons is entitled to that legacy, or whether what has been done by the testator in respect to the property which he has devised to William Parsons does not only act as an ademption of the devise of that property, but also take away the right to the 10,000*l*. This question stands on a totally different footing from the question with regard to the debts, which is, whether the testator having given certain collieries and works to William Parsons, and debts due to the testator in respect of that concern, and subject to the obligation of paying debts

due from him, inasmuch as the concern itself is sold in his lifetime, the legatee can still say he is to have the debts due to the concern on paying the debts due from the concern. His Honour, after reading the words, said, the contention upon the part of the residuary legatees is, that inasmuch as William Parsons did not under the will take any benefit in the colliery, therefore the legatee is not entitled to the 10,000*l*. It has been argued that this legacy is in fact a pertinence or accessory to the principal gift, and inasmuch as the principal gift is at an end the accessory must follow. Neither in its nature, nor from what the testator has said with respect to it, can it be considered as a pertinence or accessory, nor is it necessary to the colliery. It is true that the mode in which the 10,000*l*. is to be used, is for enabling William Parsons to carry on the business, but there is not the smallest obligation upon him to carry on the business for a single hour. Supposing he had reason to expect that his brother would leave him considerable property, and had contracted to sell that property to A. B, would he not be entitled to the 10,000*l*.? It was given for his general benefit, to do just what he pleased with, although the testator considered that he would be the better enabled to carry on the works if he chose; if not, still he would have the 10,000*l*. The only case which at all appears to support the arguments adduced is *Ex parte Smith*, but that either proves too much, or does not at all prove the proposition. If the language of Lord Eldon, taken abstractedly, applies, *Leche v. Lord Kilmorey*, and the other cases cited, are not law, and that cannot be contended. The case of *Ex parte Smith* was a gift to a trustee for a married lady, and when the purpose failed, it could not be ascertained what was the amount of the surplus; therefore, the general language of Lord Eldon must be interpreted with respect to that particular case: the husband was the residuary legatee, and the question was the right of parties against his estate, and, therefore, it does not govern this case. This is a gift of 10,000*l*., stating the way in which the testator considered he might apply it. That does not take away the 10,000*l*. If the testator had given property with the obligation of carrying

on the works, where the carrying on would have been to the devisee's detriment, then, indeed, the party could not say, if the works were not carried on he would still be entitled to have the 10,000*l*., because the 10,000*l*. would have been a condition; here it is an additional benefit, and the taking away of one portion does not deprive the devisee of it. William Parsons is, therefore, entitled to the 10,000*l*. absolutely. Upon the question of the gift of the debts, my opinion is, that the residuary legatees are right in their contention. It is true that the testator might have given debts due to and from him, but the intention was to give William Parsons at his death this property with the works upon it as they stood, paying the debts due from the business, and taking the debts due to it. By what took place, the testator has now said, "I no longer mean this to belong to William Parsons," and the effect is, that he has withdrawn from him all the appurtenances and accessories which he attached to it, if they were not so necessarily in their nature. That was not the case with the 10,000*l*., so that the withdrawal of the principal gift does not affect it. If it so happened that the debts due from the concern at the testator's decease exceeded those due to him, it would be impossible to impose upon William Parsons the obligation of taking those due to, or paying those due from the testator.

Wood, V.C.
July 7, 9.

{ *In re* THE JOINT-STOCK COMPANIES WINDING-UP ACTS, 1848, 1849; AND *In re* THE ATHENÆUM LIFE ASSURANCE COMPANY.
Ex parte THE EAGLE INSURANCE COMPANY.

Company — Deed of Settlement — Contract Ultra Vires—7 & 8 Vict. c. 110. s. 44.

By the deed of settlement of an incorporated joint-stock company the directors were empowered to effect assurances on lives on such terms and conditions as they should think proper; and it was provided, that every policy, &c. should be given under the hands of not less than three of the directors and sealed with the common seal of the

society, and that there should be contained therein, and in every other contract to be entered into on behalf of the company, in or about the premises, a reference to the deed of settlement; and it was by another clause declared that it should be competent for the directors generally, where the deed did not otherwise provide, to act in the direction of the concerns of the society, and to do all such things as might be requisite in that behalf. Three of the directors having signed a contract, not under seal, to grant a policy of assurance, — Held, that the directors had power to make such contract, and that the same was binding on the company.

Mr. W. M. James (with whom was *Mr. T. Stevens*) moved, on behalf of the Eagle Insurance Company, as assignees of the Mentor Life Assurance Company, that the trustees of the Eagle Company might be admitted to prove against the estate of the Athenæum Company for the sum of 2,000*l.*, with interest from the 26th of December 1856, under the following circumstances :

On the 6th of July 1852 the Mentor Company granted a policy of assurance on the life of Andus Adolf Sahlin, for 2,000*l.*, and proposed to the Athenæum to re-assure the policy. The proposal was accepted, and the following memorandum was indorsed on a copy of the policy :—

"The Athenæum Life Assurance Society guarantee the Mentor Life Assurance Company the whole of the within assurance on the same terms and conditions, at a premium of 33*l.* 5*s.*, payable half-yearly, on the 16th of January and 16th of July, or within 30 days thereafter, and will issue, whenever required, a stamped policy, numbered 327, in favour of the Mentor, on payment of stamp-duty.

"Witness our hands, this 10th day of July 1852,

"Henry Harriss,
J. Bartlett,
Henry Sutton, manager, } Directors.

"Examined, R. F. Jopling, actuary.

"Entered, C. G. Parker."

The premiums were duly paid by the Mentor Company until the death of Sahlin, in February 1856, when the sum assured under the Mentor policy became payable.

The Mentor Company some time since transferred this policy and all their right

under the memorandum to the Eagle Company, who paid the sum assured on the 26th of December 1856.

It was contended, on behalf of the official manager of the Athenæum Company, which was in course of winding up, that that company was not liable on the memorandum, because it was not given in the manner prescribed by their deed of settlement.

The clauses of the deed on which reliance was placed will be found in the judgment.

In support of the application, the following cases were cited :—

Reuter v. the Electric Telegraph Company, 6 El. & B. 341; s. c. 26 Law J. Rep. (N.S.) Q.B. 46.

Shortridge v. Bosanquet, 16 Beav. 84; s. c. 22 Law J. Rep. (N.S.) Chanc. 48: affirmed on appeal, 5 H.L. Cas. 297; s. c. 24 Law J. Rep. (N.S.) Chanc. 457.

Re the Norwich Yarn Company, 5 De Gex, M. & G. 505; s. c. 21 Law J. Rep. (N.S.) Chanc. 822.
7 & 8 Vict. c. 110. s. 44.

Mr. Rolt, *Mr. W. Field*, of the Common Law Bar, and *Mr. W. D. Lewis*, for the official manager of the Athenæum Company, referred to—

The Royal British Bank v. Turquand, 6 El. & B. 327; s. c. 25 Law J. Rep. (N.S.) Q.B. 317.

Ernest v. Nicholls, 6 H.L. Cas. 401.

The Mayor of Ludlow v. Charlton, 6 Mee. & W. 815; s. c. 10 Law J. Rep. (N.S.) Exch. 75.

Alexander v. M'Kenzie, 6 Com. B. Rep. 766; s. c. 18 Law J. Rep. (N.S.) C.P. 94.

The British Empire Company v. Browne, 12 Ibid. 723; s. c. 22 Law J. Rep. (N.S.) C.P. 51.

Mr. James replied.

July 9.—WOOD, V.C.—The question in this case is, whether or not the Eagle Insurance Company should be admitted to prove as a debt for a certain sum of money in respect of a memorandum of this description :—The Mentor Company had insured the life of a foreigner. The insurance was

in the same form, and subject, in fact, to the same conditions as are contained in the ordinary assurance policies, which the Athenæum Company was in the habit of issuing, and was authorized by its deed to grant; and there was a memorandum signed by three of the directors, including the managing director of the Athenæum Company, which memorandum referred to this policy existing on the life of a foreigner, and was, in fact, to this effect: that on the premiums being paid on the amount of this policy, the Athenæum Company would hold itself responsible in respect of the sum to be paid to the assured, and would undertake to grant to the parties now seeking to prove under this instrument, upon request, a policy upon the same terms; meaning thereby, evidently, as it appears to me, that it should be upon the same terms *mutatis mutandis* applied to their own deed, not the terms of making the payment out of the capital of the other insurance company, which would be an absurd contract, but out of the capital of their own company, upon the same terms and in the same manner as provided by the other policy with reference to the capital and effects of the other company, which would be undertaking to grant a policy according to their ordinary form and their ordinary power. It reduces the case to the very simple point—whether or not, under the provisions of the act of parliament and of the deed of settlement of the Athenæum, such an instrument as this gives any right, either at law or in equity, to the persons who are making this claim; whether, in truth, the claimants would be entitled to file a bill to have such a policy granted in respect of this contract signed by the directors. This must depend entirely upon the powers given to the directors by the deed of settlement. The act of parliament merely shews that, with regard to joint-stock companies of this description, the contracts are to be in a given form, signed by two of the directors at least, and sealed with the common seal, and, if not so executed, only to be binding on the company, and to be void against every one else except the company. What the precise intention of the legislature is, is not clearly seen; but I believe it was thought desirable that all contracts with joint-stock companies

should be in this form; and possibly the legislature may have thought the best way of securing that was to take care that, unless they chose to make them in this form, the contracts entered into with their contractors should be such as to bind the joint-stock companies, but should not be binding on the persons with whom they were entered into. The clauses of the deed that have application to the subject are the 27th, the 28th and the 38th. The 27th says—"After complete registration, it shall be lawful for the directors of the society to effect assurances on lives and survivorships, to sell out and purchase reversions and annuities, and to grant endowments for children, and generally to effect all such other assurances, whether life, guardian, guarantee or otherwise, upon such terms and conditions and in such manner as the directors shall think proper." Then, the 28th is, "That every policy, endowment, grant of annuity, or other instrument required in any of the transactions aforesaid, shall be given under the hands of not less than three of the directors, and sealed with the common seal of the society, and that there shall be contained therein, and in every other contract to be entered into on behalf of the society, in or about the premises, a reference to these presents, and a proviso limiting the scope and effect of the contract thereby created, so that the same shall take effect and be satisfied only out of such funds and property of the society as, under the provisions hereafter contained, shall, at the time at which such liability shall accrue, be at the disposal of the directors in that behalf, negating an unconditional liability." The rest of the clause I need not read. It had relation to the discussion which took place in the other matter (1), and does not refer to the point now before me. One sees two things on this clause clearly: that every policy, endowment, grant of annuity, or other instrument required in the transactions aforesaid, is to be under the hands of three of the directors and sealed with the common seal of the society, and there is also to be contained therein, and in every other contract to be entered into on

(1) *Ex parte* the Prince of Wales Company, *ante*, p. 798.

behalf of the society in or about the premises, a reference to these presents. According to the true construction of that clause, one must read it (and I understand that a Court of law has taken that view)—that the policy shall be in the form prescribed, sealed with the common seal of the company and signed by three of the directors, and in that and in every other contract to be entered into on behalf of the society, there is to be this stipulation, that that obligation shall be made good only out of the funds of the company: and this contract that I have before me fulfils that second stipulation, because it is in that express form which provides that the debt shall be paid only out of the assets of the company. It is a contract, therefore, fulfilling that condition, and the only question is, whether it is a contract necessarily within the scope of the first words, “every policy, endowment, grant of annuity, or other instrument required in any of the transactions aforesaid,” that is, it must be under the hands of the directors and sealed with the common seal? Looking at the two branches of the clause I think it was a sound construction put upon it by Mr. James to say that this first portion relates to the completed instrument, that “every policy, endowment, grant of annuity or other instrument” relates to the completed instrument, which is to be in that particular form; and then they refer to other contracts, which may be made in or about the premises, that is, in or about the matters connected with the insurance, for those are the premises which form the principal part of the deed. If the matter rested there, there would be very considerable ground for contending that there might be a contract entered into on behalf of the company by the directors, which should not be in that form, but which would be required to be satisfied only out of the funds of the society. When we come to the 38th clause, which is the only other clause having a bearing on this matter, namely, the general powers of the directors, we find, omitting all the previous part of the clause, which has no particular bearing on the subject, it says, that it shall be competent for the directors “generally, where these presents are silent or do not otherwise provide, to act in the direction of

the concerns of the society, in such manner, as at their absolute discretion, they shall think most conducive to the interest of the society, and for that purpose to make, do and execute all such acts, deeds, matters and things whatsoever as may be requisite or expedient in that behalf.” The “deeds,” of course, cannot be formal instruments, but such things are to be done as may be necessary. Now, among these other powers, it is not an unreasonable power, fortified very strongly as it is by the express terms of the 28th clause, which assumes that there may be other contracts besides the formal instrument, that this company, through the medium of its directors, may contract so as to bind the company to specific performance of agreements, which would ultimately be carried into effect, by means of instruments under the common seal, or by means of the ordinary policy of assurance, or other deeds that may be necessary for that purpose. It seems to me, it is like the case of a man executing a power of attorney to his attorney to execute a contract for the sale of his estate, and to execute all deeds necessary for making the conveyance. I use this with reference to one particular argument of Mr. Field. He said, if I were to hold that this contract was good, I should be giving to the imperfect instrument a greater effect than to the complete and perfect instrument. But if a person has power to contract, although the conveyance will not be perfected without a formal deed, still the contract will be binding, and capable of being enforced in equity; and if I find that such a power is given, either expressly or impliedly, I am authorized in assuming that the society is bound by the contract, and would be bound on a bill filed to have executed a policy under that undertaking or agreement, which they by their original contract stipulated to do. I entirely concur with all the observations thrown out in *Ernest v. Nicholls*, if I may say so, speaking of a superior Court. I think, when applied to the subject-matter before the Court, those observations are exceedingly clear, as we might expect from the learned Judge who made them. He points out distinctly the powers of companies acting under the powers contained in this act of parliament. It is

most important, as is there said, that people should know that they deal with a company whose deed they must be bound to be fully acquainted with; and, with regard to every form of contract which is there stipulated for, the case must be looked upon as one of a limited agency, and the general body of proprietors must be taken to have given those powers which are granted in this deed, to be exercised *modo et formâ*. But seeing the immense powers of directors, and the very little controul which the shareholders of joint-stock companies have over them, and the very little information which is contained in the reports, it is important that they should not be bound one step beyond the provisions which they have made for the proper securing of their interests: I do not think it is at all an unreasonable requisition on the part of these companies, that every instrument should be under seal. I think the 43rd section of the act makes it of the utmost importance that they should so stipulate, because, according to that section, every contract that was entered into would be unilateral as regarded them. It would be a contract for liability, and they could not claim the benefit of it as against the party with whom the directors had contracted, although in this particular case, that observation has no great force, regard being had to the nature of a contract of assurance, which is merely a perpetually renewed contract year by year, leaving no right against the party contracting with the company, for he acquires his right merely by the payment of his premiums, and there would be no right therefore to be enforced against him. Yet, at the same time, that would not induce me to say there might not be other contracts in which it would be of the utmost importance to the society that they should only be bound in the way in which they stipulated. If this was an actual policy issued in this imperfect form, the legal right would not be acquired under which they could have been sued in a court of law. The only question before me is, whether it is a contract to be enforced in equity, regard being had to the special powers of the deed. What Lord Wensleydale says is this—"Provisions which give to the directors discretionary powers of management do not

affect strangers, and the shareholders are bound by the exercise of the discretion, which they have consented to give. Other stipulations are directory merely, and do not constitute conditions to the exercise of the powers, but they form the subject of an action against the directors for the breach of their covenants expressed or implied in the deed. The great body of shareholders, for whose protection these limitations of authority are provided, cannot be affected, unless they are complied with. They can only act and contract through their directors, and the acts of the individual shareholders have no effect whatever on the company at large." No doubt the distinction is to be drawn between that which is apparent on the face of the deed which every contracting party must know, as here, that the policy is to be under seal, and what is only the result of certain meetings which are to take place in compliance with the forms of the deed, certain internal arrangements of the company, the compliance with which the contracting party has a right to assume, when he finds that the acts so done by the directors are within the scope and power of the directors. He is not bound to inquire whether meetings have been held and the like, because, if so, he would be bound to go on to inquire whether those meetings have been duly summoned and a variety of other matters, which would render it impossible for the society to carry on the business for which it was formed. After saying that, Lord Wensleydale comments upon a particular case at law—*Smith v. the Hull Plate Glass Company* (2). He says—"If there had been a special verdict, unless it had been stated that all the directors, or that a board of directors saw and sanctioned the purchase of each article, it would not have been sufficient to fix the company, unless the reasoning of Maule, J. is correct, that, if the directors carried on the business and allowed persons to act for them on the premises in ordering and receiving goods, the company at large would be fixed, as an ordinary partnership would be under the same circumstances. No doubt this position is quite correct, if the direc-

(2) 11 Com. B. Rep. 897; s.c. 21 Law J. Rep. (N.S.) C.P. 106.

tors are expressly or impliedly authorized by the deed, which depends upon the terms of it, to do so." That is all that it is important to read. Whatever power you can collect from the deed to be either expressly or impliedly vested in the directors, that power a person contracting is entitled to believe they can exercise on his behalf. And here, as it seems to me, is a very true construction of the 28th clause, referring to instruments in that settled form, and referring to contracts distinguished from those instruments. The 38th clause gives to the directors, where the deed is silent, discretionary powers of management, power to do everything which is necessary to carry on the business of the company. I find a contract executed, which is a reasonable contract, and within the exact scope and object of the society, a contract that they will do an act which the society was formed for carrying into effect, and a contract which this Court would hold that the directors were authorized to enter into and will hold the company liable upon. Accordingly, I hold in this case that the debt is established; if not established at law, it is established as a good equitable debt. A good deal of observation, no doubt, might arise with reference to the peculiar constitution of these companies. They differ very considerably from the case that was cited to me of a chartered company; and, of course without knowing what was laid before the shareholders in that case, and without knowing what powers of inspection they had, how they were informed, or rather, were capable of obtaining information on their own behalf with respect to the transactions which had taken place, one would have a great deal to consider before arriving at a conclusion, that if the act itself were unauthorized by the deed of the company, there could be an acquiescence, unless distinct, plain and clear notice, in the shape of a report or the like, was brought home to them. However, in this case, I do not think it is necessary to go into that part of the subject, because a contract has been made which will bind the company.

M.R. } HUTCHINSON v. WRIGHT.
April 19, 20, 22. }

Ship—Insurance—Mortgage.

Several shipowners established an association for the insurance of ships. The association and insurances were each confined to a year, commencing on the 20th of February at noon, and ceasing on the 20th of February following at noon, in each year. It had been so continued for several years. The plaintiff was the owner of 16-64ths of the ship "Boyne," and he insured his interest in the association for 500l. He was indebted to P, the owner of the remaining 48-64ths, in the sum of 432l. 10s., and the plaintiff, on P. requiring other security for the debt than a promissory note, made an absolute assignment of his 16-64ths to P, who though he gave no written undertaking, understood that the shares were to be re-transferred to the plaintiff on payment of the debt. Neither the plaintiff nor P. gave any notice of this transaction to the association. On the 27th of January 1856 the ship was lost; and upon a bill by the plaintiff to obtain payment of the insurance,—Held, that the claim was within the rules of the association; that he was the owner of the ship; that notwithstanding the assignment, his interest and the insurance continued; that he was liable for the debt though the ship was lost; that P. never incurred any risk; that the ship was sailed at the plaintiff's risk, and that he was entitled to the insurance-money.

The Eligible Insurance Association was established at North Shields for the mutual insurance of ships. It consisted of a number of persons who were owners of or interested in ships, and each member upon joining the association agreed to become liable to contribute to insure against the loss of any ship entered in the association, or according to the sum insured on the ship so lost. The association was continued from year to year, as from noon on the 20th of February in each year, and rules were drawn up for the government of the association. The 6th rule was, that ships lost or detained by the restraint of princes or powers, shall be liable to contribute five days after being so lost or detained; but ships sold shall be off risk from the date of the transfer, provided

notice in writing be given within ten days after such transfer; neglecting to do so, only to be off risk when such notice is given to the secretary; and ships stranded, but not totally lost, shall be free from risk of others, except fire and harbour risk, fifteen days after such event, and shall remain so until the day at noon on which they are got off the strand; and in case of the failure or insolvency of any member, the insurance shall cease six days after the date of such event, unless the assignees or other approved persons will guarantee, by written document, the payment of all average bills in arrear, and which may become due thereafter. No vessel which is mortgaged shall be insured, unless the mortgagee give a written guarantee, to the satisfaction of the committee, for payment of all demands on the said vessel.

Robert Westmoreland Hutchinson, the plaintiff, was the owner of 16-64ths of a vessel called "The Boyne." He insured his interest for 500*l.* in the association for a year, commencing on the 20th of February 1855. On the 18th of August 1855 the plaintiff, being indebted to the defendant Francis Rockcliffe Pierce (who was the owner of the remaining 48-64ths in the vessel) in the sum of 432*l.* 10*s.*, mortgaged his shares of the ship to him to secure the amount; but the mode of effecting this was by transferring the whole of the plaintiff's shares of the ship absolutely into the name of F. R. Pierce, it being understood between them that the transaction was to be considered as a mortgage only, and that the plaintiff was to be at liberty to redeem. F. R. Pierce, therefore, was registered as the sole owner of the ship, but no notice was ever sent to the secretary. On the 27th of January 1856 the ship was lost near Varna, and the plaintiff then claimed the benefit of the policy. The association, however, insisted that he was not the owner of the ship when it was lost, and that it was not insured with the association. The plaintiff therefore instituted this suit to obtain payment of what should be found due to him on the policy.

Mr. R. Palmer and *Mr. Southgate*, for the plaintiff.—The plaintiff's interest in the ship was insurable at the time of the

loss; he was in fact the owner, and as such liable to all losses as a member of the association. Though the transfer of the ship was in its form absolute, it was in effect nothing but an equitable mortgage; and as no notice of the transfer had been given to the association, the ship was never off risk within the meaning of the 6th rule: that rule could not refer to mortgages after the insurance was effected.—

Ladbroke v. Lee, 4 De Gex & Sm. 106.

Alston v. Campbell, 4 Bro. P.C. 476.

Taylor v. Dean, 22 Beav. 429.

Abbott on Shipping, 51, 92, 10th edit. 17 & 18 *Vict.* c. 104. (*Merchant Shipping*) ss. 100, 107.

Mr. Elderton, for F. R. Pierce, cited—
Sparkes v. Marshall, 2 Bing. N.C. 761; s.c. 3 Scott, 172; 5 Law J. Rep. (N.S.) C.P. 286.

Mr. Follett and *Mr. T. Stevens*, for the defendants, the managing committee of the association in 1855.—This was a legal question: it must depend much on the meaning of the word "owner." No equitable contract for insurance could in any way differ from a legal contract; it must be in writing. The plaintiff had transferred his interest in the ship; his name was not upon the register, and without that he could effect no insurance. By the late acts no trust could be noticed on the register. It was therefore absolutely necessary that a person insuring should have an interest in the ship, both at the time of insurance and loss. It was a mere contract of indemnity from loss; but as the plaintiff by his assignment ceased to be the owner of the ship he could not recover against the company.—

Law v. the Indisputable Assurance Society, 1 Kay & J. 223; s.c. 24 Law J. Rep. (N.S.) Chanc. 196.

M'Calmont v. Rankin, 2 De Gex, M. & G. 408; s.c. 22 Law J. Rep. (N.S.) Chanc. 554; 8 Hare, 1; 19 Law J. Rep. (N.S.) Chanc. 215.

Hughes v. Morris, 2 De Gex, M. & G. 349; 9 Hare, 636; 21 Law J. Rep. (N.S.) Chanc. 761.

Armstrong v. Armstrong, 21 Beav. 78; s.c. 24 Law J. Rep. (N.S.) Chanc. 659.

Sharp v. Taylor, 2 Phill. 801.
Mestaer v. Gillespie, 11 Ves. 621, 625.
Stockdale v. Dunlop, 6 Mee. & W. 224;
 s.c. 9 Law J. Rep. (N.S.) Exch. 83.
Rennie v. Young, ante, 753.
 35 Geo. 3. c. 63.
Dalby v. the India and London Life Assurance Company, 15 Com. B. Rep. 365; s.c. 24 Law J. Rep. (N.S.) C.P. 2.
Hamilton v. Mendes, 2 Burr. 1198.
The Sadlers Company v. Badcock, 2 Atk. 554.
Powles v. Innes, 11 Mee. & W. 10; s.c. 12 Law J. Rep. (N.S.) Exch. 163.
Le Cras v. Hughes, cited in *Camden v. Anderson*, 5 Term Rep. 709.
Robinson v. Gleadow, 2 Bing. N.C. 156.
Campbell v. Innes, 4 B. & Ald. 423.

Mr. R. Palmer, in reply.

April 22.—THE MASTER OF THE ROLLS.
 —The probable effect of the sixth rule, applying it to a ship sold would be, that no insurance could be recovered in respect of that ship, unless the insurance were duly transferred to the purchaser of the ship, and that if any new insurance was effected after the expiration of the existing policy, which lasted for one year, the insurance must be effected in the name of the purchaser of the ship, who must be a member of the association; but that the liability of the vendor to contribute to the loss of other ships was to continue till he had given notice of such transfer. There is an error in the concluding words of the rule; it ought to be "guarantie of the amount of the vessel." Does then the insurance cease as soon as the mortgage is made, unless the mortgagee gives the required guarantie? That certainly is not the effect of the rule. The meaning is not that the insurance shall cease, and that the owner of the ship shall not have the benefit of his insurance, unless the person to whom he mortgages it shall also enter into security, and give a double security to the association for the benefit of the other underwriters; but it merely means, that if a ship is at the time when the insurance is made actually in mortgage, then all persons who have any interest in the

ship, not merely the mortgagor, the owner of the ship, but also the mortgagee, shall give a guarantie to the association for the payment of all the demands which may be made on the vessel. Does then the form of the register, being that of an absolute sale, affect the question? I think not. Though it was made in that form it was not a sale, and the evidence satisfies me that there was no sale of the ship either conditional or actual, and that there was nothing more than a mortgage of the ship as between the plaintiff and the defendant F. R. Pierce; and that when the money was repaid the plaintiff was entitled to have the ship retransferred to him. There is nothing in this rule which insists on the form of the registry governing or controlling the true character of the transaction. The circumstance of the transaction being a mortgage does govern the question, but with respect to the association, it applies only to a ship in mortgage at the time of the insurance being effected; but it does not stop or conclude the insurance of a ship which has been mortgaged after the insurance was effected. With respect to the form of the registry, it is argued that by the Registry Act the interest of the plaintiff from August 1855, the date of the mortgage, down to the time when the loss occurred, was such as to prevent him from insuring the vessel; that both at law and in equity F. R. Pierce was, under the statute, the real owner of the vessel; that the plaintiff, therefore, had no insurable interest, and that he was not entitled to recover against the underwriters. Assuming the construction to be correct, without giving any opinion, I think that the consequence contended for by the defendants does not follow. When the insurance was effected by the plaintiff, he was the real owner of the ship, and according to every principle he was entitled to effect an insurance. It was contended that this was a contract of indemnity; in that I concur, and upon this assumption it follows that, in order to give a right to recover for the loss, there must have been a *bond fide* loss, and the evidence satisfies me that a *bond fide* loss has been sustained by the plaintiff. The loss does not fall on the defendant F. R. Pierce; he is entitled to recover the amount of the debt for which the vessel

is mortgaged against the plaintiff, and the entire loss arising from the destruction of the vessel falls on the plaintiff and on no one else. I admit, if the transaction had been a sale to Pierce, that independently of the question under the 6th rule, the plaintiff could not have recovered, because he would have sustained no loss; it would have fallen on Pierce, and he could not have recovered, because the benefit of the insurance had not been assigned to him. But when the loss has really been sustained by the person effecting the insurance, can it be reasonably contended, that because, for reasons of state policy, the beneficial owner of the ship shall not be treated as such in any court of law or equity unless his name is entered on the register, therefore on this account the underwriters who have accepted the risk are not to make good any loss which may occur? Their argument is, that if through inadvertence or otherwise the name of the owner is not entered on the register at the time the loss is actually incurred, although they entered into a valid contract to indemnify the insured against loss, and although that loss has been sustained; yet they are relieved from that contract by force of the statute, because the true owner's name no longer remains as the registered owner of the vessel. Before I could assent to that construction, I should wish to find more express provision in the statute. There is no such provision; and is it to be contended that the statute in a case of this sort is to be construed strictly, and that the insurers are to be entitled to get rid of their liability, simply because the person claiming is not named in the register? The cases all establish that the Court does not look at little technical details and questions as to whether the person exists in one character or another, but whether, in fact, the person whom they had indemnified against the loss has really *bonâ fide* sustained the loss. That is the effect of all the cases, as I read them. In this case, it is clearly and distinctly proved that the loss fell on the plaintiff. The Court is bound to give effect to this contract, and it cannot relieve these underwriters from it upon technical grounds, drawn from analogy to the statute, when the reason for which the statute was enacted does not

apply. I must therefore declare, that the plaintiff is entitled to be paid the insurance out of the monies and property of the association, or by a contribution of the members, according to the rules, but subject to such deductions as the plaintiff, as a member of the association, was bound to make in respect of averages and losses of ships of other members, and the defendants, the committee, with the consent of the plaintiff, must pay the amount of such balance to F. R. Pierce, out of the money or property of the association, or draw bills, or otherwise procure the contribution of the members for that purpose, according to the customary mode of payment in use in the association. There must also be an account taken of the monies, &c., the property of the association in the possession of the defendants, the committee, with a declaration that the defendants are bound to raise the amount due to the plaintiff, and his costs; but the costs of F. R. Pierce must be added to his mortgage.

STUART, V.C.

WATSON, B.

May 26, 28;

June 5;

July 28.

THE ATTORNEY GENERAL
v. HANMER AND OTHERS.

Letters Patent—Construction—"Waste" of Manor—Information, Costs of as against Crown—Stat. 18 & 19 Vict. c. 90.—Jurisdiction of Court of Equity.

Grant by letters patent by the Crown as lord of the manor of E, of "all those coal-mines found, or to be found, within the commons, waste grounds, or marshes within the said lordship of E," &c. with a proviso that the grant should be construed strictly against the Crown, and most strictly and beneficially for the grantees,—Held, to pass coal lying under the foreshore of the estuary of the river Dee, between high and low-water marks, and forming part of the manor of E.

Where an information by the Attorney General is dismissed, the Court has jurisdiction to dismiss it with costs.

This was an information, at the suit of the Attorney General, praying that the right of Her Majesty to the coals under a

part of the sea-shore or estuary of the river Dee between high and low-water marks, called "White Sands," might be established and declared, and that it might be declared that the grant in certain letters patent did not comprise the coal under "White Sands" at the time of the grant of the said letters patent.

The following were the facts of the case :—The Crown, as lord of the manor of Englefield, in the county of Flint, was entitled to the land lying between high and low-water marks called "White Sands," as within and parcel of the said manor of Englefield, and to the coal thereunder.

By letters patent, bearing date in February of the twelfth year of Charles I., his Majesty made a grant of coal within land of this manor (amongst many other manors, land and franchises) to Francis Braddock and Christopher Kingscote in fee, in these words :—"Necnon omnes illos carbones et mineras carbonum, inventos aut inveniendos infra communias, terras vastas, sive mariscos, infra dominium de Englefield, in comitatu nostro Flint, cum plenâ libertate, potestate et authoritate, fodere, deprimere, et experire puteos, et aperire dictas mineras in omnibus locis convenientibus, infra dictas communias, terras vastas, et mariscos, ad acquirendum carbones infra dominium prædictum."

The letters patent contained an exception and a provision, of which the following is a copy :—"except always, nevertheless, out of this, and to ourselves, our heirs and successors wholly reserved, all arrears of rents for the said premises now due and depending, and also all advowsons, donations, free dispositions, and rights of patronage of rectories, churches, vicarages, chapels, and other ecclesiastical benefices whatsoever, to the premises, or to any or either of them, in anywise belonging, appertaining, incident or appendant, and all knight's fees, wards and marriages of the premises, and all services for or in respect of the same; and also except all royal mines of gold and silver within or upon the premises being or to be found, and all prerogatives to the same mines belonging. And further, we will, and by these presents for ourselves, our heirs and successors do grant to the aforesaid Francis Braddock and Christopher Kingscote, their heirs and

assigns, that these our letters patent, or the inrolment thereof, shall be in and by all things firm, valid, good, sufficient and effectual in the law, and shall be expounded and construed strictly towards and against us, our heirs and successors, and most strictly and beneficially for the aforesaid Francis Braddock and Christopher Kingscote, their heirs and assigns, as well in all our courts as elsewhere wheresoever within our kingdom of England, without any confirmation, licences or tolerations to be procured and obtained from us, our heirs and successors; notwithstanding the ill-naming or not naming, or the wrong reciting the aforesaid manors, granges, messuages, lands, tenements and hereditaments, and other the premises above by these presents before granted or mentioned to be granted, or any part or parcel thereof; and notwithstanding the not finding or ill-finding of any office or offices, or inquisition or inquisitions of the premises, or of any parcel thereof, by which our title ought to be found before the making of these our letters patent; and notwithstanding any defect or defects in not reciting or ill-reciting any demise or grant, demises or grants, gift or gifts of or concerning the premises, or of or concerning any part or parcel thereof, or any of the profits thereof, being of record or not of record, heretofore made; and notwithstanding the ill naming or not rightly naming, or not naming any city, town, hamlet, place, parish or county in which the premises or any parcel thereof are to be; and notwithstanding any defect or defects in wrong naming, or not naming, or not rightly naming of any tenant, farmer or occupier of the premises, or of any parcel thereof; and notwithstanding any variation, discrepancy or difference in any matter, name or form between these our letters patent and any particular, certificate or survey of the premises, or of any parcel thereof, heretofore made, or between these our letters patent, or any other letters patent of the premises, or any parcel thereof, heretofore made, or between these our letters patent and any record or records, account or accounts, in anywise touching or concerning the premises aforesaid, or any parcel thereof; and notwithstanding any defect or defects in not mentioning, or not rightly or ill mention-

ing, the true yearly value of the premises or of any part thereof, or the true yearly rents reserved out of, in or upon the premises, or any parcel thereof, specified in any particular survey or account heretofore made or hereafter to be made of the premises, or any or either of them; and notwithstanding that the same premises, or any the profits thereof, are or at any time have been of greater yearly value than specified in these letters patent, or any particulars of the premises; and notwithstanding that of the estate or title of us or any of our progenitors to have the same premises or any part thereof, or of the manner or ways in which the same premises came to our hands, or to the hands of any of our progenitors, or of any part thereof, mention be not made in these letters patent; and notwithstanding the statute made in parliament in the eighteenth year of our Lord Henry VI. formerly King of England; and notwithstanding the statute made in parliament in the first year of the reign of Lord Henry IV. late King of England; and notwithstanding any defects in not naming or not rightly naming the nature, kind, species, quantity or quality of the premises, or of any parcel of them, or of any person or persons who before us was or were seised of the premises, or of any one or more thereof, or any estate tail or other estate made to us, or any of our progenitors or ancestors, or any indenture or annexation by our late most dear father (of happy memory), or any other of our progenitors or ancestors, kings and queens of England, before now made, or any convention, agreement or covenant concerning the same premises, or any part thereof, in anywise notwithstanding; and notwithstanding that the same premises by our said father, before our accession to our Crown, were in any way, or as to any part thereof, granted to us and our heirs, kings of England, or to us and our heirs male, kings of England, or us and any other person whomsoever; and notwithstanding that of any other grant of the premises, or of any parcel thereof, mention is not made, or true mention is not made, by these presents; and notwithstanding that the premises, or either of them are or were formerly parcel of or annexed to any castle or honour, or were

heretofore or are now annexed or united to any castle or honour; and notwithstanding any other cause or matter whatsoever. Also, we by these presents do grant to the aforesaid Francis Braddock and Christopher Kingscote, their heirs and assigns, that they may or shall have these letters patent as well under our Great Seal of England as under the seal of our Duchy of Lancaster, and the seal of our county palatine of Lancaster, and the seal of our counties palatine of Chester and Flint, made and sealed in due manner, without fine, into our hanaper," &c.

A demise to Lady Hanmer in 1625 of the same coal-mines was referred to in the letters patent as descriptive of the coals in question, and the lease was in English and translated into Latin in the letters patent. The operative words were: "All those coals and coal-mines found or to be found within the commons, waste grounds or marishes within the said lordship of Englefield, in the county of Flint, with full liberty, power and authority to dig and search for and sink pits, and open the said mines, in all places convenient within the said commons, waste grounds and marishes, for getting of coal within the lordship aforesaid."

The question upon the information turned on the true construction of the letters patent, and that question was, whether the coals under the foreshore or land between high and low-water marks, called "White Sands," and which was admitted to form part of the manor of Englefield, passed under these letters patent.

The Solicitor General, Mr. W. M. James and Mr. Hanson, appeared in support of the information.

Kinglake, Serj., Mr. Bacon, Mr. Malins, Mr. G. M. Giffard, Mr. E. F. Smith and Mr. Barnard, appeared for the different defendants.

The following authorities were referred to:—

- Scrutton v. Brown*, 4 B. & C. 485.
- Calmady v. Rowe*, 6 Com. B. Rep. 861.
- Blundell v. Catterell*, 5 B. & Ald. 268.
- The Duke of Beaufort v. the Mayor, &c. of Swansea*, 3 Exch. Rep. 413.
- Jack v. M'Intyre*, 12 Cl. & F. 151.

The Irish Society v. the Bishop of Derry and Raphoe, Ibid. 641.
Stat. 2 & 3 Will. 4. c. 100. s. 3.

June 5.—WATSON, B.—[After stating the facts, and the question upon the information as set forth above, proceeded as follows.]—The Crown contended that the coals did not pass by the letters patent. The defendants asserted the affirmative. It is not a grant by the Crown of its prerogative right to the foreshore, but a grant of coals within and parcel of the manor of Englefield. In order to ascertain the effect of this deed, it is necessary to inquire, first, are there apt words to pass the coals under White Sands? The words of the grant are, "all coals under the commons, waste grounds or marishes." It is not necessary here to put a construction on the words "commons" or "marishes," for it appears to me to be clear that the word "waste" is sufficient to pass the foreshore or the coals thereunder. The word "waste" means desolate or uncultivated ground, land unoccupied, or that lies in commons. This is the plain and common acceptance of the word, and, undoubtedly land between high and low watermarks falls within this signification. It lies open, desolate, unoccupied, uncultivated; and so Bayley, J., in delivering his judgment in *Scrutton v. Brown*, calls the land between high and low watermarks "wastes." Again, in the description of lands or manors, the terms "lord's waste," or "waste of the manors," are well known. The large open commons within and parcel of the manor over which rights of common or other commonable rights are exercised, are "wastes" of the manor. Moors, also, are strips of unoccupied land within the manor. The right to strips of land by the side of highways is not unfrequently the subject of litigation between the adjoining landowners and the lord claiming them as "wastes of the manor." The true meaning of "wastes," or "waste lands," or "waste grounds of the manor," is the open, uncultivated and unoccupied lands parcel of the manor, or open lands parcel of the manor other than the demesne lands of the manor. Lord Hale says, that the main sea is the waste and demesne of the kings of England, and the king is the owner of

that great waste the sea. It is, therefore, impossible to say, that, as the sea-shore is waste, that word "waste" is not an apt word to pass the coals under this foreshore, being parcel of the manor; and as the foreshore is waste, and waste of the manor, it seems that there is no more appropriate word in a grant like the present. It is argued, on the part of the Crown, that the proper description of the foreshore is—"littus maris, marina, or warrena," and no doubt that is so; but it is equally clear the Crown might alienate the foreshore by other words if it were the apparent intention to be collected from the grant itself or in an ancient grant constructed by user—*The Duke of Beaufort v. the Mayor of Swansea, Calmady v. Rowe*. This is not a grant by the Crown of its prerogative right, but a grant by the lord of the manor of the coals under the wastes of the manor. Certainly, very different words might be sufficient in dealing with the wastes of a manor than in a direct grant from the Crown. The words in these letters patent being sufficient to pass these coals, a second question arises, viz., is it to be collected from the letters patent that it was the intention of the grantors that the coals under this foreshore should pass? This intention is to be collected from the letters patent. At the time of the grant the coals under the copyholds as demesne lands—*Vis. Abr. tit. 'Manor,' c. 2*; and also all the coals under the waste grounds of the manor were vested in the Crown as lord of the manor of Englefield, as parcel of that manor. The Crown then grants all the coal and coal-mines found or to be found within the common, waste grounds, or marshes, without any exception, which would pass any coal to be found in any part of the manor under commons, waste grounds or marshes. There is a power to enter such lands "to get" or "for getting" coals within the lordship. These last words would not enlarge the extent of the grant so as to render it a grant of coal not under the commons, wastes or marshes, but it shews that the right to get coals was to be co-extensive with the manor. There is nothing to be collected from the letters patent to shew that the grant should not extend to coals under ground between high and low watermarks, and no reason can be

assigned why it should be so. On the other hand, it would seem strange that the Crown should retain these coals where the power of getting them would be most difficult and expensive, if not impossible, and the extent of the coals granted on the part of the grantee would shift as the sea receded from or encroached upon the lands—*The King v. Lord Yarborough* (1), *Scrutton v. Brown*. Considering that the Crown did not reserve or except out of this general grant, it is abundantly clear it was the intention of the Crown to pass the coal under the foreshore. It was contended, on the part of the Crown, that the words of the grant ought to be read, "all coals under commons, whether waste grounds or marshes," and that the grant was accordingly to be confined to lands over which commonable rights were or might be exercised. Indeed, one of the counsel for the Crown urged that we were to find the interpretation of this grant in the words of the Statute of Merton, which is confined to approvement by the lord against common of pasture only, not against other common rights. Supposing such a construction to be adopted, it is putting too narrow a construction on the word "commons," for that word means as often lands where rights of common are exercised, as common uninclosed open land, where there are no commonable rights. Taking the word in this confined sense, over land between high and low watermarks, easements and privileges are exercised in many manors bordering on the sea in many parts of England. Thus, freeholders by prescription, and copyholders against the lord by custom, have a right to get sea-weed for manure for their lands, and to get stone and sand from the foreshore to repair their buildings and walls. Public ways pass over it, and it would be a valid custom for the inhabitants of a villa within the manor to bathe in the sea and go over the foreshore. These rights are analogous to, although not, strictly speaking, commonable, rights—see the judgment of Holroyd, J., in *Blundell v. Catterell*. But the true answer to this and other arguments urged on the part of the Crown is, that on these letters patent

full effect must be given to all the words, and in doing so, the true construction of this grant is, that the coals under the common, the coals under the waste ground, and the coals under the marshes, within and parcel of the manor pass thereby; to hold otherwise would be to depart from the rule of construction expressed in the letters patent, that the deed should be construed most favourably to the grantee. The case of *Doe d. Marwood v. Hammond* (2) was cited for the Crown, where Maule, J. held, upon a charter produced in that case, that, by commons and waste places, the king did not grant the soil of the foreshore between high and low watermarks in the river Tees, which was quite clear from the context, as the grant contained a grant of easement over that land, which negatived the intention that the soil itself should pass. It does not seem consequential reasoning that, because in one deed the intention shewed the land between high and low watermarks did not pass, therefore, such words will not pass coal under the sea-shore, being waste of the manor, in any other deed. I do not consider it necessary to go through any of the documents, such as modern inclosure acts for inclosing land with herbage, and other documents adverted to in the argument, as they throw no light on the mode of construing this grant, certainly none in favour of the Crown. I have not adverted to the parol evidence of user, as I think the letters patent prove the right on the part of the defendant. I am, therefore, of opinion that the coals under White Sands did pass, because there are apt words and a clear intention on the face of the letters patent leading to that conclusion.

STUART, V.C. said it had been admitted, on behalf of the Crown, that the soil between high and low watermarks was parcel of the manor. Being necessarily uncultivated land, in ordinary language, it would fairly be described as "waste." Bayley, J., speaking in Court, and using the language of a Judge to describe the soil between high and low watermarks, called it "waste." That would seem to render inevitable the conclusion that the

(1) 3 B. & C. 91; a.c. 2 Law J. Rep. K.B. 215.

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(2) Not reported.

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Crown, in granting the right to work for coal and the coal-mines under the "waste" of this lordship, without words excepting the soil between high and low watermarks, must be considered to have passed the right to work for coal under soil between high and low watermarks. But supposing that the question were doubtful—supposing that, on a narrow view of the language of the grant, and putting a strict construction upon it, a doubt was raised, still, the Crown had declared, in the letters patent, that if there should be a doubt, that doubt should be resolved against the Crown. Concurring, as he did, in the opinion which had been delivered by Mr. Baron Watson, it was very clearly his duty to dismiss the information. Considering the language of the grant, and the ample language in which the bounty of the Crown to this family was therein expressed, it was to be regretted that the Crown should have deemed it expedient that this expensive litigation should be commenced. The question having, however, been decided against the Crown, it only remained for him to consider who ought to bear the costs. In the case of *Kane v. Reynolds* (3), he had taken occasion to observe that the rule which used to prevail at law, with reference to the costs of the Crown, viz., that the Crown ought neither to pay nor receive costs, did not prevail in this court. That had been, in fact, decided in *The Attorney General v. the Earl of Ashburnham* (4), where the Crown was held entitled to receive costs: and it appeared desirable that such a rule should not prevail, for nothing appeared more contrary to justice than that the Crown, in its own court, should have the means of conducting a litigation on terms, with reference to the expense of it, more favourable than those on which it could be conducted by any subject of the Crown. He had, therefore, come to the conclusion that it was but common justice to apply in this case, which was that of a claim urged unsuccessfully in an expensive litigation, the ordinary rule of the Court, viz., that where a claim was advanced in this court, and was found to be of a character which ought not to prevail, the claim fail-

ing, the claimant must pay the costs. He was of opinion, therefore, that this information must be dismissed, with costs.

At a later hour of the day—

The Solicitor General was heard against the Vice Chancellor's decision as to the payment of costs. He cited—

The Attorney General v. the Earl of Ashburnham, 1 Sim. & S. 394.

The Lord Advocate v. Lord Douglas, 9 Cl. & F. 173.

The Attorney General v. the Corporation of London, 2 Mac. & Gor. 247; s. c. 19 Law J. Rep. (N.S.) Chanc. 314.

Smith v. Lord Stair, 2 H.L. Cas. 807: and submitted that the rule that the Crown should not pay or receive costs was well established, and had not been affected by the statute, 18 & 19 Vict. c. 90.

Mr. E. F. Smith submitted, that the statute did apply, at least, so far as the defendants for whom he appeared were concerned, who had not been made parties to the suit until after the act had been passed. He cited—

Long v. Burton, 2 Atk. 218.

Plowden v. Thorpe, West's App. Cas. 42.

July 23.—STUART, V.C.—The information in this case was dismissed, and justice seemed to me to require that it should be dismissed, with costs. In the case of *The Attorney General v. Ashburnham* the usual course, according to which the Attorney General neither received nor paid costs, was departed from. The object of this information was to recover from the defendants property which they had long enjoyed, as included in a grant from the Crown, with other property which the defendant Sir John Hanmer and his family have enjoyed for more than two centuries. After a long and expensive litigation, the Court has decided against the claim of the informant, and in favour of the defendants, whose rights were attacked. To leave the successful defendants to bear the heavy costs of an expensive litigation with so formidable an antagonist as the Attorney General would be a manifest injustice. But, as an order dismissing an information

(3) 2 Sm. & Gif. 340.

(4) 1 Sim. & S. 394.

with costs is unusual, the matter stood over on the question of costs. That question has since been re-argued by the Solicitor General, who referred to several authorities and to the recent statute, 18 & 19 Vict. c. 90, to shew that the defendants, although successful in the litigation, should still be left to bear the burthen of the costs. As to the authorities thus cited, so far as they consisted of cases decided in the House of Lords, they are disposed of by Lord Cottenham, in the case of *The Attorney General v. the Corporation of London*. In the most important of these cases Lord Cottenham himself had, by his advice, guided the decision of the House of Lords, yet in the case of *The Attorney General v. the Corporation of London*, Lord Cottenham, with the decision of the House of Lords before him, used this language: "It is said that costs are not to be given because there is a rule, or at least a practice, that the Attorney General neither receives nor pays costs. Such a rule, however, although it has no doubt been recognized by the House of Lords, seems to me to be too vague to be generally acted upon." Again, after having taken time to refer to the authorities, Lord Cottenham says, "Although there may be and has been a generally-received opinion, a sort of saying, that the Attorney General neither pays nor receives costs, yet that is open to a variety of exceptions, and there are very many cases to be found in which that rule has not been acted upon. There does not, however, appear to have been a very general practice or understanding on the subject." The authority of Lord Cottenham is, therefore, clear against the existence of any such rule. If there be no such rule, it would follow that the Court must deal with the question of costs, as payable to or receivable by the Attorney General, upon the ordinary principles of justice; subject only to the observation of Lord Cottenham, that the saying or general opinion so often acted upon should not be lost sight of, for he says that "nothing would be more unjust than, in a contest in which the Attorney General could not be made to pay costs, that he should be, under any circumstances, entitled to receive costs, for it is not putting the parties at all upon equal terms." Lord Cottenham, having satisfied himself that

there was no general rule, ordered that the Attorney General should receive his costs from the defendant. The decision of Sir J. Leach, in the case of *The Attorney General v. Ashburnham*, was to the same effect, and he also held that there was no general rule on the subject. The recent statute of the 18 & 19 Vict. c. 90. recognizes no such rule. The words of the preamble are not that, heretofore, in all proceedings instituted on behalf of the Crown, no costs are paid by the Crown to the subject. On the contrary, the words are, "In divers proceedings instituted by or on behalf of the Crown against the Queen's subjects, no costs are paid by the Crown to the subject." And the 2nd section not only is silent as to the existence of any general rule, but is framed as seeking to exclude all doubt by a peremptory enactment. Instead of leaving the costs in the discretion of the Court, as matter of separate adjudication, the language is imperative, and seems to give an absolute title to the costs against the Attorney General in all cases in which the information is dismissed. The words are, "If judgment shall be given against the Crown the defendant shall be entitled to recover costs, in like manner and subject to the same rules and provisions as though such proceeding had been between subject and subject." And the great object of the statute is to authorize the Lords of the Treasury to defray such costs out of funds to be provided by parliament for the purpose. But it does not authorize execution against the Lords of the Treasury, or any person other than the informant. It was argued that the statute is not retrospective, and that unless brought within the statute, which provided a fund for payment of costs, there were no means by which the decree for payment of costs by the Attorney General could be made effectual. It was said that the Court had never ordered the Attorney General to pay costs, because there was no public fund applicable, and he could not be made to pay them personally. This argument is a mere repetition of the old notion that there is a rule upon the subject; but, as it has been authoritatively decided that there is no rule, the matter must be disposed of on some intelligible principle consistent with justice and common sense. The public

officer who filed this information on behalf of the Crown might clearly, according to the decided cases, have succeeded in obtaining a decree that the defendants should pay costs to him. It is impossible to say that he, being a public officer, could have retained these costs in his own pocket. It is quite as impossible to suppose that, in a suit instituted on behalf of the public, the expenditure of money, which was necessary to bring the cause to a hearing, was an expenditure of the private monies of the Attorney General. The same source from which the expenditure for a public purpose was defrayed in order to bring this cause to a hearing—that same source to which the costs, if awarded in favour of the informant, must have been conveyed—must be considered accessible to the informant for defraying all expenses of every kind to which he may be held liable. If, as must be admitted, the law officer of the Crown, had he sued as a private individual in this case, ought in justice to have been condemned to pay the costs, the same right of the defendants to recover their costs, when he sues in a public character, cannot be refused without a violation of justice. If the Attorney General had sued by a relator, it cannot be said that the relator would not have been compelled to pay the costs. Lord Redesdale says, "Where a relator has been named, it has been done through the tenderness of the officers of the Crown towards the defendant, that the Court might award costs against the relator if the suit should appear to be improperly instituted." In the present case the suit was instituted without any relator, and it might be thought that the want of that tenderness on the part of the officers of the Crown arose from inadvertence. But the result of the litigation is, that the defendants, whose property, enjoyed under a grant from the Crown itself, was attacked by this information, if they are left to bear the heavy burthen of the costs of the litigation, will be seriously injured as to their property, and be deprived of that to which it is not disputed that they are in justice entitled, but which it is contended they must not have by reason of a supposed technical rule. It seems irreconcilable with any principle of justice to deprive these defendants of their costs. Sir W. Blackstone,

speaking of the course of justice as administered in England between the Crown and its subjects, says, "Injuries to the rights of property can scarcely be committed by the Crown without the intervention of its officers; for whom the law in matters of right entertains no respect or delicacy, but furnishes various methods of detecting the error or misconduct of those agents by whom the sovereign has been deceived and induced to do a temporary injustice" (5). If, therefore, this is a case in which the defendants have a right to recover their costs, the duty of the Court is to endeavour that what simple justice requires should not fail. The decree must, therefore, be, that the information be dismissed, with costs.

KINDERSLEY, V.C. } SHARMAN v. RUDD.
June 10.

Executors—Right of Retainer—Statute of Limitations.

After a decree for taking accounts in an administration suit, one of several executors may insist upon his right of retainer in respect of a debt due more than six years before the testator's death, notwithstanding the Statute of Limitations.

This was a suit for the administration of a testator's estate, and the usual decree for accounts was made on the 22nd of November 1856. The defendants were the executors of the testator, one of whom, Mark Sharman, was a partner with the testator in his business. At the date of the decree the executors had money of the testator's in their hands, and M. Sharman, subsequently to the decree, and while the accounts were being taken in the Judge's chambers, claimed to retain certain sums of money due to him in respect of the partnership accounts, and also another sum due upon a separate private account between him and the testator. The balance claimed, in respect of the private account, was composed of sums advanced for the testator more than six years before his death, and also of other sums advanced at a later period. The claim of the executor in respect of those sums advanced on the pri-

(5) 3 Black. Com. 255.

vate account, more than six years before the death, was opposed on the ground of its being barred by the Statute of Limitations, and that question now came on for argument.

Mr. Baily and Mr. H. Clarke, in support of the claim, contended that the debt due to the executor was not barred by the statute, and that he was entitled to retain it, notwithstanding the decree had been made. The executor had not treated this as a debt existing at the time the accounts were taken, but he claimed to retain it out of the assets in his hands. An executor had full right to waive the statute in respect of any creditors of the testator, and he could not have the less right to do so on his own account. They cited—

Stahlschmidt v. Lett, 1 Sm. & G. 415.

Hill v. Walker, 4 Kay & J. 166.

Mr. Shapter and Mr. Dickinson, for the residuary legatee, submitted that the right to retain could not be claimed after decree. An executor had no right, after decree, to waive the Statute of Limitations, either on his own account or in respect of a debt due to a stranger. He was, therefore, bound to plead the statute and was himself barred—

Sheuen v. Vanderhorst, 1 Russ. & M. 347.

Sneesby v. Thorn, 7 De Gex, M. & G. 399.

Cole v. Miles, 10 Hare, 179

Mr. Toller appeared for the other executors, and neither assented to nor dissented from the claim made by M. Sharman.

KINDERSLEY, V.C. — The mere decree does not prevent an executor from insisting upon his right of retainer, although there is nothing said about it in the answer; and I see no reason why one executor of several may not exercise his right of retainer. This executor did not carry in his claim as an existing debt at the time the accounts were taken, therefore no question arises of his having waived his right to retain. My opinion, therefore, is, that the executor has a right to retain the debt, notwithstanding the Statute of Limitations.

M.R. }
May 5. } BOLTON v. STANNARD.

Executor — Implied Power of Sale — Mortgage—Foreclosure—Creditors' Suit.

An implied power of sale in the executor of a mortgagor, arising from a direction in the will to pay debts, will not enable the Court to direct the sale of the mortgaged estate if it cannot make a decree for foreclosure.

Such a decree can only be made in a creditors' suit.

An executrix directed to pay debts cannot be considered to represent third parties within the meaning of the 15 & 16 Vict. c. 86.

The bill in this case was filed to obtain a foreclosure of a copyhold messuage and lands, held of the manor of Russells, in Fakenham, in the county of Suffolk, which, by a surrender, dated the 29th of April 1829, were conditionally surrendered, by John Stannard to Jane Peach Bolton, her heirs and assigns, to secure the repayment of 250*l.* and interest.

After the decease of Mrs. Bolton in 1852, her interest in the messuage and lands became vested in the plaintiffs Joseph Sadler Bolton and Martin Chigwin Hall, and on the 5th of February 1857 they were admitted as tenants to the mortgaged premises, according to the form of the conditional surrender.

John Stannard, by his will, dated the 8th of March 1848, directed the payment of his debts, and testamentary and funeral expenses, and gave and bequeathed to his wife Dinah Stannard the mortgaged premises for her life, and at her death to be divided amongst his children, share and share alike, and he appointed his wife the sole executrix of his will.

The testator died soon after making his will; his wife paid his debts, funeral and testamentary expenses, but she omitted to pay the 250*l.* and interest due upon the mortgage.

There had been eight children of the mortgagor: two had died in his lifetime. Those living at his decease were, James, his eldest son and heir-at-law, Sarah Ann, John, Rosanna, William and Henry; they were all made parties to the bill. The two

elder children had attained twenty-one; the four younger children were infants.

James Stannard some years since sailed for Australia; he had not since returned, and he had never been served with a copy of the bill.

The bill stated, that James Stannard, the eldest son, was also the customary heir of the testator; but upon the evidence, the youngest son was stated to be the heir according to the custom.

Mr. Marten, for the plaintiffs.—The direction in the will of the mortgagor to pay his debts, gave the executrix an implied power of sale; she represented her absent son, and could therefore make a good title to the estate, as she might be ordered to convey it to a purchaser under the 15 & 16 Vict. c. 86. s. 42. rule 9, which enacted, "that in all suits concerning real or personal estate which is vested in trustees under a will, settlement or otherwise, such trustees shall represent the persons beneficially entitled under the trust." On the implied power he cited—

Robinson v. Lowater, 17 Beav. 592; s. c. 23 Law J. Rep. (n.s.) Chanc. 641; 5 De Gex, M. & G. 272.

Wrigley v. Sykes, 21 Beav. 337; s. c. 25 Law J. Rep. (n.s.) Chanc. 458.

On the representative character of the executrix he referred to—

Sale v. Kitson, 3 De Gex, M. & G. 119; s. c. 22 Law J. Rep. (n.s.) Chanc. 344.

Fleming v. Buchanan, 3 De Gex, M. & G. 976; s. c. 22 Law J. Rep. (n.s.) Chanc. 886.

3 & 4 Will. 4. c. 104.

Mr. J. H. Taylor, for the infant defendants.

The widow and other defendants did not appear.

THE MASTER OF THE ROLLS.—The executrix is not a trustee within the 15 & 16 Vict. c. 86. s. 42. r. 9, in whom an estate is vested, but she has a power of sale, and the plaintiffs may take advantage of it in a creditors' suit. The suit originally asked for a foreclosure. I will now give the plaintiffs a general liberty to amend the bill; but if the defendants resist the decree, they must be heard next term; before, however, I can order a sale there must be advertisements for creditors to come in. I will, however, now make a decree foreclosing the estate against all the defendants except James Stannard.

The following cases will be reported in the Volume for 1859 :—

ROLLS COURT.

FEATHERSTONHAUGH v. TURNER.

GREAVES v. WILSON.

In re NEWBERRY.

WHITE v. WAKLEY.

VICE CHANCELLOR KINDERSLEY'S COURT.

ATKINSON v. SMITH.

VICE CHANCELLOR STUART'S COURT.

COOK v. STURGIS.

THE COLLINS COMPANY v. REEVES.

VINT v. PADGETT.

VICE CHANCELLOR WOOD'S COURT.

WARREN v. RUDALL.

REPORTS
OF
Cases in Bankruptcy,

BEFORE THE LORDS JUSTICES AND BEFORE THE FULL COURT OF APPEAL.

BY
SAMUEL VALLIS BONE, Esq.
BARRISTER-AT-LAW.

FROM MICHAELMAS TERM 1857 TO MICHAELMAS TERM 1858.

CASES IN BANKRUPTCY.

COMMENCING WITH

MICHAELMAS TERM, 21 VICTORIÆ.

FULL COURT
OF
APPEAL.
Dec. 15.

{ *In re* WELSH POTOSI LEAD
AND COPPER MINING COM-
PANY (*limited*), *ex parte*
LOFTHOUSE AND WHIT-
WORTH.*

*Company—19 & 20 Vict. c. 47—Winding
up—Contributory—Transfer of Shares.*

A. B. was the holder of shares in a mining company established upon the cost-book principle. In October 1856 it was determined by the shareholders to register the company as "limited," under the 19 & 20 Vict. c. 47, with a view to its being wound up. A delay however occurred, which prevented the registration of the company until June 1857. In January 1857 A. B. sold his shares, and the transfer was completed, A. B.'s name not being returned as a shareholder on the company's being registered in June 1857. In July the company was ordered to be wound up, and Mr. Commissioner Fane placed A. B.'s name on the list of contributories; but it was held, on appeal, that the name was improperly placed on the list.

This was an appeal, by Messrs. Loft-house and Whitworth, from the decision of Mr. Commissioner Fane, placing their names on the list of contributories of the

above-named company. The company was established in September 1853, upon the cost-book principle, and by the prospectus it was stated that the liability was limited, and that the capital was to consist of 100,000*l.*, in 20,000 shares of 5*l.* each. By the 27th rule of the company it was provided, "that upon any requisition being made to the purser by the holder of any certificate of shares, and upon such certificate being registered in the cost-book in the name of such holder, the purser should make an entry in the cost-book of such registration against the name of the person (if any) who should appear therein as the theretofore registered holder of the shares specified in such certificate, and the interest of such person in such shares should thereupon cease, and he or she should be thereupon freed from all future liabilities in respect thereof."

The petitioners became possessed at different times of 655 shares, and the whole amount was paid upon them. In May 1854 the petitioner Lofthouse was appointed a director, and continued to act in that capacity until October 1856. The 655 shares were sold in January 1857 to Mr. Slack, who accepted the transfer, and notices were duly forwarded to the purser. These transfers were registered in the cost-book on the 26th of January 1857.

Upon the 19 & 20 Vict. c. 47. being

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* Reported by G. S. Allnutt, Esq.

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passed, the shareholders determined, on the 18th of October 1856, to make the company one of limited liability under that statute. A delay, however, occurring in consequence of some doubt being raised as to the company's being within the provisions of the act, the company was not registered under this act until the 26th of June 1857, and as the petitioners had then transferred their shares, their names were not included in the returns made to the registrar. In July 1857, upon the petition of Mr. Hutton, one of the shareholders, an order was made to wind up the company. Notice was given to include the petitioners as contributories in respect of 655 shares, and on the 29th of August 1857 the Commissioner decided to place their names on the list.

Mr. Bacon and Mr. Doria, in support of the appeal, contended that, according to the law previous to the 19 & 20 Vict. c. 47, the petitioners would have been free from liability upon relinquishing their shares, as was shewn by *Fenn's case* (1) and *Mayhew's case* (2). The 19 & 20 Vict. c. 47. was not intended to alter the existing law in this respect, or existing rights. The 19th section provides, "that every person who has accepted any share in a company registered under this act, and whose name is entered in the register of shareholders, and no other person (except a subscriber to the memorandum of association in respect of the shares subscribed for by him), shall for the purposes of this act be deemed to be a shareholder." The 11th section provides for the delivery to the Registrar of Joint-Stock Companies, previous to the registration under the act, among other things, of a list of the shareholders; and in the list furnished upon the registration of this company the petitioners' names were not included. The 62nd and 63rd sections, however, have created the difficulty in this case (3); but they must be construed with

reference to the 19th and 11th sections, and nothing further than the register therein referred to can be regarded. The petitioners must, according to the 65th section, be liable either as shareholders under the 19th section, or as contributories under the 63rd section. The company, however, had altogether ceased to treat the petitioners as shareholders, and gave them no notice of the intention to register under the act—*Ex parte Stirling* (4).

As to the transfer by the petitioners not being fraudulent, they cited *In re Kilbricken Mines Company* (5).

Mr. Selwyn and Mr. Roxburgh, for the official liquidator.—The petitioner Loft-house was an active director of the company up to January 1857, and he had in October 1856 assented to the company being registered, with a view to its being wound up under this act. He could not, therefore, after having concurred in all these preliminary arrangements, escape from his liability by transferring his shares. There was a material distinction between relinquishing shares under the rule of the company which had been referred to, and assigning shares. The objects of this sta-

prior to the commencement of the winding up, shall be deemed for the purposes of contribution towards payment of the debts of the company, and the costs, charges and expenses of winding up the same, to be an existing shareholder, and shall have in all respects the same rights, and be subject to the same liabilities to creditors, as if he had not so ceased to be a shareholder, with this exception, that he shall not be liable in respect of any debt of the company contracted after the time at which he ceased to be a shareholder."

Section 63.—"In the event of any limited company being wound up by the Court or voluntarily, any person who has ceased to be a holder of any share or shares within the period of one year prior to the commencement of the winding up, shall be deemed for the purposes of contribution towards payment of the debts of the company, and the costs, charges and expenses of winding up the same, to be an existing holder of such share or shares, and shall have in all respects the same rights, and be subject to the same liabilities to creditors as if he had not so ceased to be a shareholder."

Section 65.—"Any existing or former shareholder upon whom calls are authorized to be made by the third part of this act, is hereinafter called 'a contributory'; and the representatives of any deceased contributory shall be liable in a due course of administration to the same extent as such contributory would be liable under the third part of this act, if alive."

(4) 6 Ir. Chanc. Rep. 180.

(5) 30 Law Times, 185.

(1) 4 De Gex, M. & G. 285; a. c. 22 Law J. Rep. (N.S.) Chanc. 692.

(2) 5 Ibid. 837; a. c. 24 Law J. Rep. (N.S.) Chanc. 353.

(3) The 62nd, 63rd and 65th sections are as follows:—

Section 62.—"In the event of any company other than a limited company being wound up by the Court or voluntarily, any person who has ceased to be a shareholder within the period of three years

tute were, first, the payment of all the company's debts, and, secondly, the settlement of the shares, in respect of which these debts and liabilities were to be borne. As to the latter object, the 62nd, 63rd and 65th were the governing sections. The register was the register kept by the company, as was shewn by the 16th section, which required that a register of shareholders should be kept by the company; and in that register the petitioners' names appeared.

The LORD CHANCELLOR, without hearing a reply, said, that the Court was unanimous in the opinion that the order of the Commissioner could not be maintained. The petitioner Lofthouse became a shareholder in a company for the purpose of working mines on the cost-book principle. The company became for most, if not for all, purposes insolvent; and that being so, Lofthouse was content, in October 1856, to concur with the other partners to put the company under the provisions of the Joint-Stock Companies Act of 1856. When the company attempted to avail itself of that act, the registrar of the joint-stock companies made an objection that the company did not come within the provisions of the act, which caused some delay, and the company, therefore, was not registered until June 1857. In the mean time, that was in January 1857, Mr. Lofthouse sold his shares to Mr. Slack, and the shares were regularly transferred according to the requirements of the cost-book. The first point raised by the respondent was, that the transfer to Slack was fictitious, and a mere device of Lofthouse to get rid of his liability. But it was competent for a shareholder in this company to resign his interest at once, and to have no further interest or liabilities in connexion with it; and it was probably true that when Lofthouse assigned his shares to Slack, he did so with the object imputed to him. But that was not the matter to be inquired into now. If the transfer was fictitious why did the company assent to it? No objection of that kind, however, was then taken to the transfer. Therefore, Mr. Lofthouse, to all intents and purposes, ceased to be a partner in the company in January. In

June the company was minded to become incorporated, and they took the necessary steps and registered under the Joint-Stock Companies Act of 1856. They did so, as it was said, for the purpose of having their affairs wound up; and, looking at the act, that appeared to be a fair course. In consequence of their becoming a company under the act, and a petition being presented by a contributory for the purpose of winding up, it became the duty of the Court of Bankruptcy to settle the list of contributories, and in discharge of that duty the Commissioner placed Slack as well as the petitioners on the list. Whether the petitioners were properly placed on the list was the question. The act provided, that existing shareholders should be first liable as contributories; then, by the 63rd section, any person who had ceased to be a shareholder within one year prior to the commencement of the winding up of the company was to be liable as if he was an existing shareholder. The Commissioner had placed the petitioners on the list because they had been holders of shares within the year. But that was a mistake, for "a holder of shares" meant a holder of shares after the company was brought under the operation of the act. If any other construction was put on the act it would lead to great injustice. The petitioners, when they belonged to the company, knew the nature of their liabilities. From the discharge of them they could not recede. But what an injustice it would be if after the petitioners had ceased to be partners in the company, their partners should be able to place them on a list of persons to be called upon for any debts contracted after they had retired. Many other anomalies might be suggested, but looking to the language of the act and the meaning of the word "shareholders," it was clear that the petitioners ought not to be placed on the list of contributories. There was one doubt, however, in his Lordship's mind, and that was whether the Court ought to stir at all in this matter, because, supposing the petitioners' names remained on the list of contributories, he did not see how they could be damnified. The 22nd section of the act provided the only mode by which calls could be enforced against shareholders of these limited com-

panies, and, according to the provisions of that section, the parties seeking to enforce the calls must be able to aver as against the petitioners that they were within one year shareholders in the company as constituted under the act, which they could not do. However, upon the construction of the act, the Commissioner was wrong in placing their names on the list of contributories, and, therefore, the order must be discharged.

LORD JUSTICE KNIGHT BRUCE said, that he did not consider that the Commissioner had jurisdiction to place the petitioners on the list of contributories.

LORD JUSTICE TURNER entirely agreed. It was plain, upon referring to the provisions of the 19th section of the 19 & 20 Vict. c. 47, that the petitioners had never accepted shares under the act. It was said that the case came within the 63rd section of the act. But the fact of ceasing to be a shareholder implied that the person had been a shareholder, which must be a shareholder under this act; and this the petitioners had never been. The order must be discharged, and the costs must be paid out of the estate.

FULL COURT } *In re* WELSH POTOSI LEAD AND
OF } COPPER MINING COMPANY
APPEAL. } (limited), *ex parte* BIRCH.*
Dec. 16.

Company—Cost Book—Relinquishment of Shares—19 & 20 Vict. c. 47.—Contributory.

A. B. was the holder of shares in a mining company established on the cost-book principle. In accordance with one of the rules of the company, he gave notice, in April 1857, to relinquish his shares, but he had not then paid all his arrears, and the purser declined to take the relinquishment. In May the arrears were paid, and on the 4th of June his solicitor applied to the purser to know why the name was retained on the list. On the 26th of June the company was registered as a limited company under the 19 & 20 Vict. c. 47, and A. B.'s name

was then returned as a shareholder. The company being in July ordered to be wound up, A. B.'s name was placed by the Commissioner on the list of contributories. On appeal, it was considered that the proper course was for A. B. to apply to have his name removed from the list of shareholders, and, the petition of appeal being agreed to be treated as such application, the name was removed from the list.

This was an appeal, by Mr. Birch, whose name had been placed, by Mr. Commissioner Fane, on the list of contributories to the Welsh Potosi Lead and Copper Mining Company (limited) (1). Mr. Birch became, in March 1854, holder of fifty shares, twenty-five in his own name and twenty-five in that of his wife. On the 2nd of April 1857 he gave notice to the purser to relinquish his shares, pursuant to the tenth rule of the company, which was similar to that in *Fenn's case* (2), and the certificates were given to the purser. It was, however, then said that all the calls on the shares were not paid, and Mr. Birch subsequently paid the arrears, and a receipt was given to him on the 19th of May. The company was registered, under the 19 & 20 Vict. c. 47, on the 26th of June, and Mr. Birch's name was then returned as a shareholder; and, accordingly, as his name appeared on the register, the Commissioner, in settling the list of contributories, placed his name on such list.

Mr. Giffard and Mr. Pontifex appeared in support of the appeal.

Mr. Selwyn and Mr. Roxburgh, for the official liquidator, contended that as Birch's name was on the list of shareholders, the Commissioner could not do otherwise than include it in the list of contributories. The petitioner's proper course would have been to apply, under the 25th section, to remove his name from the list of shareholders.

The LORD CHANCELLOR suggested that as such a course appeared to be the proper

(1) See the last case.

(2) 4 De Gex, M. & G. 285; s.c. 22 Law J. Rep. (N.S.) Chanc. 692.

(*) Reported by G. S. Allnutt, Esq.

one, the present petition should be treated as an application for that purpose.

This being assented to on both sides,

Mr. Selwyn and *Mr. Roxburgh* contended that the application came too late. *Birch's* duty was clearly to have applied at once, and as he had neglected to do so, he must be considered to have waived his notice of relinquishment. As it was on the faith of the register of shareholders that credit was given, delay in applying to have a name removed was of great importance.

Mr. Giffard said that no imputation of neglect could be made against the petitioner, as, on the 4th of June 1857, his solicitor wrote to *Mr. Wilkinson*, the pursuer, in these terms:—"Dear Sir,—Do you not intend ever to strike out the names of *Mr. and Mrs. Birch* from the list of adventurers in the coat-book or share register? They have done everything required by the rules to put an end to their connexion with the company, but continue to receive notices from you, as shareholders. Yours faithfully, *Mears & Andrews*."

The LORD CHANCELLOR said that there could be no doubt that this company had no right to place *Mr. Birch's* name on the list of shareholders of this limited company. On the 2nd of April he had taken steps to have his name removed, but an objection was made that he had not paid all the calls. That money was afterwards paid. After that, the name was still retained and notices were sent to him. Then the letter which had been referred to was written. It was quite clear that the company had no right to put his name on its list of shareholders. He was, therefore, neither an actual nor a retired shareholder. Whether the Commissioner was wrong in placing his name on the list of contributories his Lordship had some doubt, as he had no right to take the name off the list of shareholders. But the name ought to go off the list of shareholders, and then it would go off the list of contributories. The costs must be paid out of the estate.

The LORDS JUSTICES concurred.

LORDS JUSTICES. } *Ex parte BARKWORTH, in*
Jan. 29, 30. } *re HARRISON.*

Banker and Customer—Short Bills—Bills treated as Cash—Property in such Bills on Bankruptcy of Bankers.

Bankers received short bills from their customers, and credited them with the amount as cash, and dealt with the bills at their discretion. The bankers became bankrupt, at which time they held some of such bills which were not then due. The assignees refused to deliver up the bills to the depositing customer, but it was held by one of the Commissioners that there being no evidence of a contract or arrangement between the bankers and customer, that the bills should be treated in all respects as cash, the fact of these bankrupts having credited the amount secured by the bills to the customer as cash, did not render the bills the absolute property of the bankers; and the state of the account at the time of the bankruptcy shewing that the customer had a balance in his favour, the assignees must deliver up the bills. Upon appeal, the Lord Justices affirmed the decision.

Mr. Commissioner Ayrton, of the Leeds District Court of Bankruptcy, had, on the 23rd of December 1857, ordered the assignees in bankruptcy of *Messrs. Harrison, Watson & Plase*, bankers, at Kingston-upon-Hull to deliver up to *Messrs. Froggart, Woodward & Marriott*, Baltic merchants, customers of the firm, certain short bills of exchange not due at the time of the bankruptcy, which had come into their hands, and which they claimed to retain as part of the estate. The bankruptcy took place on the 24th of September 1857, at which time the bankrupts had in their possession various bills of exchange which had not arrived at maturity but which passed into the hands of the assignees, *Messrs. Barkworth, Chapman & Simpson*. These bills of exchange were deposited with the bankrupts by *Messrs. Froggart & Co.*, who kept an account with them, and paid in the bills which were credited in the bankers' books. *Messrs. Froggart & Co.* demanded that these bills should be returned to them as their property, but the assignees resisted, alleging that they belonged absolutely to

the bankrupts at the time of the bankruptcy. This was the short point in dispute; and when the case was before the Commissioner, it appeared from evidence adduced by the assignees that the constant custom not only of the bankrupts, but of all other bankers at Hull, except the branch of the Bank of England, was, that when an undue bill was paid in by a customer, the bill, on being indorsed to them by the customer or otherwise guaranteed, was not entered as a short bill, but was treated as a cash payment, and the bankers were in the habit of discounting them or otherwise dealing with them at their discretion. The customer was credited with the full amount of the bill at the time of its payment into the bank, but was allowed interest on the amount only from the time when the bill became due. The assignees attempted to prove that there was an understanding, amounting to a contract between the bankers and their customers, that such bills should be treated in all respects as cash payments, and should be at the absolute disposal of the bankers, whatever might be the state of accounts between them; and they put in evidence a correspondence between the bankrupts and Messrs. Froggart, in the course of which the latter had stated their account with the bank in such a way as to include the undue bills as cash payments.

One point was admitted, namely, that at the time of the bankruptcy the balance of the accounts between the bankrupts and Messrs. Froggart & Co. was in favour of the latter. The Commissioner was of opinion that the evidence adduced was not sufficient to prove that the alleged custom amounted to a contract, and made the order from which this appeal was presented by the assignees.

The argument was long, but as the chief points are so very minutely considered by the Lords Justices in their respective judgments, it is wholly unnecessary to state them here, more than to observe that, for the assignees, it was urged that the custom of the bankers was well known to Messrs. Froggart & Co., that the bills should be treated as cash, and that the bankers were entitled to dispose of them at their uncontrolled discretion, whatever

might be the state of the accounts between them and the depositing customer.

Mr. Selwyn, Mr. Nalder and Mr. Melish supported the appeal of the assignees, referring in the manner indicated in the judgment to some of, and relying on, the following authorities:—

Thompson v. Giles, 2 B. & C. 422; s. c. 2 Law J. Rep. K.B. 48.

Ex parte Sargeant, 1 Rose, 153.

Ex parte Oursell, Ambl. 297.

Ex parte Pease, 1 Rose, 232; s. c. 19 Ves. 25.

Ex parte Leeds Bank, 1 Ibid. 254.

Giles v. Perkins, 9 East, 12.

Bent v. Puller, 5 Term Rep. 494.

Ex parte Twogood, 19 Ves. 229.

Stewart v. Aberdeen, 4 Mee. & W. 211;

s. c. 7 Law J. Rep. (N.S.) Exch. 292.

Ex parte Thompson, Mont. & M. 102.

Todd v. Reid, 4 B. & Ald. 210.

Mr. Bacon, Mr. Serj. Hayes and Mr. Browne, for the respondents, Messrs. Froggart & Co., relied upon the cases of—

Thompson v. Giles, ubi supra.

Ex parte Benson, 1 Mont. & Bl. 120.

Ex parte Armistead, 2 G. & J. 371.

Ex parte Frere, Mont. & Mac. 263.

Jombart v. Woollett, 2 Myl. & Cr. 389; s. c. 6 Law J. Rep. (N.S.) Chanc. 211.

Ex parte Smith, Buck. 355.

Buchanan v. Findlay, 9 B. & C. 738; s. c. 7 Law J. Rep. K.B. 314.

Mr. Selwyn was heard in reply.

LORD JUSTICE KNIGHT BRUCE.—In my opinion, the case on behalf of the appellants has been as well and as ably argued by their counsel as an appeal so hopeless could possibly be. The facts are not numerous. A firm of bankers have become bankrupt, and at the time of their bankruptcy they had in their possession short bills deposited with, or otherwise furnished to, them by one of their customers. The customer then said to the bankrupts: "I am ready to pay you the balance against me on my account, upon its being ascertained, and I will relieve you from all liability in respect of your transactions with

me or with my firm; but return to us the short bills belonging to us which you hold." To this the bankrupts, or rather their assignees, replied, "No; the bills now belong to us, and we have a right to retain them as part of the assets, and you must come in as a creditor for the amount." To me it appears that this proposition is as startling as a demand by a bankrupt to retain the plate or the title-deeds which a customer has deposited with him for safe custody; and this demand—this refusal to comply with a claim which common honesty required should be complied with—is attempted to be supported on the ground that by an agreement, either express or which is to be inferred from the ordinary course of business transactions, the bills in question became the property of the bankers from the moment when they came into their hands. Now this proposition, though highly improbable, is of course not impossible; it is one that might be supported and established by evidence; but from the nature of the case, and on every conceivable ground, it is incumbent on those who make the assertion to prove it. The question, therefore, for us is, whether the difficulty of proving the proposition has or has not been surmounted by the appellants; whether, in fact, they have succeeded in shewing that so improbable an agreement has been entered into by their customers with the bankrupts. The decision in the case of *Thompson v. Giles* completely disposes of many of the circumstances on which the assignees relied to support their contention; since that decision a period of more than thirty years has elapsed, and so far as I am aware, during that time the decision has never been substantially questioned; by that decision the affairs of mankind have been governed ever since, and it is moreover one recommended—if indeed any recommendation be needed—by its entire conformity with reason, good sense and common honesty. The decision has been always acquiesced in worthily and without reserve, and it is known to be a correct exposition of the law. It has been contended, it is true, that in a judgment of Lord Eldon, in *Ex parte Sargeant*, judicial statements have been made at variance with its principles, yet from that view I must express my dissent. It may be that,

taken apart from the context and from the orders made by Lord Eldon, the expressions which he used might afford some ground for such a construction; but when read in connexion with the context and the orders made by him in that and other similar cases, it appears to me that Lord Eldon's language is quite consistent with the doctrine which has been laid down by the learned Judges who decided the case of *Thompson v. Giles*. Then again, it has been argued that the present appeal is different in its circumstances from *Thompson v. Giles*, and particularly in reference to the custom of the bankers with respect to the bills deposited by their customers with them; but assuming this to be so, still, in my opinion, that is a habit of the bankers in conducting their own business with which the customer has nothing to do, and of which he probably knew nothing. For as to the knowledge of the custom by the respondents, there is nothing which can be traced to their knowledge inconsistent with an understanding that their bankers were to have a lien upon their securities deposited with them, to cover any cash balance that might be due from the customers, and a right to deal with the bills as the exigencies of the case might require. The evidence adduced proves nothing beyond this, and the correspondence between the parties has not carried the case further. The sole question, then, is, whether there has been any agreement between the customers and the bankrupts that, under all circumstances and for all purposes, the short bills paid in by the customers should become the absolute property of the bankers? In *Thompson v. Giles*, and indeed in all the cases which have been subsequently decided, this has been considered the sole question. It has been contended very forcibly by Mr. Nalder, in his argument for the appellants, that it would not be open to the bankers at any moment to retire from the arrangement and to say to their customers, "Close your accounts with us and take back your bills"; but I consider that no such principle is established in fact, although, if it could be established, that argument would have great weight. On the contrary, to me it appears that there would have been nothing inconsistent with the arrangement, if the bankers had chosen to close the

account with their customers, and had then said to them, "We will cease all further dealings with you; pay us the balance due to us on your account, and take back your bills." On these grounds, I am clearly of opinion that the order of the learned Commissioner was quite right, and that it is consistent with honesty, justice and good sense, and, therefore, that the appeal must be dismissed.

LORD JUSTICE TURNER.—It appears to me unnecessary to say whether weight would or would not have been attached to the arguments urged, on behalf of the appellants, if this case had come for decision before *Thompson v. Giles*, for according to my view that case has entirely disposed of the argument in the present appeal. The appellants have endeavoured to distinguish their case from *Thompson v. Giles* upon three grounds: first, that the state of the accounts and the balances were in this instance different from what they had been in the other; secondly, that in the present case the bankers had always treated the short bills as their own property, and dealt with them accordingly; and thirdly, that the customers were aware of this course of dealing with the bills, and had therefore acquiesced in it. This third point was not proved in *Thompson v. Giles*, but it was contended for the assignees that it is made out in the present case. The first point is disposed of by this consideration, that it was a variation of circumstances and not of principles; and no difference in the state of the accounts in the two cases at the time of the bankruptcy can affect the principles on which the decision in *Thompson v. Giles* was based. Then, as to the second point contended for by the assignees—namely, the custom of these bankers in dealing with the short bills—the same mode of dealing had prevailed in the case of *Thompson v. Giles* as in this case, and I do not see in what manner the custom of the bankers can be held to affect the customers, unless that mode of dealing has been brought to their knowledge and has been acquiesced in by them. According to my view there is not any evidence that a knowledge of the manner in which the bankrupts treated and dealt with these bills has been traced to the respondents, at least so long as the balance upon the banking account was in

their favour, although it is admitted that there was an undertaking that the bankers should deal with the bills as their own property whenever the state of the account might require it. Again, it was contended that the correspondence established the fact of an arrangement between the parties that these bills should be the property of the bankrupts. The respondents might have paid in the bills to their bankers on one or other of two contracts, namely, either that upon their being paid in, they should immediately become the property of the bankrupts, or that they should remain in their hands as a security to them for any advances they might make to their customers; and the assignees' counsel have argued that it was clear from the correspondence, that Messrs. Froggart, Woodward & Co. intended the bills to become the absolute property of the bankrupts as soon as they were paid in, inasmuch as in the letters to the bankrupts respecting the state of their account, they had constantly claimed as items in their favour unpaid bills which they regarded as cash. If this were so, still as it seems to me as between banker and customer, it was the only accurate way of stating the account, where the object was that the customer might ascertain its real condition, and to what extent his balance in the hands of his banker would enable or permit him to draw. True it is that notice was subsequently given by the respondents to the bankers requiring them not to deal with the bills, and this, it has been contended, is a proof of what was the arrangement before that notice was given. In my judgment that was not so, and that it amounts only to this: that the respondents thought it necessary to take additional precautions, and I think that the notice affords no evidence of a previous contract. Then comes the argument of Mr. Nalder, alluded to by my learned Brother, that the bankers, even if desirous of doing so, could not have closed the account. This does not appear to me to affect the case, for even if the bankrupts were precluded by the contract from closing the account,—and my learned Brother thinks that they were not,—yet that does not settle the question, for it may be that there was a contract that the bankers should honour cheques to the

amount of the bills paid in. According to my judgment, therefore, the case of *Thompson v. Giles* is distinctly in point and must be held to govern this. It has been argued then with reference to that case, that the language of Lord Eldon in some expressions he used in *Ex parte Sargeant*, is inconsistent with the doctrine in *Thompson v. Giles*. I observe, however, that *Ex parte Sargeant* was cited in *Thompson v. Giles*, and that the Judges who decided the latter case do not appear to have considered their decision at all inconsistent with *Ex parte Sargeant*, and Lord Eldon said, upon consideration of that case, he saw no reasonable ground for doubt. The words reported to have been used by the learned Lord were, "That the bills were not written short, amounts to nothing unless there is a concurrence manifested at the time, or to be inferred from the habits of dealing between the parties, that they should be considered as cash." By the expression "considered as cash" Lord Eldon said distinctly that he did not mean merely entered in the account as cash, but his meaning was that the short bills were paid in precisely as cash was paid in, and that it thus constituted an immediate debt due to the customer from the bankers. That is my own view of the matter, and in that view there appears to me nothing inconsistent with the decision in *Thompson v. Giles*. I agree with my learned Brother that this appeal is utterly without foundation, and that it must be dismissed. The costs of the respondents must be borne by the estate, but the costs of the assignees we leave to be dealt with by the learned Commissioner.

LORDS JUSTICES. } *Ex parte YATES, in re*
Dec. 22. } SMITH.

Proof—Promissory Note—Subsequent Alteration—Indorsement though made on Face of Note.

Money was lent to one, to secure the repayment of which he and two others made a joint and several promissory note. The lender required payment some years after the date of the note; but upon the makers procuring a new name to the note, he forbore

payment. The new name was written on the face of the note, but not under the former names, and had its date appended. One of the original makers became bankrupt, and one of the Commissioners refused to allow proof of the debt on account of the alteration of the note:—Held, however, on appeal, reversing that decision, that the creditor was entitled to prove, for that the third name, though on the face of the note, was added as an indorsement, and for the purpose of adding a person with fresh liability, and not as a new maker.

This was an appeal from a decision of Mr. Commissioner Fane refusing proof of a debt. The bankrupt, Tilden Smith (of the firm of Smith, Hilder & Co., bankers), borrowed 3,000*l.* of Mr. Edward Yates, to secure the repayment of which, with interest, he, together with Mr. Richard Smith and Mr. Henry Smith, made a joint and several promissory note of the following date and form:—

"Nov. 27, 1850.

"3,000*l.*

"On demand, we jointly and severally promise to pay to Edward Yates, sen., or his order, the sum of 3,000*l.*, with interest, at the rate of 5*l.* per cent. per annum, for value received.

"Tilden Smith.

"Richard Smith.

"Henry Smith."

Upon the evidence it appeared that the 3,000*l.* was handed to Tilden Smith by cheque, and that the other two makers did not take any active part in the transaction, one being his brother and the other his nephew.

The lender, Mr. Edward Yates, died in 1856, having appointed his son, the petitioner, his executor; who shortly afterwards intimated an intention to call in the money. He, however, abandoned such intention, at the request of Mr. Tilden Smith; and upon the offer of that gentleman to procure additional security, or a guarantee of some independent party that the money should be paid, the petitioner agreed to let the matter stand over. Accordingly, one Mr. Richard Russell was procured to place his name on the note (and this was done with the concurrence of all parties), which he did in the manner following:—He wrote his name, and added the

date of his signature thereunder, not under or on the same part of the note on which appeared the names of the original makers, but at the opposite corner, "Richard Russell, 29th Sept. 1856." The interest on the 3,000*l.* was regularly paid up to June 1857; and on the happening of the bankruptcy the executor of the original payee tendered proof for 3,009*l.* for principal and interest against the separate estate of Mr. Tilden Smith, but upon the same being opposed by the assignees, on the ground that a material alteration had been made after the issue of the note in its body, the Commissioner, Mr. Fane, rejected the proof, and hence the appeal (1).

Mr. Selwyn and Mr. Aspland, for the appellant, argued that the only effect of the addition of the name of Mr. Russell was to render him liable as an indorser, though it was written on the face of the note, and that it was not such an alteration as to render the note invalid as between the

makers and the payee. Should the case of *Gardner v. Walsh* (2) be relied on for the respondents, it would be sufficient to say that the alteration was here made with the consent of all parties.

They also cited—

Catton v. Simpson, 8 Ad. & E. 136.

Anderson v. Weston, 6 Bing. N.C. 296;
s. c. 9 Law J. Rep. (N.S.) C.P. 194.

Mr. Bacon and Mr. Bagley, for the assignees, insisted that the estate of Mr. Tilden Smith, as a separate debtor, was liable only in respect of the note, and that if from any irregularity that note was invalid, his estate was wholly discharged; that there had been such irregularity by reason of a material alteration being made

action several years after the instrument upon which the transaction was based had been made, by reason of an alteration introduced into the original instrument; for any such alteration by way of addition would make the instrument a new security, which would be simply void for want of a proper stamp; but it was contended that such addition could not affect the original security, which was valid in its inception as between the parties originally liable. *Gardner v. Walsh* was distinguishable from the present case, inasmuch as there the parties did not consent to the alteration being made. To this observation the Commissioner asked, how do you get over the principle laid down in the cases cited, that the note should be preserved in the same state in which it was originally signed? and observed that the doctrine seemed to be clear that the instrument creating the right should be kept distinct. It was further urged, that in no way could Mr. Russell be made responsible upon the note for want of a proper stamp, whereupon the Commissioner remarked "that was so in *Blackstock's* case, in which *Blackstock* was in no way liable, and yet the note was held to be utterly void. That is exactly this case." It was then finally said, that assuming that the promissory note was of no value under the Stamp Acts for the purpose of proof, it would still be open to Mr. Yates to prove the original consideration, for which see *Catton v. Simpson* (4). The learned Commissioner observed, that in *Gardner v. Walsh* it was said that *Catton v. Simpson* was not law, and that unless other authorities could be produced he should decide that this case fell within the principle of the cases cited for the assignees. Counsel having refused the offer of the Court to allow the case to stand over, his Honour rejected the proof, on the ground that the promissory note was altered, with the consent of the holder, some years after it was made.

(2) 5 El. & B. 83; s. c. 24 Law J. Rep. (N.S.) Q.B. 285.

(1) The case, when before the learned Commissioner, was argued as follows:—

For the assignees, it was contended that, in the proof tendered, the debt was stated to be the debt of Tilden Smith alone; whereas, if it were due at all, it would turn out to be due from Tilden Smith conjointly with others; that it was only in respect of the promissory note that Tilden Smith could be made liable as a separate debtor; that the claim upon the note was not maintainable, as that instrument was wholly void, by reason of a material alteration having been made by the introduction of a fresh name long after the note was made; that it was clear from contemporaneous letters that the name of "Richard Russell" was indorsed upon the note at the time it bore date; that the principle laid down by all the authorities from the earliest times was, that a party was bound to preserve an instrument of this description in precisely the same condition in which he received it, and any variation from that rule, or any material alteration by the introduction of a fresh name, rendered it a new document, which required a fresh stamp. The earliest authority upon the subject of bills of exchange was a decision of Lord Kenyon in *Master v. Miller* (1); see also *Smith's Lead. Cas.* 4th edit. 1856, vol. 1, p. 686. There were numerous earlier authorities respecting the application of the rule to deeds and instruments of that description. *Clark v. Blackstock* (2) was one of the intermediate cases in which the principle was recognised, and the latest decision was that of Lord Campbell in *Gardner v. Walsh* (3). On the other hand, for the petitioner, it was admitted that a party could not become a principal in regard to a trans-

(1) 4 Term Rep. 320.

(2) Holt's N.P.C. 474.

(3) *Ubi supra*.

(4) *Ubi supra*.

in the note by the addition of a fresh name of an additional maker, years after the original date, as to render it wholly void; that this addition rendered the document a new note, and liable, therefore, to a new stamp; and that, as time had been given by the payee to the makers of the note, no action would lie upon it. The name "Richard Russell" could not be interpreted as an indorsement, for it was made, and properly made, on the face of the note.

They relied upon—

Gardner v. Walsh, ubi supra.

Clark v. Blackstock, Holt's N.P.C. 474.

Mr. Selwyn was heard in reply.

LORD JUSTICE KNIGHT BRUCE said, that there were only two points in this case requiring notice. The first was, whether the extension of time conceded to Mr. Tilden Smith, or to the makers of the note, or to some or one of them, was material or relevant. In his judgment it was not material and not relevant, because the only question was, whether the estate of Tilden Smith was liable to this demand; and although it was true that time had been given, it was given at the request of Tilden Smith himself, or of some person acting for him. This objection, therefore, as he considered, failed. The other point was the intention with which Mr. Russell had signed his name upon the note; and here his Lordship was of opinion, that that gentleman had intended to sign it, and that he had in fact signed it in the character of a mere indorser, and in that character only. In reply to this it had been urged that the signature was upon the face of the note, and not upon the back of it; but that circumstance made no difference, and the law upon that point had been settled for a century and upwards. The signature, although it was written upon the face of the note, was intended to have the sense and effect of an indorsement, and it was as effectual as an indorsement as if it had been written upon the back. This was at all events settled law, and it would be absurd if it were otherwise. For these reasons, he held that the signature of Mr. Russell was a mere indorsement by him,

and the proof must be allowed. The costs must be borne by the estate.

LORD JUSTICE TURNER.—I concur in the reasoning, and in the judgment of my learned Brother. It seems to me that there is no ground for the contention which has been raised, that the name of Mr. Russell was added for the purpose of adding a new maker to the instrument, for on the contrary, I am satisfied that such addition was made by way of providing further security to the creditor, by means of the name of a person with fresh liability; and I am, therefore, of opinion, that the name "Richard Russell" amounts to nothing more in fact and in law than, however informally, an indorsement on the note. The appeal must be allowed, and the proof admitted.

LORDS JUSTICES. } *Ex parte KING, in re KING.*
Jan. 22.

Certificate—Fraudulent Preference.

Where a bankrupt had committed the offence of fraudulent preference enumerated in the 4th clause of offences appended to section 256. of the Bankrupt Laws Consolidation Act, 1849 (12 & 13 Vict. c. 106.), one of the Commissioners refused him any certificate; but upon appeal, the Lords Justices granted him a certificate of the second class, with a suspension of six months, and, with the consent of the assignees, granted protection in the mean time.

This was an appeal from a decision of Mr. Commissioner Bere, of the Exeter District Court of Bankruptcy, refusing the petitioner, Mr. King, a bankrupt, his certificate. The facts were, very shortly, as follows:—Messrs. Greenwood & King, builders and architects at Devonport, held contracts with government for the erection of barracks and other works, and at the end of 1856 they held one, to perform which required a sum of 11,000*l.* and upwards. Their drawing account at their bankers was at that time 5,000*l.* to their debit, and in the month of December, and in the three following months, the bankers pressed urgently for payment of the amount or for a reduction of it. Un-

able to meet this and other embarrassments, the firm were on the 25th of May 1857 adjudicated bankrupt. The assets of Greenwood & King were extremely small, but their debts amounted to 10,000*l.* or thereabouts.

Before December 1856, when the bankers pressed for payment or reduction of their account, Mr. King was indebted to a very near relation, his father, and to his brother-in-law, Mr. William Small, to the former in 101*l.* 5*s.* and to the latter in 92*l.* 10*s.* for principal money and interest respectively; and these two individuals were equally pressing for payment of their demands as the bankers subsequently became for a settlement of their account. Thus pressed, Mr. King executed to his father a mortgage of freehold property for securing his debt, dated the 21st of April 1857, and another mortgage to his brother-in-law, to secure his demand, dated the 24th of the same month. During the proceedings under the adjudication, some of the creditors complained of the mortgages; whereupon the father and brother-in-law surrendered their securities, and stated their willingness to come in *pari passu* with the other creditors; but at the certificate meeting, notwithstanding proof was adduced, and indeed the fact was on all hands admitted, that the debts were *bond fide* debts due to the father and brother-in-law, the Commissioner said, he considered the terms of the 256th section (1) were so imperative, that as it was clear Mr. King had committed the offence named in the 4th clause (2) appended to that section, he was bound to refuse him both his

certificate and protection, and made an order accordingly.

From this judgment Mr. King appealed.

In support of the appeal, it was urged that the 256th section did not render it imperative on the Commissioner to refuse any certificate—a construction put upon it in the case of *In re Manico* (3)—and more especially as it was proved, and not at any time disputed, that the father and the brother-in-law had urgently pressed for payment of their demands before the bankrupt consented to execute the mortgages; that the debts were *bond fide* due, as was not disputed; and that the sole reason for the adjudication was the fact, that the firm had not sufficient pecuniary means to complete their contract with government, though their credit remained good, even up to so late a period as the early part of May 1857.

For the assignees, it was submitted that the Court should shew its disapprobation of the conduct of Mr. King by a suspension of his certificate, though they did not press the Court to confirm the Commissioner's judgment intact; and it was stated that they only performed their duty in submitting the matter to the Court.

Mr. Karslake, in support of the petition.

Mr. Hanson, for the assignees.

Mr. Karslake, in reply.

LORD JUSTICE KNIGHT BRUCE considered that the assignees had only performed a plain duty in bringing the facts to the notice of the Court, and they had done so with both leniency and propriety. He and his learned Brother were of opinion that they might so far relax the judgment of the learned Commissioner as to grant a certificate of the second class after a suspension of six months; but unless the assignees gave a distinct consent, no protection in the interim could be granted.

LORD JUSTICE TURNER was of the same opinion.

to any of his creditors, have paid or satisfied any such creditor wholly or in part, or have made away with, mortgaged or charged any part of his property, of what kind soever."

(3) 22 Law J. Rep. (N.S.) Bankr. 41.

(1) The effect of section 256. is, that if at the last examination, or at the meeting for granting the certificate, it shall appear that the bankrupt has been guilty of any of the offences thereafter enumerated, the Court shall refuse to grant a certificate, or shall suspend the same for such time as it shall think fit, and shall refuse any further protection.

(2) The 4th clause of enumeration of offences is as follows:—"If the bankrupt shall at any time within two months next preceding the issuing of the fiat or the filing of the petition for adjudication of bankruptcy, fraudulently, in contemplation of bankruptcy, and not under pressure from any of his creditors, with intent to diminish the sum to be divided among his creditors, or to give an undue preference

Mr. Hanson said, the assignees had no objection to protection, and the order was made accordingly, granting a second-class certificate, to take effect after six months, with interim protection.

LORDS JUSTICES. } *Ex parte DALES, in re*
 Jan. 23. } *DALES.*

Adjudication—Trader Debtor Summons—Arrangement Clauses—Substitution of Petitioning Creditor.

A creditor took out a trader debtor summons, under the 78th section of the Bankrupt Law Consolidation Act, 1849, (12 & 13 Vict. c. 106). The debtor admitted the debt, and on the same day filed a petition, under the 211th section, for arrangement with his creditors, and obtained protection. The creditor, however, on his debt remaining unpaid, presented a petition for adjudication founded on the summons, but did not prosecute it in due time. Another creditor was thereupon substituted for the original creditor, and the trader was adjudicated bankrupt:—Held, (affirming a decision of one of the Commissioners), that the original creditor had a right to proceed to adjudication, notwithstanding the protection under the 211th section, and that the second creditor was rightly substituted for the first.

This was an appeal from an order of Mr. Commissioner Fonblanque, who had decided that a debtor had been properly adjudicated bankrupt. The facts were these:—Mr. Dales was indebted to Mr. King, and not paying the debt, the latter, on the 14th of October 1857, took out a trader debtor summons against him, under the 78th section of the statute 12 & 13 Vict. c. 106. (the Bankrupt Law Consolidation Act, 1849). Mr. Dales, on the 23rd of October, on the return of the summons, filed an admission of the debt, and on the same day he presented a petition for private arrangement with his creditors, under the 211th section of the same act, and obtained "protection from all process until further order." He did not pay or compound for the debt of Mr. King within the period of seven days prescribed by the 81st section,

and that gentleman, therefore, on the 3rd of November presented a petition for adjudication of bankruptcy against Mr. Dales, under the provisions of the 101st section, but did not prosecute it within the three days therein prescribed. Another creditor, Mr. Collins, applied for and obtained leave, under the 96th section, to prosecute the proceedings for adjudication under the petition presented by Mr. King, and Mr. Commissioner Fonblanque decided that the adjudication was valid and regular; from which decision Mr. Dales now appealed.

The clauses upon which the question whether the second creditor could obtain an adjudication in such a state of circumstances, notwithstanding the protection, are, so far as necessary to be stated, as follows.—Section 211. "That any such trader, unable to meet his engagements with his creditors, and desirous of laying the state of his affairs before them, under the superintendence and controul of the Court of Bankruptcy, and of submitting himself to the jurisdiction of the Court, in manner hereinafter mentioned, may present a petition to the Court, setting forth the true cause of such inability, and praying that his person and property may be protected from all process until further order; and the Court on such petition shall have power to grant such protection, and may renew the same from time to time as it shall think fit," &c.

Section 96. enacts, "That if the petitioning creditor in any petition for adjudication of bankruptcy shall not proceed and obtain adjudication within three days after his petition shall have been filed, or within such extended time as shall be allowed by the Court, the Court may at any time within fourteen days then next following, upon the application of any other creditor to the amount required to constitute a petitioning creditor, proceed to adjudicate on such petition upon the proof of the debt of such creditor, and of the other requisites to support such petition (except the debt of the petitioning creditor); but if neither the petitioner nor any other creditor shall within such fourteen days, or within such extended time as may be granted by the Court for that purpose, apply to the Court to adjudicate upon such petition, no further proceeding shall be taken thereon."

The grounds upon which the order appealed from was disputed were, that it was not competent for a second creditor to intervene and obtain an adjudication upon a petition presented by a former creditor, and by such proceeding interfere with a *bond fide* arrangement between the debtor and his creditors which was being prosecuted. The case of *Ex parte Walker* (1), decided by the Lords Justices, was not fully in point, for there the original creditor had followed up his petition and obtained adjudication notwithstanding the arrangement clauses protection, while here that original creditor had abandoned his right. It was therefore contended that the proper course for Mr. Collins to adopt would have been to proceed under the 223rd section, if he conceived he had any ground for dissatisfaction at the proceedings under the private arrangement, the proceedings under that clause being most amply pointed out.

Mr. Selwyn and *Mr. Bagley*, in support of the petition.

Mr. Swanston and *Mr. Clement Swanston*, for Mr. Collins, were not called upon.

LORD JUSTICE KNIGHT BRUCE.—I am of opinion that, notwithstanding the commencement of the proceedings for a private arrangement, any creditor of a debtor is at liberty to avail himself of the act of bankruptcy committed by the debtor in not paying by the time required by the provisions of the act, a debt in respect of which a trader debtor summons has been taken out previously to the commencement of proceedings for private arrangement. The adjudication is, I am of opinion, perfectly valid, and the appeal must, therefore, be dismissed.

LORD JUSTICE TURNER expressed his concurrence.

LORDS JUSTICES. } *Ex parte* SELLERS, *in re*
Feb. 12. } SELLERS.

Certificate—Collusion—No Assets.

Where an adjudication of bankruptcy was

made under such circumstances as, upon the evidence, satisfied the Court that the adjudication was substantially that of the bankrupt himself, and it appeared that there were no assets to divide among the creditors, the Court (Lord Justice Turner not assenting) affirmed a decision of one of the Commissioners, refusing the bankrupt his certificate.

The present petition was an appeal, by the bankrupt, against a decision of Mr. Commissioner Goulburn, who had refused his certificate. The facts were, that the bankrupt, Mr. George Henry Sellers, carried on business in partnership with Mr. Hugh Spooner Sands, at Liverpool and New York, as general merchants and commission agents. On the 12th of October 1856, a petition for adjudication of bankruptcy was filed, by a creditor, against Mr. Sellers, upon which he was adjudicated bankrupt, and on the 12th of November assignees were appointed. On the 15th of December Mr. Commissioner Goulburn adjourned the last examination *sine die*, the bankrupt undertaking to procure books of account from New York. Upon that occasion it appeared that the debts were more than 11,000*l.*, the assets being *nil*, and the accounts, without the New York books, were of no use whatever. The bankrupt afterwards obtained the books, and the accounts were made out. In July 1857, the bankrupt again appeared to pass his last examination, but although no opposition was offered by the solicitor for the assignees, or by any joint or separate creditor, the Commissioner again adjourned the last examination *sine die*. On appeal, the Lords Justices made an order as follows:—"The assignees not opposing, and not desiring any further examination, declare that the bankrupt ought to pass his last examination, without prejudice to any question upon the certificate." In obedience to this order, the balance-sheet having been duly filed, the bankrupt passed his last examination, on the 27th of November 1857, and on the 23rd of December a sitting was appointed for the grant of a certificate. No person appeared to oppose, but the Commissioner reserved his judgment, which he gave on the 8th of January 1858, on which day he wholly refused any certificate, considering that the bankruptcy

(1) 6 De Gex, M. & G. 752; a.c. 24 Law J. Rep. (N.S.) Bankr. 26.

was a contrivance fraudulently devised for the benefit of the bankrupt, that he had been guilty of fraud, and that the accounts were not satisfactory. The debts stood at more than 11,000*l.*, and there were no assets or the prospect of any being obtained. The present petition of appeal was presented by the bankrupt against this decision.

Mr. Bacon, in support of the petition, said, that no person whosoever, except the learned Commissioner, was dissatisfied with the conduct of the bankrupt. The creditors were satisfied, the assignees equally so, and therefore they offered no opposition when he applied to pass his last examination, nor did they make any objection to his obtaining his certificate. If the state of his accounts was not satisfactory to the learned Commissioner much allowance might fairly be made for a man carrying on an American business, the whole of the books of which were kept at New York; and even without any such allowance, still the sentence was immeasurably more severe than the circumstances of the case required. There had been no case of fraud established against the bankrupt, no dishonesty or falsehood was even alleged against him. Had there been one of those three ingredients in the case it would ill become counsel to attempt to induce this Court to interfere with the judgment of the Commissioner, as, in no instance had their Lordships, lenient as they were disposed to be in certificate cases, passed over such conduct, but, on the contrary, had viewed and dealt with it with reprobation and severity.

[LORD JUSTICE KNIGHT BRUCE.—Still, 11,000*l.* worth of debts and no assets seems a startling fact.]

True, it is so; but if no assets being forthcoming is to be held a proof of misconduct, it will be tantamount to treating poverty as a crime, and it would be easy for a man on the eve of bankruptcy, knowing he had no available property to divide among his creditors, and dreading that such a circumstance would tell against him on the question of certificate, to obtain a large supply of goods and then contrive an adjudication to be made against

him, offering the proceeds of these very goods as a dividend amongst his creditors at large. Upon the whole, he submitted that the sentence was too severe, and trusted their Lordships would not confirm the Commissioner's decision.

Mr. Bagley, for the official assignee, said, he attended, not to oppose the petition, but only at the desire of Mr. Commissioner Goulburn, to offer any explanation the Court might require. That learned gentleman considered that the bankruptcy was a contrivance concocted between the petitioning creditor and the bankrupt for the benefit of the latter, at a time when he knew he had no assets to divide, nor any prospect of any assets being forthcoming at a future time. Their Lordships were aware that the 93rd section of the Bankrupt Law Consolidation Act, 1849, (12 & 13 Vict. c. 106.), under which a trader could petition for an adjudication against himself if he could make it appear that he could pay 5*s.* in the pound, had been repealed and other provisions substituted. That was done by the 20th section of the statute 17 & 18 Vict. c. 119. (an act for regulating appointments to offices in the Court of Bankruptcy, and for amending the laws relating to bankrupts), which enacts, as follows: "Any trader liable to become bankrupt may petition for adjudication of bankruptcy against himself; but unless he shall forthwith after filing his petition, and before adjudication of bankruptcy thereunder, make it appear to the satisfaction of the Court that his available estate is sufficient to produce the sum of 150*l.* at the least, his petition shall be dismissed, and no further petition shall be filed by him in the same district without the leave of the Court first obtained, and the adjudication on any further petition shall be subject to the like condition as aforesaid as to his available estate." As the learned Commissioner considered, upon the evidence before him, that the bankruptcy in this case was a contrivance of the bankrupt himself, he came within the scope and intention of this clause, and not being able to shew an ability to divide a sum of 150*l.* among his creditors, it was a correct view to take of his case to refuse him any certificate.

Mr. Roxburgh, for the trade assignee, did not oppose, and with reference to the order of the Commissioner adjourning the meeting to allow of the books and trade documents being obtained from America, stated, that unless such an order had been obtained the partner in New York would not have parted with such books and documents. The assignee was not disposed to offer any opposition to a mitigation of the severity of the Commissioner's judgment.

Mr. Bacon was heard in reply.

LORD JUSTICE KNIGHT BRUCE.—Upon the materials before the Court I am perfectly satisfied that this bankruptcy was indirectly as much that of the bankrupt himself, as if the whole proceedings were directly and absolutely conducted by himself throughout. I must, therefore, assume that this was so; and taking this in connexion with the fact that there are no assets whatever to be administered in the bankruptcy, I think the learned Commissioner has rightly decided, and that the certificate must continue to be refused, subject, however, to this, that if the bankrupt can procure the consent of the creditors who have proved, he may apply to have the bankruptcy put an end to.

LORD JUSTICE TURNER.—As my learned Brother agrees with the Commissioner in his decision it is unnecessary for me to express any opinion upon the case. I may, however, say, that I do not feel the same degree of certainty that the bankruptcy was the act of the bankrupt himself, and although I might have granted the certificate, yet, under the general circumstances of the case, I should have ordered it to be suspended for a considerable period. The judgment of the Court below will, of course, stand.

LORD JUSTICE KNIGHT BRUCE.—The bankrupt may have six weeks' time wherein to determine whether he will apply to have the adjudication annulled.

FULL COURT
OF
APPEAL.
March 11.

*In re THE HULL BANK.**

Practice—Certificate—Appeal.

Where an appeal by a bankrupt against the Commissioner's refusal of his certificate was, through accident, not presented at the proper office until after the office was closed on the last day allowed for appeal, but was in the evening of the same day tendered to the officer at his private residence, the Court permitted the petition of appeal to be entered as of that day.

Mr. Hardy, for the bankrupts in this case, applied to the Court, under the following circumstances:—The Commissioner had refused the bankrupts their certificate, although neither the assignees nor any creditor opposed. The twenty-one days allowed for the appeal expired on the 10th of March. The petition of appeal had been sent to London, and when copied by the law-stationer was sent, on the 10th of March, into the office of the partner in the firm of London agents, who was not connected with the business. The mistake was not discovered until after four o'clock. The petition was immediately sent to the Registrar's office, but the office was closed. Application was then made to *Mr. Ross*, at his private residence at Brixton, it being his duty to receive the petition; but he, having a doubt of the propriety of receiving it after office hours, the present application, for leave to enter the petition as of the 10th of March, was rendered necessary.

LORD JUSTICE KNIGHT BRUCE inquired whether there was an affidavit that *Mr. Ross* was seen between six and seven o'clock on the 10th of March, with the petition.

Mr. Hardy replied that there was.

The **LORD CHANCELLOR** said that the petition might be entered as of the 10th of March, without prejudice to any objection.

* Reported by G. S. Allnutt, Esq.

Impress. Imperial Decree by Act 1821, 22, 23, 24.
 LORDS JUSTICES.
 March 15, 18, 23. { *Ex parte BALDWIN,*
 in re BALDWIN.
 Ex parte FOSS, in re
 BALDWIN.

Order and Disposition — Newspaper Copyright, Mortgage of, and of Types and Plant—Seizure by Sheriff.

E. B., the registered proprietor under the statute 6 & 7 Will. 4. c. 76. (the Newspaper Act), of three newspapers, mortgaged, on the 1st of February 1853, the copyright of all of them, and the types and plant for printing the same, to *E. F.* He also, on the 2nd of February 1853, mortgaged two of the three papers and the types and plant to *C. B.*, subject to the former mortgage. *E. B.*, after meetings of his creditors had been held, at which the securities were discussed, continued to carry on his business under inspection, though no deed for the purpose was ever executed. On the 16th of February 1857 the sheriff seized the property comprised in the mortgages under a writ of *fi. fa.*, and notice of the mortgages was, on the following day, given, notwithstanding which the sheriff remained in possession until the 19th, *E. B.* being adjudicated a bankrupt on a petition presented on the 18th:—Held (reversing a decision of one of the Commissioners), that the types and plant were not in the order and disposition of the bankrupt; but, affirming the same decision, that the copyright was in his order and disposition and reputed ownership, he being the sole registered proprietor of the newspapers.

There were two petitions of appeal in this case from a decision of Mr. Commissioner Evans, by which he had held that certain copyrights of newspapers, and types and machinery for the printing and carrying on of the same, were in the order and disposition of the bankrupt.

The first in order of time was that of Mr. Foss, as first mortgagee, and the second was that of Mr. Charles Baldwin, the second mortgagee, although at the hearing of the appeals the case of the latter was taken first.

The petition of Mr. Charles Baldwin prayed that he might be declared a mortgagee of the property comprised in the

indentures of the 20th of July 1850 and the 2nd of February 1853 respectively mentioned in the petition, subject to the security held by Mr. Edward Foss, and that the value of certain annuities might be ascertained, and an account of principal and interest taken, and that the petitioner might be permitted to prove against the estate of the bankrupt for any deficiency after applying the proceeds of sale of the property.

The petition of Mr. Foss prayed that he might be declared to be first mortgagee of the whole of the copyright, types, plant and machinery of the three newspapers mentioned in his petition, and that he might be permitted to prove for any deficiency after the same were realized by a sale.

The facts were these:—Mr. Charles Baldwin was in 1850 the sole proprietor of the London evening newspapers called the *Standard*, and the *St. James's Chronicle and Whitehall and Evening Post*, and in July in that year he entered into an arrangement, by deed, dated the 20th of July, with his son Mr. Edward Baldwin (the bankrupt), by which he covenanted and agreed upon a certain notice to make over the two newspapers and the copyright of the same as from the 1st of January preceding, together with the types, plant, machinery and stock-in-trade of his business of printer, and the son covenanted and agreed to pay the father an annuity of 2,000*l.* a year for his life, to be computed from the 1st of January 1850, and after his death to Emma Ann Baldwin 75*l.* a year for her life, and that the son would pay to the executors, administrators or assigns of the father, within four years after his decease, three sums of 1,500*l.* each, and a sum of 2,000*l.*, and would also pay by certain instalments the sum of 14,000*l.*

By an indenture dated the 2nd of February 1853, made between Edward Baldwin (the bankrupt) of one part, and the petitioner (Charles Baldwin) of the other part, after reciting the deed of the 20th of July 1850, and that since the date thereof the petitioner had delivered to the bankrupt the types, machinery and stock-in-trade therein mentioned, and that the name of the bankrupt was then entered at the

Stamp Office as the proprietor of the two newspapers, and that in order to enable the bankrupt to effect a security to Mr. Edward Foss, the petitioner had, by an indenture, dated the 31st of January 1853, released the provisions contained in the deed of the 20th of July 1850, upon an agreement by the bankrupt that, upon completion of the security to Edward Foss he would assign the newspapers, plant, types and machinery to the petitioner, upon trust for securing the several annuities and the gross sums covenanted to be paid in that deed; and reciting an indenture, dated the 1st of February 1853, made between the bankrupt of the one part, and Edward Foss of the other part, whereby the bankrupt had assigned the two newspapers and other the premises thereafter assigned, to Edward Foss by way of mortgage with certain other property, for securing a sum of 7,000*l.* with interest; it was witnessed that the bankrupt assigned to the petitioner the two newspapers, and the entire copyrights of the same respectively, and all the plant, steam-engines, types, machinery and effects used in the conduct and publication thereof, and which were then in and upon the premises of the bankrupt in Shoe Lane, in the city of London, and all the profits derivable from the same, and all the right and interest of the bankrupt therein, to hold the same to the petitioner, subject to the mortgage to Edward Foss, upon trust to re-assign the same in the event of payment of the annuities and gross sums mentioned in the deed of the 20th of July 1850; and in default upon trust that the petitioner might take possession of all the premises thereby assigned and sell the same, and apply the proceeds of sale in payment of the several annuities and gross sums, and other monies payable under that deed.

A notice of this deed was given to Mr. Foss, the first mortgagee.

The deed executed to that gentleman, dated the 1st of February 1853, contained recitals as to the bankrupt being the registered proprietor of the *Morning Herald*, London morning paper, and the two before-mentioned evening papers, at the Stamp Office, and his being owner of the types, plant and machinery for carrying on the

printing business at the place in Shoe Lane, and it witnessed that the bankrupt assigned to Edward Foss the three papers and their respective copyrights, and the types, plant and machinery, for securing 7,000*l.* then lent to him by Mr. Foss, and he covenanted to pay the same with interest on the 28th of January 1858, or on such earlier day as Mr. Foss might, by six months' previous notice in writing, appoint; and there was a power for Mr. Foss to enter and sell in case of default, with a proviso that if interest was regularly paid the principal should not be called in until the 28th of January 1858.

The following are passages from an affidavit filed by Mr. T. B. Crompton, a paper-maker:—

"I was applied to by the petitioner Charles Baldwin, in November 1854, to supply paper to the bankrupt, and upon making such application Charles Baldwin assured me that the journals above named were then in a very prosperous state, but by reason of a debt due to the stationer, a liberal credit upon the paper to be supplied would be required. The said Charles Baldwin also stated that the bankrupt was the sole owner of the three newspapers, and he referred me to the declaration filed at Somerset House, in proof of the correctness of his statement. I accordingly searched in the proper office, and found that a declaration had been filed in pursuance of the act of parliament, and that the bankrupt stood registered as the sole proprietor of the three newspapers, and I was thus led to believe that the bankrupt was the unincumbered owner thereof.

"Upon the faith of what Charles Baldwin had thus stated to me I supplied paper to the bankrupt down to his bankruptcy, when the bankrupt was indebted to me in a sum of 7,988*l.* 4*s.* 3*d.*, for which amount I have proved against the estate. If I had been aware of any mortgage or other incumbrance, I should not have trusted the bankrupt without taking or requiring security for the paper supplied. A petition for adjudication of bankruptcy against Mr. Edward Baldwin, the bankrupt, was filed by Messrs. Salt & Co., bankers, on the 18th of February 1857, at which time the principal sums secured by the deeds, with

arrears of interest and arrears of the annuity of 2,000*l.*, were due to Mr. Charles Baldwin. In May 1856 the bankrupt was in pecuniary difficulties, and several meetings of his creditors were held, and at one, which was held on the 6th of June 1856, the securities of Mr. Charles Baldwin, and also the securities held by Mr. Foss, and their nature and particulars, were stated and discussed, so that the principal creditors had full knowledge of them. From that time until the bankruptcy the bankrupt had conducted the whole business of the newspapers and the printing business at the same printing-office, under inspection of the principal creditors, although no formal deed of inspection was executed. On the 16th of February 1857 the property assigned to Mr. Charles Baldwin was, with other property, namely, that assigned to Mr. Foss, seized and taken by the sheriffs of London under a writ of *feri facias*, upon a judgment obtained in the Court of Queen's Bench, at the suit of Henry Jenkings. On the following day notice of the mortgages was given to the sheriffs, and they were required to withdraw, but they continued in possession until the 19th. Since the bankruptcy the newspapers and the copyrights, and the stock-in-trade, types and machinery, and other property comprised in the deeds, together with the copyright of the *Morning Herald* newspaper, have been sold by the assignees with the consent of Mr. Charles Baldwin, and also of Mr. Foss, but without prejudice to the rights of any parties, for the aggregate sum of 16,500*l.*, of which 4,378*l.* 2*s.* was apportioned as the purchase-moneys for the *Standard* and the *St. James's Chronicle*, and their copyrights, and 5,018*l.* 16*s.* 7*d.* as purchase-money for the stock-in-trade, types and machinery, as well of those two newspapers as of the *Morning Herald*."

This was done in consequence of disputes between the assignees and the mortgagees, whether or not, under the 125th section of the Bankrupt Law Consolidation Act, the property was not in the order and disposition of the bankrupt. The claim of the mortgagees to prove was made before the Commissioner, who held that the copyrights and the types, machinery, &c. were in the order and disposition of

the bankrupt, with the consent of the true owners, and dismissed both petitions. The adjudication was made upon the bankrupt's own declaration of insolvency, which he had signed at the meeting of the 6th of June 1856, at the desire of the creditors, in order that it might be used as occasion should require.

It appeared that Mr. Foss had given notice, but his money was not paid. At the time of the petition no less than 6,544*l.* 19*s.* 9*d.* was due to him.

The argument on the appeal was founded mainly on the Newspaper Act, 6 & 7 Will. 4. c. 76, entitled 'An Act to reduce the duties on newspapers, and to amend the laws relating to the duties on newspapers and advertisements.' The substance of the 6th, 7th, 10th and 19th sections will be found below (1):

(1) The 6th section of the statute enacts, "That no person shall print or publish, or shall cause to be printed or published, any newspaper before there shall be delivered to the Commissioners of Stamps and Taxes, or to the proper authorized officer, at the head office for stamps in Westminster, Edinburgh or Dublin, a declaration in writing containing the several matters and things hereinafter for that purpose specified; that is to say, every such declaration shall set forth the correct title of the newspaper to which the same shall relate, and the true description of the house or building wherein such newspaper is intended to be printed, and also of the house or building wherein such newspaper is intended to be published, by or for or on behalf of the proprietor thereof, and shall also set forth the true name, addition and place of abode of every person who is intended to be the printer or to conduct the actual printing of such newspaper, and of every person who is intended to be the publisher thereof, and of every person who shall be a proprietor of such newspaper who shall be resident out of the United Kingdom, and also of every person resident in the United Kingdom who shall be a proprietor of the same, if the number of such last-mentioned persons (exclusive of the printer and publisher) shall not exceed two; and in case such number shall exceed two, then of such two persons, being such proprietors resident in the United Kingdom, the amount of whose respective proportional shares in the property, or in the profit or loss of such newspaper, shall not be less than the proportional share of any other proprietor thereof resident in the United Kingdom, exclusive of the printer and publisher; and also where the number of such proprietors resident in the United Kingdom shall exceed two, the amount of the proportional shares or interests of such several proprietors whose names shall be specified in such declaration; and every such declaration shall be made and signed by every person named therein as printer or publisher of the newspaper to which such declaration shall relate, and

The Solicitor General and *Mr. Hannen* argued that the property comprised in the security was in the possession of the sheriff at the time of the bankruptcy, and was not therefore, and could not be, in the order and disposition of the bankrupt. Secondly, that the registration required by the statute was of the proprietors, obviously meaning thereby the printer and publisher, as was shewn by the context, for the public could only search for the names and addresses of such parties; and, thirdly, that a mortgagee from a proprietor was in no sense a proprietor, and it was unheard of that a mortgagee, who only held as a security for money advanced, should be entered at the Stamp Office as a registered proprietor. The newspapers were not goods and chattels within the meaning of the 125th section of the Bankrupt Act. The possession of the sheriff

by such of the said persons named therein as proprietors as shall be resident within the United Kingdom; and a declaration of the like import shall be made, signed and delivered in like manner whenever and so often as any share, interest or property soever in any newspaper named in any such declaration shall be assigned, transferred, divided or changed by act of the parties, or by operation of law, and also whenever and so often as any printer, publisher, or proprietor named in such declaration, or the person conducting the actual printing of the newspaper named in any such declaration, shall be changed, or shall change his place of abode, and also whenever and so often as the title of any such newspaper, or the printing office or the place of publication thereof shall be changed." The 7th section, "That if any person shall knowingly and wilfully print or publish, or shall cause to be printed or published, or either as a proprietor or otherwise sell or deliver out any newspaper relating to which such declaration as aforesaid, containing such matters and things as are required by this act to be therein contained, shall not have been duly signed and made and delivered when and so often as by this act is required, or any other matter or thing required by this act to be done or performed, shall not have been accordingly done or performed, every person in any such case offending shall forfeit for every such act done the sum of 50*l.* for every day on which any such newspaper shall be printed or published, sold or delivered out, before or until such declaration shall be signed, and made and delivered, or before or until such other matter or thing shall be done or performed as by this act is directed, and every such person shall be disabled from receiving any stamped paper for printing such newspaper until such declaration shall be signed, and made and delivered, or until such other matter or thing shall be done and performed." The 10th section, "That the Commissioners of Stamps and Taxes shall cause to be

was the possession of the mortgagees. They cited—

Fletcher v. Manning, 12 Mee. & W. 571; s. c. 13 Law J. Rep. (N.S.) Exch. 150.

Barrow v. Bell, 5 El. & B. 510.

Gurr v. Rutton, Holt's N.P. 327.

Smith v. Topping, 5 B. & Ad. 674; s. c. 2 Nev. & M. 421; 3 Law J. Rep. (N.S.) K.B. 47.

Edwards v. Scott, 1 Mac. & Gor. 962; s. c. 10 Law J. Rep. (N.S.) C.P. 11.

Sims v. Thomas, 12 Ad. & E. 536.

Mr. T. Stevens contended that there was nothing to remain in the order and disposition of the bankrupt; as even the copyright, so far as it could have been taken, was virtually in the possession of the sheriffs, for the types, plant and machinery, whereby that right had been exercised, had been seized, as had also the printing-offices where the papers were produced, and were in his possession. According to the requirements of the act, that printing-office was the only place where the papers could be lawfully printed and published, the 7th section imposing a penalty for disobedience. The sole object of the legislature in passing the act was to protect the revenue, and the registration was with that view, and did not afford any

entered in a book to be kept at the head office for stamps in Westminster, Edinburgh and Dublin respectively, the title of every newspaper registered at the said respective offices, and also the names of the printers and publishers thereof as the same appear in the declaration required by this act to be made relating to such newspapers respectively, and all persons shall have free liberty to search and inspect the said book from time to time during the hours of business at the said offices without payment of any fee or reward." The 19th section, "That if any person shall file any bill in any court for the discovery of the name of any person concerned as printer, publisher or proprietor of any newspaper, or of any matters relative to the printing or publishing of any newspaper, in order the more effectually to bring or carry on any suit or action for damages alleged to have been sustained by reason of any slanderous or libellous matter contained in any such newspaper respecting such person, it shall not be lawful for the defendant to plead or demur to such bill, but such defendant shall be compellable to make the discovery required; provided always, that such discovery shall not be made use of as evidence or otherwise in any proceeding against the defendant, save only in that proceeding for which the discovery is made."

evidence of ownership. He referred to *Longman v. Tripp* (2).

Mr. Bacon and *Mr. Roxburgh*, for the assignees, denied that the possession of the sheriff was the possession of the mortgagees, and contended that the only means of ascertaining the ownership of the paper was by consulting the register, and that at least the types and all the tangible property was in the order and disposition of the bankrupt. They relied upon—

Longman v. Tripp (2).

Harmer v. Westmacott, 6 Sim. 284.

Mullett v. Green, 8 Car. & P. 382.

Mr. Hannen and *Mr. T. Stevens* were respectively heard in reply.

March 23. — LORD JUSTICE KNIGHT BRUCE.—As to the tangible property in question upon these petitions included in the respective securities of the petitioners, which was seized by the sheriff before the bankruptcy, and in his possession down to the bankruptcy, I am of opinion that at the time of the bankruptcy it was not in the order and disposition and reputed ownership of the bankrupt, with the consent of both or either of the petitioners. The notice served on the bailiff before the bankruptcy on behalf, in effect, of the two petitioners, although mentioning the security of the petitioner, *Mr. Baldwin*, only, was, I conceive, available for both the petitioners, according to their respective titles, and so far *Mr. Foss* is the prior mortgagee. Thus far, therefore, I differ from the learned Commissioner. With regard, however, to the property not tangible, that which has been called the copyright of the newspapers, and was a right to publish the newspapers bearing particular names, I agree with him. This property—this right—was not, nor could have been seized by the sheriff, and neither of the petitioners' mortgages was in my opinion rendered, by means of the communication made to the meetings of some of the bankrupt's creditors or otherwise, sufficiently public or notorious to preclude the reputed ownership of the bankrupt with regard to it. He was registered at the Stamp Office as the sole proprietor of the

newspapers; was the rated occupier and master of the house where the printing and publishing of them were carried on, and was generally known and regarded as their proprietor. Observations were well made by *Mr. Stevens* on the circumstances that the type and other visible effects used in printing and bringing out the newspapers were in the possession of the sheriff before and at the time of the bankruptcy, and that the newspapers could not be printed elsewhere than where they were then printed, without a fresh entry at the Stamp Office. These facts, however, I do not think, on consideration, make any difference. The order before us, consequently, will be altered as to the tangible effects, but not further, and the deposit will be divided. As to the tangible effects, there will be a mortgagee's order.

LORD JUSTICE TURNER. — These are petitions by mortgagees of three newspapers, and of the type, and plant and machinery attached to the establishment, complaining of a decision of *Mr. Commissioner Evans*, by which he held that the newspapers and the plant were in the order and disposition of the bankrupt at the time of his bankruptcy, and therefore passed to the assignees. The bankrupt was the sole proprietor of the newspapers, and he alone had made the statutory declaration required by the Newspaper Acts, and matters continued in that position down to the time of the bankruptcy. No such statutory declaration as was recognized by the acts was ever made by either of the mortgagees. The case in the argument before us was very properly divided into two considerations: first, as it affects the newspapers, and, secondly, as it affects the plant. As to the newspapers, it was in the first place contended that they are not goods and chattels within the meaning of the 125th section of the act, which provides for goods and chattels of which the bankrupt is reputed owner passing to the assignees. It was said that the right in the newspaper is a mere right to publish the paper under that name, and that such a right could not be considered as goods and chattels within the meaning of the act. But to say nothing of the copyright in the newspapers, which undoubtedly exists, the

right to publish the newspaper is a right to which an interest is attached. It is a right protected by Courts of law and by Courts of equity, and therefore a proprietary right; and the statutes, the very Newspaper Acts on which the argument before us proceeds, treat the matter as a matter of property, and as being a proprietary right. I feel, therefore, that the property in these newspapers must be considered as goods and chattels within the meaning of the act. Those words, "goods and chattels," are words of very extensive signification, and undoubtedly comprise both property tangible and property which is not tangible. If there had been any doubt in my mind on that point, it would have been removed by the case of *Longman v. Tripp*, which seems to me to be a decisive authority upon the subject, and to be well founded in point of law. The case was argued further as to the question of the copyrights, on this ground: it was said that the Newspaper Acts were acts that were merely passed for fiscal purposes, that they had nothing to do with the rights of property, and therefore could not be considered as at all affecting the question whether the property was in the nature of goods and chattels within the meaning of the Bankrupt Act. But the case of *Longman v. Tripp* governs that point also; and, independently of the case of *Longman v. Tripp*, I think that the argument derived from the Newspaper Statutes is not well founded, for whether those statutes are for fiscal purposes or not, they, at all events, furnish the means by which the ownership of the property may be made known to the world. The declarations which are made under the Newspaper Acts are *indicia* of the property, and where such *indicia* exist I apprehend they must be attended to for the purpose of taking the property out of the disposition of the bankrupt, and removing them out of the operation of the reputed ownership clauses. The declaration is evidence of the ownership, and what may be effectual to remove that evidence must be resorted to. A case was referred to on this subject in favour of the appellants' argument, namely, *Sims v. Thomas*, but that case does not seem to affect the question at all. In the first place, it was a case under the Insolvent Debtors' Act, 1 Geo. 4. c. 119,

which has nothing whatever to do with the question of reputed ownership, there being no clause of reputed ownership contained in the statute. What is more material is this, that the observations which are there made upon the words "goods and chattels" have reference, not to any such words used in that statute, but to the words "goods and chattels" used in the Statute of Elizabeth for the protection of creditors (13 Eliz. c. 5.), for it has been well settled that the policy of that statute being to prevent impediments to judgments in favour of creditors, the words "goods and chattels" in that statute apply to goods and chattels which may be made the subject of an execution. When we consider the use of the words "goods and chattels" in the Statute of Elizabeth, and also their use in the Bankrupt Act, the use of the two words is plainly different. In the case of the Statute of Elizabeth they are for the purpose of securing to the creditors execution against the goods and chattels, and therefore apply to property which may be the subject of an execution; but in the case of the Bankrupt Act, the provision is for the purpose of preventing creditors from being deceived by an apparent ownership in the property. That applies not only to tangible property, but to property which is not tangible, and of course the act has been so construed that "goods and chattels" in that act apply as well to property which is tangible as to property which is not tangible. I fully, therefore, agree with the decision of the learned Commissioner upon the question of copyright in the newspapers; or of the property in the newspapers, but with respect to the plant I very respectfully differ from his decision on that point. The learned Commissioner's judgment on that subject seems to have been founded almost entirely upon the case of *Barrow v. Bell*, but upon examining that case it does not seem to me to govern the present question. I think that the true ground of the decision in *Barrow v. Bell* is to be found in the judgment of Mr. Justice Erle upon the subject. There a question had arisen as to goods in a trader's house which were not the property of the trader, there being an execution against the goods, and the sheriff having taken them all. It was held,

that the fact of the sheriff having taken them did not take them out of the order and disposition of the bankrupt, so that they passed to the assignees. But, upon looking at the facts of the case, it will be found that after the execution was levied it is stated thus:—"Eyre, who was the debtor, remained in possession of the said furniture from the date of the indenture of assignment by way of mortgage down to the seizure of the same by the plaintiff as after mentioned"—that is, the seizure by the mortgagee—"unless his possession was determined by the seizure by the sheriff as before mentioned." So that there was no alteration whatever in the possession of the property. But what Mr. Justice Erle says on the subject is this:—"I also am of opinion that the goods were in the possession, order and disposition of Eyre at the bankruptcy, and up to the time of filing the petition. It is clear that had the sheriff never acted that would be so. Did the sheriff's entry upon the premises, and his claim to take the goods as Eyre's make any difference as regards the true owner and the assignees of Eyre? I think not. There is a fallacy wrapped up in the use of the ambiguous word "possession." When the sheriff claimed to enter into possession of all the goods in the house, that, in so far as he was acting rightfully, was a taking possession in law of all Eyre's goods there, but, so far as he was a wrong-doer, that is, as to the goods there not belonging to Eyre, he took no possession in law beyond what he took in fact, and the case states that he took no possession at all of the plaintiff's goods." So, in truth, the Court proceeds upon this ground, that, taking the goods in execution was not in law a taking of the goods of Eyre, for it was a taking of the goods of the mortgagee, and there was no possession in fact taken, as Mr. Justice Erle puts it, because, he says (I have no doubt referring to that passage of the judgment), that the furniture remained in the possession of Eyre, unless disturbed by the taking of the sheriff. And that case does not seem to me to be at all different in substance from some of the preceding cases, particularly the case of *Jackson v. Irving* (3), of an

(3) 2 Camp. 48.

execution against a trader, where the warrant was given to the shopman of the trader, and the possession of the goods continued the same. The trade was carried on, the shopman holding the warrant of the sheriff under which the goods had been seized. That is the case in which Lord Ellenborough refers to the case of a warrant being directed to a gentleman's servant. But even in that case it is to be observed, that Lord Ellenborough says, that if the warrant had been to a bound-bailiff the case would have been all right. So that, supposing the warrant had been in that case to a bound-bailiff, Lord Ellenborough's opinion would have been that the execution did take the goods out of the order and disposition of the bankrupt. How is it here? The sheriff takes possession in fact of all the plant. There is no pretence for saying that there is any evidence to shew that that possession was in any sense the possession of the bankrupt, or that the bankrupt continued in possession after the execution by the sheriff in the same mode in which he had been in possession prior to execution levied; and that brings the case distinctly within the case of *Fletcher v. Manning*, and also in conformity with a long line of previous decisions to be found in *Jones v. Williams* (4), in *Ex parte Smith* (5) and *Robinson v. M'Donnell* (6). The case seems to me, therefore, to be clear, and to be in favour of the mortgagees as to the plant, but to fail as to the property in the newspapers themselves. An attempt was made to distinguish the case, upon the ground of some notoriety in the possession of the mortgagees. I have looked into the evidence on the subject, and I am satisfied it cannot be maintained that the mortgagees were entitled on the ground of any notoriety of their own. I fully agree with my learned Brother, that the order in this case should stand so far as respects the property in the newspapers, but must be altered so far as respects the property in the plant and chattels.

(4) 13 East, 439.

(5) 2 Rose, 254.

(6) 2 B. & Ald. 134.

LORDS JUSTICES. }
 March 26; } *Ex parte BLACKHURST,*
 April 16. } *in re BLACKHURST.*

Certificate—Bankrupt Solicitor—Vexatious Defence.

A solicitor received money on behalf of a client, and on the client bringing an action for the amount, he pleaded never indebted, and alleged that this amount was agreed, when recovered, to be left in his hands in part discharge of costs in proceedings against the client and for which he, the solicitor, was responsible. The action against the solicitor was originally brought in the County Court of Lancashire, when it was removed by him to the Common Pleas of the Duchy of Lancaster. The trial ended in a reference, on which an award was made shewing that the solicitor was debtor to the client. Thereupon a brother of the solicitor obtained an adjudication in bankruptcy; and on the application of the bankrupt for his certificate, the Commissioner suspended it for twelve months, then to be of the second class, and refused protection for three months; and on appeal, the order was affirmed.

This was the petition of the bankrupt, a solicitor, praying the reversal or variation of an order of Mr. Commissioner Perry, of the Liverpool District Court of Bankruptcy, by which he suspended the certificate for twelve months, then to be of the second class, and no protection for three months. One Mr. Woodhead was the lessee of premises, named Freemasons' Hall, at Liverpool, and let a floor to one Mr. Smith, who used it as a place of entertainment for music and dancing. A proprietor of adjoining premises filed a bill in the Court of Chancery for the Duchy of Lancaster, praying an injunction against Mr. Smith from so using the premises. Mr. Woodhead was made a co-defendant, and the bankrupt was employed as the solicitor of both defendants, Mr. Woodhead agreeing to contribute 20*l.* towards the defence. The injunction was granted. The bankrupt had also acted as Mr. Woodhead's solicitor in an action, and having recovered damages which were paid to him, the bankrupt, as the plaintiff's solicitor, refused

to hand over the amount to Woodhead, and alleged that it was due to him for the costs of the suit. Woodhead brought an action against him for the amount. This action was brought in the county court, but the bankrupt pleaded "never indebted," having removed the cause by *certiorari* into the Court of Common Pleas of the county of Lancaster. The matter was referred upon the trial, and an award was made against the bankrupt. Judgment was entered up for the amount, and for a large additional sum for costs, and the petition for adjudication against the bankrupt was then filed by the bankrupt's brother. The learned Commissioner considered that the conduct of the bankrupt in defending the action and in pleading the pleas referred to had been so vexatious and improper that he came to the decision now appealed from.

Mr. Swanston and Mr. De Gex were for the appellant, and submitted that the sentence was too severe, even if the Court should agree with the learned Commissioner that the plea was not justifiable, for it was clear that the bankrupt considered he had a good defence to the action. If the Court looked into the circumstances as to the award and otherwise as they were bound to do, they would concur with that opinion.

Mr. Osborne, for Mr. Woodhead, supported the judgment of the Commissioner.

Mr. Charles Hall, for the assignees, left the matter wholly to the Court.

LORD JUSTICE KNIGHT BRUCE said, that a solicitor who defended an action brought against him by a client for money alleged to have been received by the solicitor for that client's use, or on that client's account, ought to be able to shew especially good grounds for such a proceeding. By the expression "good grounds," his Lordship did not mean merely such grounds as would be available as a defence in a court of justice, but grounds which to an honourable man would afford a moral justification for the defence. He looked in vain for such grounds in this case. The manner

in which Mr. Woodhead had been met was litigious, vexatious and oppressive in form and substance. Not only was this Court bound by the award, which established the debt as just, notwithstanding what Mr. Swanston and Mr. De Gex had urged as to the duty of the Court to look into the circumstances, but even on looking into the circumstances, there was no excuse for the course adopted. His Lordship did not say that there had been any error in the decision at which the learned Commissioner had arrived; but if there had been any error, it was, considering the position in life and the profession of the bankrupt, an error on the side of lenity.

LORD JUSTICE TURNER added, that a vexatious resistance had been made against a legal demand, against which there was not, and it must have been well known that there was not, any defence whatever. He, therefore, agreed with the decision.

April 16.—*Mr. Swanston* read a letter from the opposing creditor, Mr. Woodhead, in which he stated his willingness to withdraw all opposition to the bankrupt having a certificate.

Mr. De Gex was on the same side.

Mr. Osborne, for Mr. Woodhead.

Mr. C. Hall, for the assignees, consented to the bankrupt having his certificate.

LORD JUSTICE KNIGHT BRUCE said, there was, to say the least, a great degree of unpleasantness in a solicitor being made a bankrupt, particularly by his own brother. His Lordship did not like to appear to differ from the Commissioner, which, in fact, he did not; but, as the only creditor on whose opposition the former decision had been made was now pacified, their Lordships would ask the Commissioner to reconsider his decision, and the case might be mentioned again.

LORDS JUSTICES. { *Ex parte CLARKE, in re*
Feb. 19. { THE WELSH POTOSI LEAD
AND COPPER MINING COMPANY (limited).*

Practice—Appeal—Time—Joint-Stock Companies Act, 1856—Winding up—Bankrupt Law Consolidation Act, 1849.

Where a contributory did not present a petition of appeal against an order of a Commissioner acting in the winding up of a company in bankruptcy under the Joint-Stock Companies Act, 1856 (19 & 20 Vict. c. 47), until after the expiration of the twenty-one days limited for appeals under the Bankrupt Law Consolidation Act, 1849 (12 & 13 Vict. c. 106.):—Held, that his petition was too late, and could not be considered on its merits.

This was the petition of appeal of Mr. Thomas Clarke, praying that three orders of the Court of Bankruptcy, dated respectively the 10th of September and the 20th of November 1857, and the 3rd of February 1858, might be discharged or varied. Into the facts of the case it becomes unnecessary to enter (further than appears from the judgment), since the decision turned upon a preliminary objection on a point of form. The company was established before 1856, and was afterwards registered under the act of 1856 (19 & 20 Vict. c. 47). In July 1857 a petition for winding up the company was presented under that act to the Court of Bankruptcy, and the company was ordered to be wound up accordingly. The Commissioner, Mr. Fane, made an order for a call on the 10th of September 1857, and made a peremptory order for the same purpose on the 20th of November following. On the 27th of November, Mr. Commissioner Holroyd (acting for Mr. Fane), ordered the suspension of the order of the 20th of November, for a particular purpose. Mr. Clarke, on the 3rd of February, 1858, applied to Mr. Commissioner Fane to review his orders of the 10th of September and the 20th of November 1857, but upon hearing the application he rescinded

* See cases respecting this company, *ante*, pp. 1, 4.

the order of Mr. Commissioner Holroyd (1), and refused to reconsider his own two previous orders. Mr. Clarke, on the 10th of February 1858, appealed from the three orders of Mr. Fane.

On the opening of the appeal, the official liquidator objected that it was too late, for by the 12th section of the Bankrupt Law Consolidation Act, 1849, it was directed that all appeals against orders in bankruptcy must be presented within twenty-one days, or be considered final; that all proceedings in bankruptcy under the Joint-Stock Companies Act of 1856, were regulated by the practice of the Court of Bankruptcy, where they were not altered or varied by the act of 1856, or any rules or orders made in pursuance of that statute (2); that, as regarded the orders of the 10th of September and the 20th of November 1857, they had not been appealed against in time, and the order of the 27th of November was plainly wrong in suspending their operation, so that the order of the 3rd of February 1858 was right in rescinding it.—See sections 10, 60, 61, 62, 82, 90, 99, 108, 111, and 113. of the act, 19 & 20 Vict. c. 47.

The argument against this objection was that the suspension by virtue of the order of the 27th of November operated to prevent the twenty-one days running against the appellant, and that the general rules in bankruptcy did not apply to the winding up of companies under the act of 1856.

For the appellant the following cases were cited and commented on:—

Ex parte Saunderson, 1 Mac. & G. 306; s. c. 1 Hall & Tw. 486; 19 Law J. Rep. (n.s.) Chanc. 122.

Ex parte Carter, 1 De Gex, M. & G. 212; s. c. 4 H.L. Cas. 337; 21 Law J. Rep. (n.s.) Bankr. 2.

(1) This order was made because *Ex parte Holt-house*, see *ante*, p. 1, governed this case, and had not then been decided on appeal.

(2) By section 99. of 19 & 20 Vict. c. 47, it is enacted that certain Commissioners of Bankruptcy may make rules, "but subject to such rules, the general practice of the Courts of Bankruptcy in England and Ireland respectively, in cases within the ordinary jurisdiction of such Courts, shall, so

Mr. Selwyn and *Mr. Roxburgh*, for the official liquidator.

Mr. Bacon and *Mr. T. H. Terrell*, for the appellant.

Mr. Selwyn was not called on to reply.

LORD JUSTICE KNIGHT BRUCE said that the present petition was presented under the Joint-Stock Companies Act, 1856, by way of appeal against three orders of the Court of Bankruptcy, dated respectively the 10th of September and the 20th of November 1857, and the 3rd of February 1858. The petitioner was, as to time, in this difficulty or dilemma, that either he had no right to appeal at all, or his right was limited by the Bankrupt Law Consolidation Act of 1849. It appeared to his Lordship that it would be more beneficial for the petitioner to consider that he had a limited power of appeal under the Bankrupt Law Consolidation Act. Then, as to the orders of September and November, the appellant was plainly out of time; although this was not the case with respect to the order of the 3rd of February, which order recited the previous order of the 20th of November, peremptorily ordering the appellant to pay to the official liquidator a sum of 1*l.* on each of his shares; and it also recited Mr. Commissioner Holroyd's order of the 27th of November, suspending the two previous orders, and, on the application of the official liquidator, it directed that the order of Mr. Commissioner Holroyd should be discharged. The question for consideration was, was that order right or wrong? In his Lordship's opinion it was clearly right. The order of the 10th of September directed that a certain class of contributories (of whom Mr. Clarke was one) should, with certain exceptions (Mr. Clarke not being within the exception), on or before the 5th of October then next ensuing, pay to the official liquidator a call of 1*l.* upon each share held by them. Mr. Clarke was therefore peremptorily ordered to pay 310*l.* to the official liquidator. That was an order which was not now questioned, or even questionable, and it directed Mr.

far as the same is applicable and not inconsistent with this act, apply to all proceedings under this act."

Clarke to pay the amount upon the day mentioned. A copy of this order was sent to Mr. Clarke by the post on the 12th of September, and was inserted in the *London Gazette* on the 18th. It must, therefore, be assumed—nor did Mr. Clarke deny—that, before the end of September, the order was well known to him; he, however, did not appeal from it. An order, which was quite an order of course, was then made that Mr. Clarke should, within seven days after personal service thereof upon him, pay to the official liquidator a sum of 310*l.*, being the amount of the aforesaid call of 1*l.* per share upon the shares held by him. Now this was only an order fixing another time for a payment which had been already ordered. Against this the order for suspension of payment did not appear to his Lordship effectual; with very great respect for the opinion of the learned Commissioner (Mr. Holroyd), he thought the suspending order erroneous; and, assuming, as on this occasion their Lordships were bound to assume, that the orders of the 10th of September and the 20th of November had been duly made and not appealed against, he was of opinion that Mr. Commissioner Fane had acted rightly in discharging it. The present petition of appeal must, for these reasons, be dismissed.

LORD JUSTICE TURNER said that he was quite of the same opinion. For his own part, he should have been glad to have had the case discussed upon its merits, as he thought the question of construction which it would have raised of the greatest importance; but his Lordship confessed that he did not see how the Court could do so. The petitioner was before the Court under the statutory jurisdiction which the Court possessed; and if the statute gave no right of appeal, it was impossible for their Lordships to do so. The 12th section of the Bankrupt Law Consolidation Act (12 & 13 Vict. c. 106), giving that right to appeal, adds this proviso, "Provided always, that if no such appeal shall be entered within twenty-one days from the date of any decision or order of the Court, and be thereafter duly prosecuted, every such decision or order shall be final." Now, in this case the order complained of had been made on the 10th of September; that order

fixed a call upon Mr. Clarke; no appeal had been preferred by him within the period limited for that purpose by the section to which his Lordship had referred, and at the expiration of the time the order became absolute. Then there followed the order for suspension, which was either inoperative, or it operated merely to suspend the operation of a former order. On the best supposition, what was in issue when the case came on again? It could not be that their Lordships had to look to the merits; but only whether there were any special circumstances; for if they were now, under the Commissioner's order, in a position to look at the merits, they must conclude that it was in the power of a Commissioner, whilst appearing to suspend, absolutely to rescind, a previous order which had become final. The appeal could not be allowed.

LORD JUSTICE KNIGHT BRUCE.—The petition appears to us to be a mistaken one, but not frivolous. No costs on either side, but those of the official liquidator will be paid out of the estate.

Rendall v Taylor 4 P.D. 262/07

LORDS JUSTICES. } *Ex parte* HIGGINS, in re
March 13. } TYLER.

Partnership Debt—Action by Creditor against One Partner—Judgment—Extinguishment of Joint Debt—Bankruptcy of Partners—Right of Proof against Joint Assets gone.

A firm of two partners owed a debt to A. B. A. B. brought an action against one of the partners, obtained judgment, and proceeded to execution and sale. Between the time of the execution, and sale, the partner sued was adjudicated bankrupt; and the day after the sale the other partner was also adjudicated bankrupt, and both sets of proceedings were consolidated. In proceedings at law the proceeds of the sale were decided to be partnership assets. The partner who had been sued had no separate assets. A. B. was admitted to prove against the joint estate of the bankrupts; but, upon appeal by the assignees,—Held, overruling this decision, that the joint debt of the two partners was extinguished by the judgment

against one of them; and that, therefore, the proof must be rejected.

This case came on upon appeal against a proof.

The bankrupts, John and William Tyler, carried on business, as millers, at King's Bromley, in the county of Stafford, in partnership. At a dividend meeting, held on the 8th of February 1858, Thomas Newbold, of Netherseal, in the county of Leicester, farmer, sought to prove, against the joint estate of the bankrupts, a debt of 918*l.* 10*s.* 10*d.* on simple contract for goods sold and delivered. The proof was resisted by the assignees, on the ground that it was admissible only against the separate estate of W. Tyler. It was proved that T. Newbold, before the bankruptcy, sued W. Tyler alone in a separate action for the debt, and that he had, on the 17th of January 1857, signed final judgment against W. Tyler alone. On or about that day T. Newbold had issued a separate execution by writ of *fiery facias* against W. Tyler alone, under which the sheriff for the county of Stafford, on the 19th of January, seized the goods and chattels of the two bankrupts, and afterwards sold the same, on the 28th of January, and two following days. On the day before the sale an adjudication of bankruptcy was made against W. Tyler, on the petition of Henry Higgins, and notice was given to the sheriff before the sale on behalf of the assignees, and on the 2nd of February 1857 J. Tyler was also adjudicated a bankrupt. On the 31st of January Newbold ruled the sheriff to make a return to the writ of *fiery facias*, and thereupon the sheriff interpleaded. Newbold insisted on his right to the proceeds of the sale under the execution, and upon the summons of interpleader Mr. Justice Erle directed an issue to try the question at the then next Staffordshire Assizes; but Newbold abandoned the right; and on the 11th of March an order was made under the interpleader proceedings confirming the right of the assignees to the money arising from the sale, as joint assets.

No joint petition for an adjudication was filed against J. & W. Tyler; but, by an order of the Commissioner, the two separate petitions were consolidated, and

it was ordered that all proofs should be against both bankrupts. There was no separate balance-sheet by either of the bankrupts; but in the joint balance-sheet Newbold's debt was treated as one due from the partnership, and under the head of "property" was inserted the sum of 1,352*l.* 15*s.*, realized by the sheriff's sale. There were no separate assets whatever of W. Tyler.

The creditors' assignees under the bankruptcy were H. Higgins and Henry Meeson; and the official assignee was George Kinnear. The Commissioner, Mr. Balguy, of the Birmingham District Court of Bankruptcy, admitted Newbold to prove for the 918*l.* 10*s.* 10*d.* against the estate of the bankrupts; and from that decision the present case was an appeal, the assignees contending that the Court ought to declare that the creditor had no right of proof against any one, or the estate of any one, but W. Tyler, whom he had sued to judgment and execution. The sale produced about 1,300*l.*; but W. Tyler swore that, if properly conducted, it would have realized not less than 2,000*l.*

Newbold deposed that he had had for several years considerable dealings with Messrs. J. & W. Tyler; but that he had always transacted his business with W. Tyler alone, who appeared to be the acting partner, and attended the neighbouring markets; that, in January 1857, he (Newbold) was a creditor, for corn supplied to the bankrupts, for upwards of 900*l.*, and not being able to obtain payment, he caused an action to be commenced against W. Tyler alone; that at that time the legal question of a partnership had never occurred to him at all, as he had never had anything to do with J. Tyler personally.

Mr. Selwyn and Mr. Speed, for the appellants, contended that there had been a merger of the simple contract debt from the two partners, in the judgment debt which had been recovered against Mr. W. Tyler, and that Mr. Newbold, having elected to make Mr. W. Tyler his sole debtor by bringing this action against him, although he knew, or must be taken to know, that he had a demand against him and his partner, it was too late to prove against the joint estate. This was con-

clusively shewn by the case of *King v. Hoare* (1). It was plain, too, that the fact of the action being brought against one of two debtors was a release of the other—*Bradley v. Miller* (2). The remedy at law of Mr. Newbold was wholly gone; and his condition in equity was no better, for there was neither fraud, surprise nor concealment. Everything had been open and fair on the part of the debtors; and he could not, had Mr. J. Tyler died, have instituted a creditors' suit against his estate, after he had deliberately taken the course he had done. The following cases were also referred to:—

Drake v. Mitchell, 3 East, 251.

Ex parte Christy, 2 Deac. & C. 155.

Mr. Bacon and *Mr. De Gex*, for the respondent, argued that Mr. Newbold's debt was equitably a joint debt, and ought to be admitted to proof against the joint estate. It was vain to say that the judgment had destroyed the debt as a joint debt, both at law and in equity; for Lord Ellenborough, in the case cited by the appellants, of *Drake v. Mitchell*, expressed his opinion to the effect that a judgment could not operate to change the nature of a debt. His Lordship there says:—"A judgment, in any form of action, is still but a security for the original cause of action, until it is made productive in satisfaction to the party; and, therefore, till then it cannot operate to change any other collateral concurrent remedy which the party may have": an opinion concurred in by Tindal, C.J., in *Bell v. Banks* (3). The case of *King v. Hoare*, so much relied upon, was rather one of special pleading than upon principle, or a decision upon the facts of the case. The following cases were also cited:—

Ex parte Waterfall, 4 De Gex & Sm. 199; s. c. nom. *Ex parte Jones*, 20

Law J. Rep. (N.S.) Bankr. 5.

Ex parte Griffiths, 3 Ibid. 174; s. c. 22 Law J. Rep. (N.S.) Bankr. 50.

Ambrose v. Clendon, Cas. temp. Hardwicke, 267; s. c. 2 Str. 1042.

Bryant v. Withers, 2 M. & S. 123.

(1) 13 Mee. & W. 494; s. c. 14 Law J. Rep. (N.S.) Exch. 29; 2 Dowl. & L. P.C. 383.

(2) 1 Rose, 273.

(3) 3 Man. & G. 258.

Mr. Speed was heard in reply.

LORD JUSTICE KNIGHT BRUCE.—In this case a farmer sold corn to two millers, who were partners, and he sold to the partnership; and his debt, therefore, constituted a partnership debt. Unluckily, perhaps, for him the facts are such that the farmer must be taken to have had notice of the partnership, and that he had the two millers for his debtors. Such appears to be the case upon the evidence. He probably dealt personally only with one of these millers, and when he found on the part of that one either unwillingness or inability to pay his demand, he consulted his attorney, and probably when he did so he mentioned as his debtor to the attorney only the name of that one miller whom he had himself seen at market. Against that one alone an action was brought, and judgment was recovered and completed. When the judgment was completed, and not before, an act of bankruptcy was committed. Notwithstanding all this, the unfortunate creditor, who found he could get nothing from the separate estate of his debtor, had been allowed to prove his debt against the joint estate of the two millers. I very much wish that I could approve of that judgment, and I feel almost ashamed to find myself differing from the Commissioner. It appears, however, to me that the joint debt is extinguished, both legally and equitably, according to the law of this country. The cases of *Ambrose v. Clendon*, *Ex parte Griffiths* and *Ex parte Waterfall*, were cases of exception; and in the present case there are no circumstances to constitute an exception. I repeat, that it is with great regret, and almost with something more, that I find myself compelled to differ from the decision of the learned Commissioner.

LORD JUSTICE TURNER.—I agree with my learned Brother. It appears to me that by the judgment the remedy was entirely gone against the joint debtors, both at law and in equity. The question is, whether there is anything to preserve the right to a remedy by proof against the joint estate under the bankruptcy. I confess that I cannot see anything which does so. It might have turned out to be for

the benefit of the creditor to maintain the judgment against W. Tyler, and to have proved against his separate estate. He has elected to take his remedy against W. Tyler's separate estate, and it now turns out that it is not for his benefit. He has made his deliberate selection to pursue his remedy against one debtor, and that having failed, he is now attempting to have recourse to the other. *Ambrose v. Clendon* was not a case of election, nor could there have been any intention to elect, and this applies to some of the other cases. But here there has been an election, and the creditor must be bound by it. The proof must, therefore, be expunged.

The counsel for the assignees consenting, the costs of both parties were ordered to be paid out of the estate.

LORDS JUSTICES.
April 16, 17, 23.

Ex parte TURNER, in
re WOOD AND TARRANT.

Certificate — Time-Bargains — Stock — Shares—Presence of Bankrupt on Questions of Certificate.

*A bankrupt had granted to him by one of the Commissioners a second-class certificate, suspended for ten months, but with protection, for having within twelve months preceding the adjudication, lost over 200*l.* by the purchase and sale of stock, within the meaning of the 201st section of the statute 12 & 13 Vict. c. 106. (the Bankrupt Law Consolidation Act). Part of the losses were on stock and part on shares not converted into stock, and the former did not amount to 200*l.* The assignees appealed against the decision, but the Lords Justices refused to make any variation in the order.*

Where a bankrupt's certificate is in question the bankrupt ought himself to be present.

This was an appeal, presented by the official and trade assignees of the bankrupts, Wood & Tarrant, cotton-brokers, of Liverpool, against the grant by the district Commissioner of their certificates.

By the 201st section of the Bankrupt

Law Consolidation Act, 12 & 13 Vict. c. 106, it is enacted "That no bankrupt shall be entitled to a certificate of conformity under this act, and any such certificate, if allowed, shall be void, if such bankrupt shall have lost by any sort of gaming or wagering in one day 20*l.*, or within one year next preceding the issuing of the fiat or filing of the petition for adjudication of bankruptcy 200*l.*, or if he shall within one year next preceding the issuing or the filing of such petition have lost 200*l.* by any contract for the purchase or sale of any Government or other stock, where such contract was not to be performed within one week after the contract, or where the stock bought or sold was not actually transferred or delivered in pursuance of such contract."

Mr. John Brearley Wood and Mr. Walter Tarrant, cotton-brokers, of Liverpool, were adjudicated bankrupts in the month of November 1857, and Mr. Charles Turner was appointed official assignee and Mr. D. Malcolmson and Mr. N. Denduit were chosen creditors' assignees of their estate.

It appeared that Mr. Wood had, between May and November 1857, entered into seven contracts for the purchase and sale of shares or stock in the Great Luxembourg, the South-Eastern, the Grand Trunk of Canada, the Midland Counties, and the Great Western of Canada Railways, and that upon those transactions he had sustained a loss amounting to 292*l.* 5*s.* 1*d.* Mr. Wood also admitted other heavy losses before May 1857. Mr. Tarrant also engaged in seventeen similar transactions in the Grand Trunk of Canada and South-Eastern Railways, shewing a total loss of 619*l.* 2*s.* 8*d.* The evidence in support of the petition shewed that at the time when these purchases were made the shares in the South-Eastern, the Grand Trunk and the Midland Counties Railways had been already converted into stock, and of the total loss of 292*l.* 5*s.* 1*d.* sustained by Mr. Wood 136*l.* 0*s.* 1*d.* arose from purchases of such description, whilst the remainder, 156*l.* 5*s.*, was attributable to purchases in the Great Luxembourg and the Great Western of Canada, neither of which had been converted into stock, though they were liable to be so converted. It was

admitted that no transfer was ever made of any of the stock or shares purchased, and that none was ever intended to be made, the dealings in question being mere time bargains or stock-jobbing speculations. The learned Commissioner was of opinion, that neither of the bankrupts had brought himself within the section before stated, and he granted them certificates accordingly, but to be of the second class, suspended for ten months from the 19th of February 1858, with protection in the mean time.

Mr. Bacon and *Mr. Charles Hall*, for the appellants, argued that for the purposes of the present case there was no distinction between railway shares and railway stock, that is to say, that there was no difference between shares in a railway company before and after the same had been consolidated or converted into stock. The act of parliament was express in its disapprobation of stock-jobbing transactions; and on a question of certificate the Court could not overlook acts of traders such as had been not only disclosed, but not denied, and which were plainly and manifestly nothing but mere acts of stock-jobbing. They cited—

Ex parte Matheson, 1 De Gex, M. & G. 448; s. c. 21 Law J. Rep. (N.S.) Bankr. 18.

Ex parte Copeland, 2 Ibid. 914; s. c. 22 Law J. Rep. (N.S.) Bankr. 17.

Ex parte Ryder, 1 De G. & Jo. 317; s. c. 26 Law J. Rep. (N.S.) Bankr. 69.

LORD JUSTICE TURNER. — Unless "shares" are "stock" within the meaning of the 201st section, the case will not fall within it.

Mr. Selwyn, for the bankrupts, urged that the statute only attached a penalty for stock-jobbing acts when there was a loss; the framers could not, therefore, have considered the acts themselves immoral. If this were so, the fact of the bankrupts having engaged in them was no offence that should call for the animadversion of the Court. There was a material distinction between "shares" and "stock," for the former could only be converted into

the latter by authority of parliament. He cited *Ex parte Wade* (1).

Mr. Bacon, in reply, insisted that as to Tarrant, at least, all the transactions were in "stock," in its technical as well as liberal sense. That an act of parliament was not necessary for the purpose of the conversion of "shares" into "stock" was plain from the 14th, 16th and 61st sections of the Companies Clauses Consolidation Act, 8 Vict. c. 16.

LORD JUSTICE KNIGHT BRUCE. — How was the matter treated before the Commissioner?

Mr. Pemberton (solicitor for the bankrupts), sworn, said, I appeared for the bankrupts in the court of the Commissioner, and on that occasion every one of the transactions was treated as if it had been in railway shares, not one of them being represented as being in railway stock. Indeed, *Mr. Squarey*, the solicitor for the assignees, all along so treated the matter.

LORD JUSTICE KNIGHT BRUCE. — As *Mr. Squarey* is not here, we both think that the matter had better stand over, to enable communication to be made with him, so that we may know what explanation he will give.

April 23. — *Mr. Selwyn* read a letter from *Mr. Squarey* confirming *Mr. Pemberton's* evidence that the whole subject-matter had been treated before the Commissioner as "shares."

LORD JUSTICE KNIGHT BRUCE. — Under the particular circumstances of this case, both my learned Brother and myself are of opinion that the order of the learned Commissioner cannot be varied, but that the bankrupts shall take their chance of the validity of the grant of the certificate at law. This Court ought not to interfere. If the case is within the 201st section of the act, to which reference has been made, the certificates will avail the bankrupts

(1) 2 Jur. N.S. 218; s. c. 25 Law J. Rep. (N.S.) Bankr. 6.

nothing; but I repeat that we do not think that the case is one in which this Court ought to interfere. My learned Brother has suggested to me, and I need not say that the suggestion is entitled to the greatest consideration, that in appeals in bankruptcy the bankrupt ought in certain cases to appear before us, and our present impression is, that in every case where the certificate is in question, the bankrupt ought to be present in court. I believe that there is at present no rule of practice on this point.

LORDS JUSTICES. } *Ex parte GREEN, in re*
 April 23. } DALES.

Joint and Separate Adjudication—Annexation—98th Section of the Bankrupt Law Consolidation Act.

A Commissioner had annexed a joint adjudication against two partners to an earlier one against one of them, under the 98th section of the statute 12 & 13 Vict. c. 106. (the Bankrupt Law Consolidation Act), and, on appeal, the Lords Justices refused to interfere.

In this case Mr. Commissioner Fonblanque had consolidated a joint adjudication which had been made against two partners who had become bankrupt, with a previous separate adjudication which had been made against one of them. By the 98th section of the Bankrupt Law Consolidation Act (12 & 13 Vict. c. 106), it is enacted, that "After a fiat issued, or a petition for adjudication of bankruptcy filed, against or by one or more member or members of a firm, any petition or petitions for adjudication of bankruptcy against or by any other member or members of such firm shall be filed and prosecuted in the court in which the first fiat or petition was prosecuted; and immediately after the adjudication under such other petition or petitions all the estate, real and personal, of such bankrupt or bankrupts, shall vest in the official assignee, and the creditors' assignee (if any) under the first fiat or petition; and thereafter all separate proceedings under such petition or peti-

tions shall be stayed, and such petition or petitions shall, without affecting the validity of the first fiat or petition, be annexed to and form part of the same; provided, that the senior Commissioner may direct that such other petition or petitions shall be filed and prosecuted in any other court, or be proceeded with either separately or in conjunction with the first fiat or petition, and such direction shall be made by a memorandum to that effect, indorsed on such petition or petitions, and under the hand of the senior Commissioner."

It was admitted that the majority of the joint creditors voted in favour of the assignees on the separate adjudication.

This was an appeal from the decision of the Commissioner.

Mr. Swanston and Mr. Clement Swanston, submitted that, according to the true construction of the 98th section, it only applied to the case of the later adjudication being against some member of a firm other than the member against whom the prior adjudication had been made, and not to a case where the second adjudication was against the whole firm. In that case the old practice remained, according to which the joint adjudication was not consolidated with the separate adjudication, but the separate adjudication was, as a matter of course, annulled or impounded, leaving the joint adjudication alone to be prosecuted.

Mr. Selwyn and Mr. De Gex, for the assignees, were not called upon.

LORD JUSTICE KNIGHT BRUCE.—I have already observed that, in my opinion, no practical object conducive to the benefit of the creditors would be obtained by departing from the course which the learned Commissioner has taken. The majority of the joint creditors have actually voted for the assignees under the separate adjudication, and I see no reason for dissenting from the order under appeal, and in my view the appeal must be dismissed.

LORD JUSTICE TURNER.—I quite agree. The appeal will be dismissed, with costs.

LORDS JUSTICES. } *Ex parte* HAINES, in re
May 31. } POWELL.

Separate and Joint Adjudication—Annexation—98th Section of the Bankrupt Law Consolidation Act, 12 & 13 Vict. c. 106. —Powers of District Commissioner—Section 90. of same Statute.

Two separate adjudications had been made against two partners, and subsequently a joint adjudication was made against both. The district Commissioner had annexed the former to the latter. Upon appeal, the decision was reversed.

This was an appeal from an order of the Registrar (acting for the Commissioner) of the Birmingham District Court of Bankruptcy, by which, without due notice, he had ordered that two separate petitions for adjudication against Mr. Powell and another, his partner, should be annexed, under the 98th section of the Bankrupt Law Consolidation Act, 12 & 13 Vict. c. 106, to a joint adjudication against both members of the firm, and that all proceedings under the separate adjudication should be stayed. There had been an agreement by the parties interested under the separate adjudication that they would waive any right to have them proceeded with.

Mr. Selwys and Mr. De Gex, in support of the appeal, said, there were two objections to what had been done; first, that no proper notice had been given, and, secondly, that, under the 98th section, the latter proceeding was directed to be annexed to the former, the second adjudication to the first, and not the reverse, which had been ordered in this case (see the section set out in the last case). There was a further ground of complaint, and that was, that, under the 90th section of the statute, no power was given to district Commissioners, but it was conferred upon the senior Commissioner. The latter section was this: "the senior Commissioner shall have power, whenever he may deem it expedient, to order any petition against or by any trader to be prosecuted in any district with or without reference to the district in which the trader shall have resided or carried on business, or to consolidate the proceedings or any part thereof, under two

or more petitions for adjudication of bankruptcy, or to impound any petition for adjudication of bankruptcy and the proceedings thereunder, or any part thereof, upon such terms as the senior Commissioner shall think fit, or to transfer any petition for adjudication of bankruptcy and the proceedings thereunder, and the prosecution or the further prosecution thereof from the Court in any one district to the Court in any other district."

Mr. Swanston and Mr. Clement Swanston, for the assignees, contended that the constant course of the Court was to suspend proceedings under a prior separate adjudication and to give effect to a joint adjudication; and they said that here the parties prosecuting the earlier separate adjudication had agreed to waive any claim to have that adjudication proceeded with.

Their LORDSHIPS considered that there had been the double irregularity which had been insisted upon on behalf of the appellant (independently of anything under the 90th section), and they discharged the order annexing the separate petitions to the joint petition, and vacated the choice of assignees; the costs of all parties being paid out of the joint estate.

LORDS JUSTICES. } *Ex parte* THE UNITY
June 1. } JOINT - STOCK MUTUAL
BANKING ASSOCIATION,
in re KING.

Infant—Joint and several Bond—Liability—Misrepresentation.

O. K., one of two partners, executed, together with his partner and another person, a joint and several bond, to secure money lent to the partnership. As part of the security, he agreed to effect a policy of assurance on his life, and for that purpose signed a declaration that he was of the age of twenty-two years. *O. K.* was, in fact, an infant; and after he attained twenty-one he became bankrupt. The lenders of the money were admitted to prove against *O. K.*'s separate estate; and, on appeal, —Held, that the fraudulent misrepresentation of *O. K.*, the bankrupt, as to age, rendered him, although

an infant, liable in equity to the debt, and the appeal was dismissed.

This was an appeal, by the assignees of a bankrupt, together with a separate creditor of his estate, against a decision of Mr. Commissioner Evans, by which he had admitted a proof.

The facts were, that Octavius and Alfred King, brothers, traded in partnership, in May 1856, when they opened a cash credit account with the bank above named to the amount of 5,000*l.*, and amongst other securities given to the bank was a joint and several bond entered into by them and a third party, to secure the repayment of advances to the extent of 5,000*l.* principal money, exclusive of interest and costs. The firm of O. & A. King became bankrupt, and a claim on behalf of the bank was entered upon the proceedings, in October 1857, for 4,175*l.* as against the separate estate of O. King, with the intention of its being thereafter turned into a proof. In December following the claim was, on the application of the assignees, ordered to be expunged, on the ground that O. King, who, at the time he executed the bond, was an infant under twenty-one years, could not bind himself. That decision was appealed against, and argued, on behalf of the bank, on the ground of misrepresentation by O. King, who, during the negotiation for the loan, represented himself to be of full age. On the 26th of February the appeal was heard before the Lords Justices, who decided that the proof was properly expunged, because the ground of misrepresentation had not been brought to the Commissioner's notice; they, therefore, dismissed the appeal, without prejudice to any application to prove, which the Unity Bank might be advised to make to the Commissioner in the bankruptcy.

A fresh proof was tendered, on behalf of the Unity Bank, against the separate estate of O. King, for 4,175*l.*, "for monies lent and advanced to the bankrupts, trading under the style or firm of 'O. & A. King,' and which O. King contracted and agreed with the bank to be responsible for and to repay, such monies being due on a cash credit account for 5,000*l.*, opened by the bankrupts respectively with the bank on

the 23rd of May 1856, at the express request of O. King, and on his expressly agreeing to become personally and individually responsible to the bank for all monies advanced to the firm on such account, and on each of the said bankrupts agreeing to deposit as security for such monies a policy of assurance for 5,000*l.*, effected on their respective lives with the Western Life Assurance Office, and also to effect a policy for 2,000*l.* on each of their lives with the Unity General Assurance Association, and on the express representation, statement in writing and solemn declaration made by O. King to the bank, and on their understanding and believing in the truth of such representation, that he would be twenty-two years of age on his then next birthday, and on the execution by the bankrupts of a joint and several bond, dated the 26th of May 1856, and entered into by them and a third party, in the penal sum of 10,000*l.*, conditioned for the payment to the bank of all and every such sum and sums of money as upon the balance of any account current which then was or at any time thereafter should be open between the said O. and A. King, or the co-partnership firm and the bank, or which might from time to time be due and owing by the bankrupts or the co-partnership firm, together with all usual discount, insurance, postage and commission to the extent of 5,000*l.*, and no more, principal money, exclusive of interest and costs, so that such bond might be a continuing and floating security for the bank to that amount." In the proposal sent in to the Unity General Assurance Association by O. King before effecting the policy, he solemnly declared that he was then twenty-two years of age. In point of fact, he was born on the 25th of September 1835.

After the bankruptcy the bank received 825*l.*, which, with sums previously received, reduced the amount of their claim to 4,175*l.*, for which they sought to prove; but the assignees opposed the same before the Commissioner, on the ground of infancy, and notwithstanding the case of fraud made against O. King.

On the 4th of May Mr. Commissioner Evans admitted the proof, when he gave the following judgment:—"In this case the Unity Bank seeks to prove on the sepa-

rate estate of O. King. It is resisted on the ground that, at the time of executing the bond, the bankrupt was an infant. The fact of his being an infant is admitted; but, on the other hand, it is asserted that, at the time of executing the bond and borrowing the money, he had stated that he was of full age; and this fact is also admitted. It was contended that this was a fraud, and that equity would, notwithstanding his infancy, enforce the obligation against him. In favour of this position a variety of cases were cited; and it appears to me, from a perusal of those cases, that equity would enforce the deed against the infant. On the other side was cited the case of *Jennings v. Rundell* (1); and I confess that at first it did appear to me that these creditors could not prove, because, although the infant might be personally liable, yet at law it would be by action of tort, and therefore not a debt, and that equity, though it might give relief against the individual, would not turn the claim into a debt; but in the case of *Vaughan v. Vanderstegen* (2), it was held, that by the fraud the married woman made the appointed estate liable as general assets, as if she had been a *feme sole* in respect of it; and that the mortgagee had a right not only to a charge on the mortgaged real estate to which she was entitled in remainder, but if it was not sufficient he was, by reason of the fraud entitled to rank as a creditor on her general assets, and to take the appointed personal fund, if there was not enough without it. The case of a married woman appears to me, on this principle, the same as that of an infant; and I therefore admit the proof."

A creditor of Octavius King now appealed from this decision, and he was joined in the appeal by the assignees.

Mr. Selwyn, in support of the appeal, contended that the debt, if proveable at all, was only so against the joint estate, and that the separate estate of O. King was wholly exempt from it, as was O. King himself, he having been an infant at the time when it was contracted, and

incapable of binding himself. In *Price v. Hewett* (3) the Court of Exchequer permitted a defendant under the Common Law Procedure Act, 15 & 16 Vict. c. 76. to demur and to plead not guilty to a declaration alleging that the defendant being an infant represented himself of age and so induced the plaintiff to lend him money. In *Stikeman v. Dawson* (4) the Court was extremely guarded in its expressions, and the case was materially distinguishable from the present. Then, in *Vaughan v. Vanderstegen*, cited before the Commissioner, the case was that of a married woman and not of an infant, and Vice Chancellor Kindersley expressly says, at page 379 of the report, "It is not necessary for me to consider the case of an infant—I take the case of a married woman."

Mr. Swanston and *Mr. Hannen*, for the assignees, in support of the appeal, insisted that infancy was a perpetual and inflexible disqualification to contract, although infancy be no defence against criminal proceedings. Upon such a point nothing could be clearer than the case of *Hearle v. Greenbank* (5); there Lord Hardwicke said that there was no precedent either at law or in equity where it had been held, that an infant could exercise a power over real estate, and he could not make one; and at page 712, after several cases had been put, it was said, "So that in law there is a total absolute disability in an infant, that by no manner of conveyance can he dispose of his inheritance;" and the rule is equally strict as to contracts. No case decided that an infant was able to bind himself by contract, and no one was able to prove that he could. In *The Liverpool Adelphi Loan Association v. Fairhurst* (6) Lord Chief Baron Pollock, referring in that judgment to the case of *Johnson v. Pye* (7), said, "In the case of an infant it was held, for a similar reason, that he could not be made liable for a fraudulent misrepresentation that he was of full age, whereby the plaintiff was induced to contract with him, and

(3) 8 Exch. Rep. 146.

(4) 1 De Gex & Sm. 90; s. c. 16 Law J. Rep. (N.S.) Chanc. 205.

(5) 3 Atk. 695.

(6) 9 Exch. Rep. 422; s. c. 23 Law J. Rep. (N.S.) Exch. 163.

(7) 1 Sid. 258.

(1) 8 Term Rep. 335.

(2) 2 Drew. 165, 365, 409; s. c. 23 Law J. Rep. (N.S.) Chanc. 793.

in the latter report (that is, the report of the same case in 1 *Keble*, 913), it is said that if the action should be maintainable, all the pleas of infancy would be taken away, for such affirmations are in every contract." The case of *Stikeman v. Dawson*, before referred to, contained some observations in the judgment, at page 115, which speculated on some supposed inaccuracies in a report of *Esron v. Nicholas* (8); but whether correct or not, it was not too much to say, that if the equitable doctrine of an infant's liability on contract were to be supported, it was nothing less than a repeal of the rule of law. The assignees were in a better position to resist the proof than O. King would be to resist the claim against him had he not become bankrupt.

Mr. W. W. Cooper (who was with *Mr. Bacon*), for the Unity Bank, in support of the decision of the Commissioner, urged that O. King by his representations, false as they now turned out to be, having induced the bank to make the advance, was actually estopped from setting up his infancy to defeat the demand, and no creditor of his nor his assignees could now do so. The debt having been contracted by fraud and misrepresentation, the fact of infancy made no difference, as was shewn by numerous authorities. In *Cory v. Gertcken* (9) an infant fraudulently procured the transfer of stock, and he was held liable as for the fraud. The Vice Chancellor, Sir Thomas Plumer, said, at p. 49, "Though in general a payment to an infant may be bad, yet if the infant practises a fraud, he is liable for the consequences. At law an infant is liable *in tort*, and cannot plead his infancy; as where (a very strong case) an action of assumpsit was brought against an infant for money embezzled by him." The case before Lord King of *Esron v. Nicholas* was quite conclusive, for there a guardian of an infant made a lease of the infant's lands, and the infant being present and cognizant of the transaction was held bound. *Watts v. Cresswell* (10) was a very clear case in favour of the bank.

There an infant engaged in a fraud upon a mortgagee, and then he refused to pay. He was nearly of age, and solicited the mortgagor to lend him money, and was all along engaged in the fraud, the title-deed being forged. The Lord Chancellor said, "If an infant is old and cunning enough to contrive and carry on a fraud, he ought to make satisfaction for it," and he made a decree against the infant. In *Clarke v. Cobley* (11) a husband pleaded infancy at the time he gave a bond, and although the Court would not decree immediate payment of the money which was asked, the Master of the Rolls said he would take care that the parties were put in the same situation in which they were at the time of the bond being given, which he said was done on the principle that an infant should not take advantage of his own fraud. In *Beckett v. Cordley* (12), which was a case of contest between mortgagees, the Lord Chancellor, referring to one of the parties who was an infant, said, "if there was a fraud of which the infant was conversant, she would be bound as much as an adult." The case of *Vaughan v. Vanderstegen*, to which the creditor who brought this appeal referred, was in itself, so far as the observations of the Vice Chancellor went, strong in favour of the Unity Bank, for his Honour, at page 379, said, "the principle applies, not only to the acts of a married woman, who is incapable of affecting herself in the ordinary way by contract, but applies also to the case of an infant." The learned counsel also referred to—

Wright v. Snowe, 2 De Gex & Sm. 321.

Ex parte Watson, 16 Ves. 265.

Ex parte Bates, 2 Mont D. & D. 337;

s. c. 11 Law J. Rep. (N.S.) Bankr. 4.

Bristow v. Eastman, 1 Esp. 171.

Overson v. Banister, 3 Hare, 503; s. c. 4 Beav. 205.

Drury v. Drury, 4 Bro. C.C. 506, n.

Money v. Jorden, 13 Beav. 229; s. c.

15 Beav. 372; 20 Law J. Rep.

(N.S.) Chanc. 174; 21 Law J. Rep.

(N.S.) Chanc. 531, 893; 2 De Gex,

M. & G. 318; and as *Jorden v.*

Money, 23 Law J. Rep. (N.S.)

Chanc. 865, s. c. 5 H.L. Cas. 185.

(8) 2 Eq. Cas. Ab. 489, nom. *Evroy v. Nicholas*.

(9) 2 Madd. 40.

(10) 2 Eq. Cas. Abr. 516; s. c. 9 Vin. Abr. 415.

(11) 2 Cox, 173.

(12) 1 Bro. C.C. 352.

Mr. Selwyn, in reply, observed, that in every case which had been relied upon there was some equitable circumstance independently of infancy, where an infant was a party concerned, and that fact accounted for the decision in each case. Here that was not so, and the only equity which the parties who upheld the Commissioner's decision could make was, that there was no remedy at law. This was wholly insufficient. If the present proof were admitted, the result must necessarily be, that in every case in which an infant had dealings, it must be considered that he impliedly asserted he was of age, since no one could safely deal with a person under such disability, and, therefore, that he had been guilty of misrepresentation and fraud.

LORD JUSTICE KNIGHT BRUCE.—It is quite unnecessary for me to say what I might have thought the right course to adopt in the present case, if the jurisdiction of the Court of Appeal had been a legal jurisdiction only, because the jurisdiction is equitable as well as legal. Again, I say, it is equally unnecessary for me to state what conclusion, with reference to the equitable jurisdiction of this Court, I might have thought right, if there had been an absence of all decisions upon the point; because, according to my view of the question, it is clearly governed by the decided cases, and by the authority of Lord Cowper, of Lord Hardwicke, and Lord Thurlow, judges of such eminence, that it would be the height of impropriety on my part to call their judgments into question. Here was a case where a young man, who from his appearance might be taken to be more than twenty-one years of age, was found carrying on business. He was desirous of borrowing money for the purposes of his business, and with that object in view he represented himself as twenty-two years old—he expressly and solemnly declared that to be his age. None of the difficulty which might in some cases be felt from the uncertainty whether he did or did not believe the representation he was making to be true, arose in the present instance, for it was impossible, upon the materials before the Court, to suppose that he believed himself to be making a true statement. Upon the faith of this fraudulent misrepresentation he procured money from the pe-

tioners, and subsequently he had become a bankrupt. The only question for us is, whether in equity—setting aside whether he was or was not liable at law—whether in equity he had rendered himself liable in respect of the debt so contracted, and in my opinion he has clearly done so.

LORD JUSTICE TURNER.—I concur in the decision, but I have felt the strongest inclination to expunge the proof of the petitioners, and I should have done so, but that I think the authorities on the question are too strong. The law is settled by them; and if, being so settled, it requires alteration, it must be effected by a decision of the House of Lords, and not of this Court.

LORDS JUSTICES. } *Ex parte ADAMS, in re*
June 4. } *HAWKES.*

Petition to annul—Time—Outlawry of Bankrupt—Available Assets—Section 20. of Bankrupt Act, 1854—Trading.

An adjudication in bankruptcy had been made in April 1857, on the petition of a gentleman who had been in trade, but had ceased to be so for more than sixteen years, and in October he obtained his certificate. At the date of the bankruptcy there were debts incurred during the trading, though not trade debts, which still remained unpaid. A creditor who was aware of all the proceedings petitioned to annul in April 1858. There was no proof of collusion or fraud:—Held, that the petition to annul was too late.

Whether an outlaw can petition for an adjudication against himself, and whether he can have available assets under the 20th section of the Bankrupt Act, 1854, (17 & 18 Vict. c. 119),—quære.

This was a petition to annul.

The facts were, that in a cause in the Court of Chancery of *Strong v. Hawkes*, the defendant, Mr. Hawkes, had been held liable to pay a large sum of money. Under deeds of settlement, dated many years ago, he was tenant for life of certain estates, with a proviso that if he became bankrupt or insolvent his life estate should cease, and the remainders over in favour of his children should be accelerated, and take effect in possession. In 1809 he had executed a bond to trustees,

conditioned for the payment of 10,000*l.*, which was then settled on the marriage of a near relative. In 1834 this bond was put in suit against him, and a judgment was obtained, but no execution was then issued. In 1842 Mr. Hawkes ceased to trade, which he had done for some years before, and being in pecuniary difficulties he went abroad, where he remained, a creditor having obtained a judgment against him, and caused process of outlawry to issue and be proclaimed. The outlawry had never been reversed. There were debts due from Mr. Hawkes to divers persons, contracted during the time he was in business, but they were not trade debts. Mr. Hawkes returned to England in 1857, and the decree in *Strong v. Hawkes* having been pronounced, he was arrested at the suit of the trustees of the 10,000*l.*, and lodged in the Queen's Prison, and while in custody he presented a petition for adjudication of bankruptcy against himself, whereupon he was declared bankrupt. The petition was filed in April 1857; the adjudication was made in June, and a first-class certificate was awarded in October following. The bankrupt paid 300*l.* into court, which he represented as the amount of his available assets, and the same was distributed in one dividend amongst such of the creditors as applied for it.

The executors of Doctor Adams, a creditor for considerable sums, were dissatisfied with the bankruptcy, believing it to have been a scheme concocted between the bankrupt and the trustees of the 10,000*l.* and others, in order to withdraw his life estate from their claims, and allow the property to go over at once to the persons entitled in remainder under the settlement, and therefore they presented a petition to annul. The petition to annul was presented on the 28th of April 1858, and it was not denied that the petitioners were aware of the whole of the proceedings in the bankruptcy. An appeal was presented against the decree in *Strong v. Hawkes*, but it was affirmed so far as to shew that the bankrupt had some estate in the property, available for the payment of the large sum in which he was declared indebted.

Mr. Lewin and Mr. Bagley, for the petitioners, said that it had never yet been laid down that a person who had ceased to

trade could petition for an adjudication of bankruptcy against himself, although it was true that if a creditor petitioned, the trader could not meet the petition by shewing that he was no longer a trader. Besides, this bankrupt was outlawed, and the outlawry had taken place after trading had ceased. The bankruptcy was not *bona fide*, but was an attempt to defeat the creditors of their rights. The petitioners therefore sought to annul the adjudication, and they did so upon four grounds: first, that there was no sufficient trading to support the adjudication; secondly, that the bankrupt was under sentence of outlawry at the time when he filed his petition, and being outlawed, was not in a position to take that or any other proceeding; thirdly, that being outlawed, all his property of every description (and among that, of course, must be included the 300*l.* which had been paid into court) was forfeited to the Crown, and that he consequently had no available assets under section 20. of the Bankruptcy Act, 1854 (17 & 18 Vict. c. 119), by which it is enacted "that on and after the 1st day of September 1854, any trader liable to become bankrupt may petition for adjudication of bankruptcy against himself; but unless he shall forthwith after filing his petition, and before adjudication of bankruptcy thereunder, make it appear to the satisfaction of the Court that his available estate is sufficient to produce the sum of 150*l.* at the least, his petition shall be dismissed"; and, fourthly, that the bankrupt was in collusion with the persons entitled in remainder under the settlement, in order, by his bankruptcy, to defeat the creditors, and to cause his life estate to determine for the benefit of the remaindermen, who were members of his own family. They cited the following cases:—

Ex parte Gaiskill, 3 Deac. 635; s. c. 8 Law J. Rep. (N.S.) Bankr. 34; M. & Ch. 160.

Ex parte Spicer, 3 M. D. & De Gex, 388; s. c. M. & A. 213; 2 Deac. 335.

Ex parte Phipps, 3 M. D. & De Gex, 488; s. c. 6 Law J. Rep. (N.S.) Bankr. 93; 2 Deac. 487.

Ex parte Taylor, 4 D. & Ch. 125; s. c. 4 Law J. Rep. (N.S.) Bankr. 4; 2 Mont. & A. 36.

Ex parte Frith, 1 Fonbl. Bankr. Cas. 233.

[LORD JUSTICE KNIGHT BRUCE.—Counsel for the respondents need not be troubled on the point of the trading being sufficient to support the adjudication. We are both of opinion that the trading was sufficient, there being debts still unpaid at the time of the adjudication, which debts were incurred during the trading.]

Mr. Clement Swanston (who was with Mr. Swanston), for the bankrupt, said there then only remained the questions of the outlawry, fraud, collusion and delay to be disposed of. With regard to the outlawry, it was plain that a person who was an outlaw was enabled to take proceedings to avail himself of the acts for the relief of insolvent debtors; and bankruptcy was analogous to that. For the first part of the proposition, he would cite *Hamlin v. Crossley* (1), where the Court of King's Bench, in a case for a prohibition to prevent the Insolvent Debtors Court from further proceeding on an order for the discharge of a prisoner in custody on a writ of *capias utlagatum*, refused to interfere. Lord Denman, in delivering judgment, said that the rule had been obtained "on the general ground that an outlaw cannot be heard in any court, except for the single purpose of reversing his outlawry," but his Lordship said the words of the old Insolvent Act were so strong and large that they did not leave it an open question, and the Court discharged the rule which had been obtained for the prohibition. Precisely similar was the course pursued by the Court of Common Pleas in *Adcock v. Fiske* (2), where a defendant having been outlawed after judgment, was discharged by the Insolvent Debtors Court while in custody under the outlawry, and the Court refused to charge him on the judgment in outlawry. The proceedings in bankruptcy being analogous, it was contended that the same rule would apply.

[LORD JUSTICE KNIGHT BRUCE.—There being judgment of outlawry against Mr. Hawkes, we must, I apprehend, take it

for good until it is reversed. If counsel wish for an opportunity of applying to reverse the outlawry, my learned Brother and myself are quite willing to give time for that purpose.]

If necessary, the bankrupt would avail himself of that permission, but at present the other point might be considered. It was alleged that there had been collusion or concert, but even if there had been, which was denied, it must be such as to amount to fraud. By the 115th section of the Bankrupt Law Consolidation Act (3) it was declared "that no fiat in bankruptcy shall be annulled, nor any petition for adjudication of bankruptcy dismissed, nor any adjudication reversed, by reason only that the fiat, petition or adjudication, or act of bankruptcy, has been concerted or agreed upon between the bankrupt, his solicitor or agent, or any of them, and any creditor, or other person." The only other point was the delay, which it was apprehended was fatal to the petitioner's case. Here the petition for adjudication was in April 1857, the adjudication in June and the certificate in October following, and yet the petition to annul was only filed in April 1858. Three cases would dispose of that point: first, *Ex parte Desanthuns* (4) where it was held, that after a commission had been proceeded upon and the creditors had acquiesced, the Court would not supersede it, though there might have been irregularity. Again, in *Ex parte Crowder* (5), Lord Eldon refused to supersede, after a bankrupt had obtained his certificate, on an objection to the trading. Again, in *Ex parte Gregory* (6), the Court refused to annul for legal invalidity not patent upon the proceedings, the petitioner not having sought to annul before the certificate was allowed or not satisfactorily accounting for the delay. Here the delay was wholly unaccounted for. In fact, the petitioners were all along aware of the bankruptcy proceedings, and it was their duty to have instituted proceedings to annul at once if they were dissatisfied.

Mr. A. E. Miller, for the creditors' assignee, supported the adjudication, and read a variety of affidavits contradicting

(1) 8 Ad. & E. 677; s. c. 7 Law J. Rep. Q.B. 265; 3 N. & P. 543, *nom. Reg. v. the Commissioners of the Insolvent Court, re Hamlin*.

(2) 6 Bing. N.C. 17; s. c. 9 Law J. Rep. (N.S.) C.P. 17; 8 Sc. 138; 8 Dowl. C.P. 66.

(3) 12 & 13 Vict. c. 106.

(4) 1 Atk. 146.

(5) 2 Rose, 324.

(6) 3 M. D. & De Gex, 572.

and wholly disproving collusion, and cited *Baskerville v. Sprye* (7), in which the cases of *Hamlin v. Crossley* and *Adcock v. Fiske* were recognized.

[LORD JUSTICE KNIGHT BRUCE.—The petitioners' counsel must account, if he can, for the delay.]

Mr. Lewin, in reply on this point, said that until the appeal to the Lords Justices in *Strong v. Hawkes* was decided, it was utterly useless to take any steps regarding the bankruptcy, for until that time *non constat* that there would be any estate remaining in the bankrupt liable to the payment of his debts.

LORD JUSTICE KNIGHT BRUCE.—The adjudication of bankruptcy was pronounced in or before the month of June in last year. The bankrupt obtained his certificate of the first class in October following, and the petitioners were aware of all the proceedings in bankruptcy at the time, and never questioned the matter until the 28th of April 1858, half a year after the certificate was granted. It is possible that the conduct of the bankrupt may have been such as to preclude him from protecting himself against an application to annul, even when so much time has elapsed; but in this case, upon the materials before the Court, I am of opinion that there is no misconduct on the part of the bankrupt, no concert or fraud, to deprive him of the right, although I confess that at the outset of the case, I considered this case as one of strong suspicion of collusion. Undoubtedly this application ought to have been made earlier. I am now only considering whether the bankruptcy ought to be annulled, and am simply deciding that point. In my opinion it ought not.

LORD JUSTICE TURNER.—I concur. I cannot see my way to annul. The petitioners must have been aware of the proviso in the settlement, and must have known that it would affect their interests. They ought to have applied earlier. The petition must be dismissed, with costs.

The costs were then arranged so as to avoid the expense of taxation.

LORDS JUSTICES. } *Ex parte HOPE, in re*
July 9. } HANSON.

Lessor and Lessee—Set-off—Mutual Debts—Section 171. of Bankrupt Law Consolidation Act, 12 & 13 Vict. c. 106.—Costs.

Owners of a factory and machinery let the same from year to year to traders, the lessees to be entitled to a lease, the machinery to be valued at the beginning and end of the tenancy, the difference in value, if any, to be paid by lessors or lessees as the case might be. The first valuation was made. After that, the lessees were adjudicated bankrupt, and then the second valuation took place, and the result was in favour of the tenants. No lease was ever demanded, and the assignees refused to take one. At the time of the adjudication the bankrupts owed rent and money for goods sold by the lessors, who claimed to set off the increased value of the machinery due from them against their debt, and to prove for the balance, but the assignees claimed to be paid the increased value, and that the lessors should prove for the whole amount due for rent, for goods and for the increased value. One of the Commissioners decided in favour of the lessors, and the Lords Justices on the appeal of the assignees confirmed the order, giving costs against the appellants personally.

This was a petition of appeal presented by the assignees of the estate of the bankrupts, Messrs. Hanson & Co., against a decision of the Leeds District Court of Bankruptcy, upon a question of mutual debt and set-off.

The facts were these:—On the 1st of July 1854 an agreement of that date was made between John Haigh and others of the one part, and Messrs. Hanson & Co. (the bankrupts) of the other part, whereby a mill or factory near Horley, in Yorkshire, with machinery and fixtures and closes of land with the appurtenances were demised to the lessees from year to year, at an annual rent of 350*l.*; and it was agreed that, in case the lessees applied for and obtained a lease of the premises, the lessors should lay out a sum of money in the enlargement and improvement of the same, and that, after the first year of the tenancy, and until completion of the improvements, the rent should be 320*l.*, to be increased

by 6l. per cent. on the monies expended. And it was agreed that, on the lessees taking possession, the machinery in and about the mill and premises should be valued, and also such machinery as should during the lease or tenancy, have been brought upon the premises by the lessees; and that a like valuation should be made at the determination of the tenancy, but so that the lessors should not be obliged to make compensation for any increased valuation beyond 15l. per cent. on the valuation first made, and that the lessees might be at liberty, either during or after the tenancy, to select and remove from the premises after such valuation such articles as they might think proper, so as to reduce the amount of such valuation to a sum not exceeding 15l. per cent. beyond the amount of the original valuation. The tenancy was to expire upon six calendar months' notice by either party. The lessees took possession, and the valuation was made at 2,192l. 18s. 1d., and during the occupation the lessees, with permission of the lessors, removed parts of the machinery, substituting for them other machinery, and they also altered and improved the remainder. On the 26th of March 1858 the lessees were adjudicated bankrupts, since which time a valuation of the machinery had been made, amounting to 2431l. 11s. 2d. The assignees declined to take a lease. On the 15th of May 1858, the lessors served the assignees with a notice of motion by them (the lessors, who were also creditors of the lessees, for coals supplied) for a statement of the account between themselves and the bankrupts, under the 171st section of the Bankrupt Law Consolidation Act, 1849, 12 & 13 Vict. c. 106, and that upon such motion the lessors would claim to be entitled to the benefit, by way of set-off in the same account, of the sum of 238l. 13s. 1d., being the amount of the excess or increase of the present value of the machinery beyond the original value at the commencement of the tenancy.

The above-mentioned section is as follows:—"Where there has been mutual credit given by the bankrupt and any other person, or where there are mutual debts between the bankrupt and any other person, the Court shall state the account between them, and one debt or demand may be set against another, notwithstanding

any prior act of bankruptcy committed by such bankrupt before the credit given to or the debt contracted by him; and what shall appear due on either side on the balance of such account, and no more, shall be claimed or paid on either side respectively; and every debt or demand hereby made proveable against the estate of the bankrupt may also be set off in manner aforesaid against such estate, provided that the person claiming the benefit of such set-off had not, when such credit was given, notice of an act of bankruptcy by such bankrupt committed."

The motion was made on the 7th of June, and it appearing that the bankrupt owed 365l. for rent and 220l. 2s. 5d. for coals, making a total of debt due to Haigh & Co. of 594l. 2s. 5d., and that Haigh & Co. were debtors in 238l. 13s. 1d., for the increased value of the machinery, the Commissioners decided that Haigh & Co. were entitled to the set-off and to prove for the balance 355l. 9s. 4d. against the bankrupt's estate; and from this decision the assignees appealed.

The argument in support of the appeal was, that the assignees were entitled to the full amount of 238l. 13s. 1d., the increased value of the machinery, for that the tenant had a clear right to sever it from the mill or factory, in which event they would have become, upon the bankruptcy, the property of the assignees, subject, of course, to the right of the lessors to purchase the machinery, under the terms of the contract of letting between the parties. The machinery constituted trade-fixtures, and the mere fact that they were not severed from the factory before the adjudication could make no difference. That the right to purchase was exercised could not be denied, but that right was not exercised until after the bankruptcy, and therefore the 171st section did not apply, for it only applied to demands existing at the time of the bankruptcy, so that the proof of the lessors ought to be for the whole debt of 594l. 2s. 5d., and not for the 355l. 9s. 4d., the balance after deducting the increased value of the machinery, and that the assignees (the petitioners) ought to have been allowed to receive that increased value of 238l. 13s. 1d. as part of the bankrupt's estate.

Mr. Swanston and Mr. De Gex supported the petition, citing—

Ex parte Ladd, in re Ryland, 4 Dea. & Chit. 647.

Kearsey v. Carstairs, 2 B. & Ad. 716; a. c. 9 Law J. Rep. K.B. 323.

Mr. Daniel and Mr. G. Lake Russell, for the respondents, were not called upon.

LORD JUSTICE KNIGHT BRUCE.—I am surprised that any assignees should, against the opinion of the Commissioner, have presented such a petition as this. It is nonsense, or worse. The respondents having expressed their consent that the order should stand as it is, let the petition be dismissed, with costs.

LORD JUSTICE TURNER.—I feel no doubt whatever in this case. There was a demise of land and machinery. The assignees declined to take a lease, and the land, as well as the machinery, thereupon reverted to the bankrupts. The assignees have claimed some money from the lessors in respect of the machinery; but as their right as assignees is gone with the lease, they can retain no benefit from it. This case fails, and the petition must be dismissed, with costs.

LORD JUSTICE KNIGHT BRUCE.—If my learned Brother agrees, the assignees must pay the respondents' costs personally, but their own costs will remain in the discretion of the learned Commissioner.

LORD JUSTICE TURNER.—I quite assent to that direction.

LORDS JUSTICES. } *Ex parte CALVERT, in re*
July 5, 6, 18. } CALVERT.

Deed of Arrangement—Certificate of due Execution—Sections 224, 225, 226. of the Bankrupt Law Consolidation Act, 1849.

A trading firm executed a deed of arrangement and inspection, made between the partners of the first part, inspectors of the second part, and several persons creditors of the partners, or some or one of them, of the third part. The deed did not contain an assignment of the property of the firm for the benefit of the creditors, but it contained covenants to carry on the business and wind up the affairs under inspection

and to assign the property if called on so to do by the inspectors. The inspectors certified under the 226th section of the 12 & 13 Vict. c. 106. that it was signed by six-sevenths in number and value of the creditors whose debts were 10l. and upwards. It did not, however, appear from the deed or the certificate whether six-sevenths in number and value of the separate as well as of the joint creditors or of each class of creditors, had executed:—Held, affirming a decision of one of the Commissioners, that the deed was not shewn to have been properly signed, and therefore that the certificate under section 225. of the same statute must be refused.

The deed contained a grant of power to the traders to carry on the business, to wind it up, and collect and get in the debts for the benefit of the creditors; the creditors covenanted not to sue or molest the traders, and if any of the creditors did so his debt was to be forfeited. The traders were to carry on the business under inspectors, the creditors were to be paid out of the assets and profits, and if the inspectors required it the traders were to assign the property of the firm for the benefit of the creditors, after which the traders were to be released from liability, and if the inspectors certified that the affairs had been wound up within two years, the traders were wholly released. Whether such a deed, even if sufficiently signed by creditors, is a good deed of arrangement under the 224th section of the same statute, quære.

This was an appeal from a decision of Mr. Commissioner Evans, refusing to grant a certificate of the due execution of a deed of inspection and arrangement under the 225th section of the Bankrupt Law Consolidation Act, 1849, (12 & 13 Vict. c. 106.), on the ground that it did not contain an assignment of the property of the debtors for the benefit of the creditors, and for another reason not now important.

The deed was dated the 7th of May 1858, and made between E. S. P. Calvert, F. Ladbroke, W. H. Calvert, N. Calvert, J. Johnstone and A. P. W. Phillips, all of Upper Thames Street, carrying on the business of brewers under the firm of Felix Calvert & Co., of the first part; Henry Kingscot, William Robinson White, and John Morse, of the second part, and the

several persons, companies and corporations who were respectively creditors of the said F. Calvert & Co., or some or one of the said partners therein, of the third part. The recitals were as follows: "Whereas the said parties hereto of the first part have for some time past carried on the business of brewers under the said firm of Felix Calvert & Co., and the said parties hereto of the first part, or some of them, from time to time carried on the said business under or by virtue of certain agreements, or otherwise, with other parties, since deceased, and the said parties hereto of the first part are as such partners, possessed of divers personal chattels and effects, including stock-in-trade, machinery, book debts and other property, both real and personal, belonging to the said firm, and they, or some of them, are respectively entitled to real and personal property as their separate estates, or some part or parts thereof has or have been derived from one or more of such deceased partners, and as separate property remaining in specie of such deceased partner or partners is or are applicable to the payment of the unsatisfied separate debts of such deceased partner or partners. And whereas the said parties hereto of the first part, some or one of them, either in respect of the said partnership so now carried on, or otherwise, are indebted to various persons, companies, and corporations. And whereas the said parties hereto of the first part having represented to their said creditors that they are unable at present to pay them the amount of their respective debts in full, it has been resolved and agreed that the business and affairs of the said copartnership shall be carried on and wound up by sale or otherwise, and the proceeds thereof, with as little delay as the case will admit, applied in or towards satisfying the said debts, under the direction and superintendence of the said H. Kingscot, W. R. White and J. Morse, as inspectors for and on behalf of themselves and the other creditors of the said parties hereto of the first part, and hereinafter referred to as the said debtors, and the said H. Kingscot, W. R. White and J. Morse, and the survivors and survivor of them, are hereinafter referred to as the said inspectors."

The deed then proceeded in effect as follows:—It was witnessed that the several creditors, parties thereto, or who should

be bound thereby, granted to the arranging debtors full and free liberty and licence thenceforth to carry on and wind up their copartnership business and affairs, and to collect, get in, sell and dispose of their stock-in-trade, estate, debts and effects, as well partnership as separate, under inspection, and subject to the approbation, direction and controul of the inspectors, for the benefit of their creditors; and a covenant was entered into on the part of the creditors, parties thereto or bound thereby, not to sue, arrest, attach, impede or molest the debtors, or their goods, estate or effects, in any manner or upon any pretence, unless or until the debtors, or some or one of them, should have broken or failed to comply with any of the stipulations or provisions therein contained, and such breach or failure had been certified in writing by the inspectors; and further, if any creditor or creditors, by whom or on whose behalf the deed was executed, his or their executors, administrators or successors, should act in any manner wilfully contrary to the aforesaid covenant, and the inspectors should by writing under their hands certify that such acting had in their opinion been wilful, then the debtors, their executors and administrators respectively, should be and were for ever absolutely discharged from all claims and demands whatsoever, both at law or in equity, of or by such creditor or creditors, and in such case the present letter of licence and covenant aforesaid might be pleaded in bar to any such action or other proceeding, at law or in equity, as a good and effectual release and discharge of and from the debts or debt of such creditor or creditors respectively, and all claims and demands in respect thereof. And in consideration of such licence the debtors covenanted that they would, on request, draw out and state true and exact accounts of all their partnership and separate debts, credits, claims, estate and effects, and of the several charges and incumbrances affecting the same, and deliver such accounts signed by them to the inspectors, and realize and get in to the best of their power, their debts, estate and effects, for the benefit of their creditors, and keep proper books and accounts relating to their business, estate and effects, whether partnership or separate. Other provisions and powers were introduced

for the carrying on of the business, by the debtors under the authority of the inspectors, and amongst them a power to the inspectors to authorize the renewal or taking of any new lease or leases as the inspectors might think beneficial for the concern. And it was declared, that the monies arising from the sale, conversion and getting in of the estate, debts and effects, should, after payment of all costs, charges and expenses, salaries, wages, &c., be distributed amongst the creditors rateably until they should have received 20s. in the pound, if the said trust-monies should be sufficient for that purpose, and that the estate and effects of the debtors, whether partnership or separate, should be administered under the inspectorship as if the debtors had been adjudicated bankrupts, and the debts of the creditors had been proved under such bankruptcy. Provision was then made for the debtors if the inspectors should think it desirable, at any time before the estate and effects should have been got in, to execute a conveyance or assignment to them of all the undistributed portion thereof for the benefit of all or such of the creditors as should be entitled thereto, or to the benefit of the said indenture, and that upon executing such assignment the debtors, their executors and administrators, should be absolutely released and discharged from the debts, claims and demands of all such creditors who should have executed or "become in any manner bound" by the provisions of the deed. And it was further covenanted on the part of the creditors who severally executed the same, or who were "in any manner bound by the provisions" thereof, that if at any time within two years from the date thereof the inspectors should certify by writing that the liquidation of the affairs of the debtors had been conducted by them to their satisfaction, and wound up and concluded, then from and immediately after the signing of such certificate the debtors should be absolutely released, and the covenant now in statement should operate and enure, and might be pleaded in bar as a good and effectual release and discharge to the debtors from all liabilities, debts, actions, suits, judgments, executions, claims and demands whatsoever, both at law and in equity, of the creditors respectively, against the respective debtors,

their estates or effects, on account of their respective debts, interest or commission due or demandable for the same. And it was provided that the inspectors, at their sole discretion, might carry on the trade under such conditions and in all respects as they should think fit, for a term not exceeding two years from that date, and for that purpose employ the assets of the firm; in which case interest was to be paid out of any profits or produce thereof to the creditors entitled to rank against the copartnership estate, on the amount of their debts in respect of which they were so entitled to rank, after the rate which such debts should respectively bear up to the 1st of April 1858, and thenceforth after the rate of 4l. per cent. per annum, payable half-yearly; and that if in the opinion of the inspectors the debtors should, before the whole of their estates and effects should have been fully realized and distributed, make default in performing any of the covenants, stipulations and agreements therein contained, or if the said deed should not become binding on non-executing creditors under the provisions of the Bankrupt Law Consolidation Act, 1849, with respect to arrangements by deed, within six calendar months after the date thereof, the inspectors might, if they should think fit, by writing declare that the deed and the licence therein contained, and every article, clause or thing, so far as the same tended to restrain the respective creditors from suing for and recovering their several demands, should cease, determine and be absolutely void. And it was lastly declared, that the indenture was a deed of arrangement within the meaning of the 224th section of the Bankrupt Law Consolidation Act, 1849, and that the clauses and provisions therein with respect to arrangements by deed were intended to be applicable thereto, and if there were any provision or direction therein not authorized or allowed by the provisions of the said act to be introduced into a deed operating thereunder, every such unauthorized provision or direction should be construed to operate as intended to bind only those creditors by or on behalf of whom the deed should be actually executed, and their respective debts, claims, rights and dividends, and should as against all other creditors be wholly void and inoperative.

The 224th, 225th and 226th clauses of the act are as follows:—

Section 224. "Every deed or memorandum of arrangement entered into between any trader and his creditors, and signed by or on behalf of six-sevenths in number and value of those creditors whose debts amount to 10*l.* and upwards, touching such trader's liabilities and his release therefrom, and the distribution, inspection, conduct, management and mode of winding-up of his estate, and all or any of such matters, or any matters having reference thereto, shall (subject to the conditions hereinafter mentioned) be as effectual and obligatory in all respects upon all the creditors who shall not have signed such deed or memorandum as if they had duly signed the same, and such deed or memorandum when so signed shall not be or be liable to be disturbed or impeached by reason of any prior or subsequent act of bankruptcy."

Section 225. "No such deed or memorandum of arrangement shall be effectual or obligatory upon any creditor who shall not have signed the same until after the expiration of three months from the time at which such creditor shall have had notice from such trader of his suspension of payment and of such deed or memorandum of arrangement, unless such trader shall within such time obtain from the Court an order or certificate of the said Court, declaring or certifying that such deed or memorandum of arrangement has been duly signed by or on behalf of such majority of the creditors as aforesaid; and it shall be lawful for the Court within the district of which the trader shall have resided or carried on business for six months next immediately preceding his suspension of payment, to make such order or certificate on the petition of any such trader, and to exercise jurisdiction in and over the matters of any such application, and no creditor who shall not have had fourteen days' notice of any intended application for an order or certificate as aforesaid shall be bound thereby."

Section 226. "When the trustee or inspector under such deed or memorandum of arrangement, or if there shall be no such trustee or inspector, when any two of the creditors shall be satisfied that six-sevenths in number and value of the creditors whose debts amount to 10*l.* and upwards have

signed such deed or memorandum, it shall be lawful for such trustee or inspector, or for such two creditors, as the case may be, to certify the same to the Court in writing, and such certificate shall be filed with the registrar of the Court, and shall thenceforth be *prima facie* evidence in all courts of law and equity that such deed or memorandum of arrangement has been so signed."

The deed before set out was signed by 428 creditors, representing debts to the amount of 780,000*l.*, the whole debts of the firm being 789,000*l.* Each creditor signed the deed, but there was nothing to shew the amount of the debt signed for, nor to distinguish whether the creditor was a joint creditor of the existing firm or of previous firms, or was a separate creditor of the individuals constituting the present firm, which was the point on which the Court of Appeal decided the case. The inspectors certified in writing that the deed had been signed by six-sevenths in number and value of the creditors of the traders, and upon that certificate an application was made to the Commissioner for his certificate under the 225th section; but he refused, for the reason before stated.

Mr. Bacon and *Mr. Roxburgh*, for the appellants, Messrs. Calvert & Co., contended that the certificate having been signed by the inspectors, every requisite had been complied with to entitle the arranging debtors to claim the higher certificate of the Commissioner, and that the one-seventh of the creditors who had not signed could not be bound unless this Court set right the error the Commissioner had committed. It was by no means necessary that an absolute assignment for the benefit of the creditors should be contained in the deed, if there were, as here, provisions which would ensure the application of the whole assets for the benefit of the creditors.

Telley v. Taylor, 1 El. & B. 521; s. c. 21 Law J. Rep. (N.S.) Q.B. 2, 346.

Fisher v. Bell, 12 Com. B. Rep. 78; s. c. 21 Law J. Rep. (N.S.) C.P. 228.

Irving v. Gray, 1 Exch. Rep. N.S. 34; s. c. 27 Law J. Rep. (N.S.) Exch. 278.

Ex parte Wilkes, 5 De Gex, M. & G. 418; s. c. 24 Law J. Rep. (N.S.) Bankr. 6.

Ridgway v. Clare, 19 Beav. 111.
Drew v. Collins, 6 Exch. Rep. 670;
 s. c. 20 Law J. Rep. (N.S.) Exch. 369.
Larpent v. Bibby, 5 H.L. Cas. 481.

Mr. Selwyn and *Mr. Bagley*, on behalf of executors of a deceased partner, supported the decision of the Commissioner. The testator had placed 2,000*l.* in the hands of the firm, bearing interest at 4*l.* per cent., and that interest had been paid up to the stoppage. By his will the testator bequeathed the interest of the money to infants, for whom these respondents were trustees. The principal money was wholly unsecured, and the respondents had not signed the deed. If the arrangement were carried into effect, the whole of the unsecured creditors would be unprovided for. The object of the deed was not to wind up the affairs, but was, in fact, a scheme for carrying on the business, which must be at the risk of the creditors, and not of the traders, and it was plain what must be the chance, since the traders had themselves only conducted it to disaster and ruin. In addition to most of the cases before referred to, *March v. Warwick* (1) and *M'Naught v. Russell* (2) were commented on.

Mr. Daniel, for Messrs. Glyn & Co., secured creditors for 46,000*l.* money lent, who had refused to sign the deed, objected to the provisions as wholly at variance with the intention of the legislature.

Mr. G. M. Giffard, on the same side, objected that there must be separate as well as joint creditors; at any rate, there was no proof that there were not. Assuming that there were, there was a total want of evidence that any separate creditor had executed the deed. To comply with the requisites of the 224th section, it was necessary that six-sevenths in number and value of each class of creditors should execute the deed, and there was not the slightest evidence to shew that this had taken place. Each creditor, or firm of creditors, merely executed the deed without stating the amount for which he executed, and without anything to shew whether he executed as a creditor of the firm, or of any individual partner, so that the deed was invalid under this section.

(1) 25 Law J. Rep. (N.S.) Exch. 334.

(2) 1 Exch. Rep. N.S. 611; s. c. 26 Law J. Rep. (N.S.) Exch. 192.

Mr. Bacon, in reply, argued that there was no proof that there were any separate creditors, and if the respondents made such a point, they were bound to support it by evidence. The certificate had been signed by the inspectors, which was *prima facie* evidence of its truth, and if impeached, it must be by direct proof, and not by mere conjecture.

July 13.—**LORD JUSTICE KNIGHT BRUCE.**
 —The question upon this appeal is, whether the deed in dispute, dated the 7th of May last, ought, as a deed between the appellants and their creditors within the meaning of the 224th section, to be the subject of an order or certificate under the 225th section of the Bankrupt Law Consolidation Act, 1849; and with respect to it, I wish, in the first place, to say, that however I may have expressed myself on any former occasion (I refer particularly to *Wilkes's case*), I am at present not satisfied that we ought to regard as a necessary preliminary to an order under the 225th section, that the Court which is asked for that order or certificate, should be convinced of the perfect correspondence and conformity of the instrument, the subject of the application, with the terms of the 224th section. My opinion at that time is, that a case may exist in which the order or certificate may with propriety be made by a Court doubting the perfect correspondence or conformity, and that a case may also exist in which the Court, though so doubting, may well refuse it. There is, I think, a discretion exercisable according to the circumstances, where the Court is not thoroughly satisfied whether, according to the true construction of the 224th section—a section, as it must be acknowledged, of some difficulty,—it has not or has been properly adhered to. The deed, that is to say, all of it that precedes the operative part, runs thus:—[His Lordship read the recitals before set forth:]—This deed, which professes to provide, in a manner accurate or inaccurate, efficiently or not quite efficiently, for the separate as well as the joint creditors of a debtor, is executed or signed by or on behalf of a great number of persons as creditors, but does not shew what is or was the amount total, or, in any one instance, due or claimed or admitted or believed to be due to

them, or to any one or more of them, nor of whom; that is to say, whether, of all, or some, or one only of the appellants, any of the persons who by themselves or others execute or sign as creditors, were or are creditors, if at all, or was or is a creditor, if at all; but probably it is, though not from the deed alone, yet from the whole of the materials before us, to be collected, that all who personally or otherwise have executed or signed as creditors, did so as joint creditors of the firm, composed of all the appellants, though possibly not being joint creditors of all the appellants; but there is not, I think, any good reason for not believing that the deed has been executed or signed by or on behalf of six-sevenths in number or value of the joint creditors of the firm whose debts amount or amounted to 10*l.* and upwards. I do not, however, find any satisfactory—if any—evidence as to the separate debts of any one or more of the members of the firm respectively. It seems to me not unreasonable to think it likely that, during the whole of the present year each of them must have had some separate creditor for 10*l.* and upwards; nor would it be inconsistent with the whole or any portion of the evidence before us to believe—though I have myself neither belief nor disbelief on the point—that the separate debts of the partners respectively amount, and have during the whole of the year amounted, to many thousands of pounds. It is not, however, as I understand the materials, here shewn that any separate creditor has executed or signed the deed, or authorized it to be executed or signed. Now, perhaps, in every instance of an indebted firm consisting of two or more persons, but certainly for all present purposes, the language of the deed before us being considered, the word “creditors” in the 224th section must, I think, be held to mean the separate creditors as well as the joint creditors; and being of that opinion, I am convinced that the evidence here falls so very far short of shewing the instrument in dispute to have been signed by or on behalf of a sufficient amount or proportion in number and value within the meaning of the 224th section, that we should not be justified in departing from the learned Commissioner’s conclusion, whether concurring or not concurring with him in the grounds upon which he arrived at that

conclusion. But in holding, as I fear I must hold on the present occasion, that the appeal should be dismissed, I wish to be understood as not intimating any opinion with regard to the sufficiency or insufficiency, the validity or invalidity, of any of the grounds of objection to the deed taken at the bar, except that which I have particularly stated. I do not think this is a case for costs.

LORD JUSTICE TURNER said:—In this case the learned Commissioner has refused to certify that the deed of arrangement in question has been signed by six-sevenths in number and value of the creditors; and we are called upon by way of appeal to reverse or vary the learned Commissioner’s decision, and to direct the certificate to be granted. Two questions were raised upon the arguments of the appeal: first, whether the deed was signed by six-sevenths in number and value of the creditors; and, secondly, whether the deed could at all be considered a deed of arrangement within the provisions of the Bankruptcy Law Consolidation Act applicable to such deeds. In order to determine the first of these questions, it is necessary to see who are the creditors with whom the deed of arrangement purports to be entered into. It is expressed to be made between the six partners of the firm of Felix Calvert & Co. of the first part, the three gentlemen who are to be inspectors of the second part, and the several persons, companies and corporations who are respectively the creditors of the said Felix Calvert & Co., or some or one of the said partners therein, of the third part. It is, therefore, on the face of it, a deed of arrangement between the six persons constituting the firm of Felix Calvert & Co., and the creditors of these six persons, or some or one of them. We must look, then, to the statute for the purpose of seeing by whom such a deed was required to be signed in order to bind non-executing creditors, and the 224th section of the statute is in the following terms.—[His Lordship then read that section.]—Then, there is a proviso directing the mode in which the amount of the debts is to be calculated; and by the interpretation clause that word “trader” is to be read as “traders” where the deed is to apply to traders, parties in partnership together. Now then this section, where it speaks of the

creditors, must, I think, be construed to mean the creditors with whom the arrangement had been entered into; and what the legislature has required, therefore, is, that the deed should be signed by six-sevenths in number and value of the arranging creditors. The question then comes to this, was there any evidence before the learned Commissioner, or is there any evidence before us, that this deed has been so signed? I can find no such evidence. It was said that by the 226th section of the act, the certificate was made *prima facie* evidence; but what is the certificate? Not that six-sevenths in number and value of the creditors with whom the arrangement was made have signed the deed, but that six-sevenths of the creditors of the six partners have signed it. The certificate is, therefore, not in compliance with the act, and can be of no avail, and certainly the parol evidence does not cure this defect. But then it was said that there was no proof that there were any other creditors than those of the six partners. I think, however, that it rested upon the appellants to shew that there were no such other creditors. It was upon them to establish the validity of the deed by proving that it had been executed by six-sevenths in number and value of the creditors with whom it purports to have been made. Whether it is incumbent upon them, as was argued at the bar, to shew that it had been executed by six-sevenths of each class of creditors, I give no opinion; but upon the grounds which I have stated, I think that the decision of the learned Commissioner was right, and that this appeal must be dismissed. It is unnecessary, therefore, for us to give any opinion upon the second point; but it may be right to add, that I am not satisfied (although I give no opinion upon it) that this deed could in any event have been upheld. I doubt whether it has not left too much in the power of the inspectors, and whether, under the circumstances of this firm, the property ought not to have been more absolutely devoted to the purpose of winding up. It may be right also to add, that the case *Re Wilkes*, referred to in the argument, seems to me to have been pushed, in the argument of *Irving v. Gray*, far

beyond, not only what was intended, but what was expressed. The judgment of the Court in *Irving v. Gray*, however, takes a more correct view of the case. All that was meant to be said in it was, that the property must be devoted to the creditors—not that it must be assigned in trust to them. I agree that there should be no costs of this appeal.

Leave was then given to the appellants to go back before the Commissioner, to make any such application touching the deed as they might be advised.

L.C.
May 1, 4, 6, 7, 24, 29. { *Re* THE LONDON AND
EASTERN BANKING
CORPORATION.

Banking Company—Winding-up Acts—Bankruptcy.

A banking company registered under the 7 & 8 Vict. c. 113, was ordered to be wound up, and official managers and a creditors' representative were appointed, the latter appointment being on the 13th of January. Some creditors of the company brought an action against the company on the same 13th of January, and on a summons by the official managers to stay proceedings, it was ordered that the plaintiffs should be at liberty to proceed, but the judgment was not to be available for any other purpose than to make the company bankrupt. Judgment was accordingly entered up, and a notice requiring payment was served. One of the Vice Chancellors having refused an injunction to stay the proceedings, the company was, on the 22nd of April, adjudged bankrupt. On an appeal from the Vice Chancellor's judgment, and an application to annul the adjudication,—Held, that the bankruptcy was valid, the 20 & 21 Vict. c. 78. not preventing a company being made bankrupt under the 7 & 8 Vict. c. 111, but that the bankruptcy was of no further avail than to clothe the assignees with authority to concur with the official manager in the proceedings in the winding up.

[For the report of the above case, see 27 Law J. Rep. (N.S.) Chanc. p. 457.]

REPORTS OF CASES
IN THE
Court of Probate,
AND THE COURT FOR
Divorce and Matrimonial Causes.

BY
GEORGE HENRY COOPER, Esq. BARRISTER-AT-LAW.

DURING THREE TERMS,
HILARY, EASTER, AND TRINITY, 1858.

FORMING PART IV. OF
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MDCCCLVIII.

Court of Probate

RULES AND ORDERS.

(CONTENTIOUS BUSINESS.)

1. All proceedings in the Court of Probate or in the Registries thereof in respect of business not included in the Act itself under the expression "Common Form business," except the warning of caveats, shall be deemed to be **CONTENTIOUS business.**

2. Executors or other parties who, previously to the passing of the Act, might prove Wills in solemn form of law, shall be at liberty to prove Wills under similar circumstances, and with the same privileges, liabilities, and effect, as heretofore.

3. Next-of-kin and others who, previous to the passing of the Act, had a right to put executors or other parties entitled to administration with the Will annexed upon proof of the Will in solemn form of law, shall continue to possess the same rights and privileges, and be subject to the same liabilities with respect to costs, as heretofore.

4. Parties who previously to the passing of the Act had a right to intervene in the cause shall continue to possess the same right, subject to the same limitations and the same rules with respect to costs as heretofore.

5. A caveat shall remain in force for the space of six months, and then expire and be of no effect, but may be renewed from time to time as heretofore. A caveat shall be warned at the place mentioned in it as the address of the person who entered it. It shall be sufficient for the warning of a caveat that one of the registrars send by the public post a warning signed by himself, and directed to the person who entered it, at the address mentioned in it.

6. Upon a party appearing in answer to the warning of a caveat, the matter shall be entered as a cause in the court book, and the contentious business shall thereupon be held to commence.

7. Where a party proposes to prove a will or codicil in solemn form of law, and no caveat has been entered, or a caveat has been entered and no appearance given to the warning thereof, the contentious business shall be held to commence with the extracting of a citation in the Forms Nos. 3, 5, or in some similar form.

8. Citations to see proceedings may be extracted from the Registry, on the application of any party to the cause. A Form is given, No. 4. Before a party can proceed after the service of a citation, an appearance must have been previously entered by or on behalf of the party cited, or an affidavit of personal service must have been filed in the Registry, or the order of the Judge, founded on an affidavit, and giving leave to proceed, must have been obtained, and filed in the Registry.

9. Every citation shall be written or printed on parchment, and the party taking out the same, or his proctor, solicitor, or attorney, shall take it, together with a præcipe, a Form of which is given, marked No. 6, to the Registry, and there deposit the præcipe and get the citation signed and sealed. The address given in the præcipe must be within three miles of the General Post Office. Personal service of any citation shall be effected by leaving a copy of the citation with the party cited, and shewing him the original, if required by him so to do.

10. The entry of the appearance of the party shall be accompanied by an address within three miles of the General Post Office.

11. It shall be sufficient to leave all pleadings and other proceedings not expressly requiring personal service under these rules and orders at the address furnished so as aforesaid by plaintiff and defendant respectively.

12. In case the party cited does not appear within the time limited in the citation, the plaintiff shall allege the default of appearance on the record, and the cause shall thereupon proceed in default.

13. The Form to be used in entering an appearance is given, No. 7.

14. In case of proving a will in solemn form of law, the plaintiff shall declare in the Forms Nos. 8. and 9, or as near thereto as the circumstances of the case admit; and such declaration shall be delivered to the defendant, and a copy thereof filed in the Registry upon one and the same day.

15. The declaration may be delivered to the defendant at any time after the defendant has entered an appearance. If the plaintiff do not deliver his declaration within one month after an appearance has been given, the defendant may apply to the Judge in chambers to fix a time within which such declaration shall be delivered.

16. In case of proceedings in default, the plaintiff shall file his declaration in the Registry within eight days from the last day allowed in the citation for the appearance of the defendant.

17. The defendant, if desirous of pleading, must deliver his plea to the plaintiff within eight days after the service of the declaration, and file a copy thereof in the Registry on one and the same day, otherwise he will not be permitted to plead, except with the permission of the Judge. Forms of pleas are given, Nos. 10. and 11.

18. If the plaintiff propound a will, and the defendant in his plea allege the existence of a will of later date, the plaintiff, as well as the defendant, may, with and subject to the permission of the Judge, adduce proof on the trial of the validity of the will upon which he relies.

19. In testamentary causes, the several scripts of the testator, that is to say, wills, codicils, drafts of wills or codicils, or written instructions for the same, shall continue to be brought into the Registry as heretofore. And for this pur-

pose every plaintiff shall at the time of filing the copy of his declaration in the Registry file therewith an affidavit of scripts to the effect of Form No. 12; and in like manner the defendant, upon filing the copy of his plea, shall file therewith a similar affidavit. The time for the filing of these affidavits of scripts may be varied by order of the Judge, on the application of either party. Every script coming within the terms of the affidavit, and of which the deponent has any knowledge, is to be specified therein, and every script in the custody or under the controul of the party making the affidavit is to be annexed thereto, and deposited therewith in the Registry.

20. Either of the parties may give in such further pleading as he may be advised. If either party desire to amend his pleadings, he may do so by permission of the Judge, and in such form and under such terms as the Judge may approve. The form of the declaration and plea will, it is presumed, be a sufficient guide to practitioners as to the form of any further pleadings.

21. If the defendant or plaintiff shall be of opinion that the declaration or plea or subsequent pleading does not disclose sufficient to enable him to proceed with safety, he may apply to the Judge to order the pleadings to be amended; and, if necessary, further application may be made to the Judge thereon.

22. Within eight days after the delivery of the last pleading in the cause, the plaintiff is to deliver to the defendant the issue in the Form No. 13, or in a form as near thereto as the circumstances of the case will admit.

23. The plaintiff, after delivery of the issue, shall give notice to the defendant, that, after the expiration of eight clear days, he intends to apply to the Court to try the question at issue before itself, either with or without a jury, or to direct an issue to be tried before a Judge of Assize, as the case may be; and if the plaintiff do not give such notice within sixteen days from the day on which the issue was delivered the defendant may give a similar notice to the plaintiff. A Form of Notice, No. 14, is subjoined.

24. A copy of every such notice shall be filed in the Registry upon the day on which the same is served upon the opposite party in the cause.

25. In each case the Judge shall direct, and, if necessary, after hearing the parties, in what mode the cause shall be tried.

26. After the direction of the Judge has been

obtained as to the mode in which the cause is to be heard, the plaintiff shall, within four clear days, deposit the record of the cause in the Registry. The record is to conclude with a statement of the mode in which the Judge has directed the cause to be tried, as in the Form No. 15.

27. The plaintiff shall, on the day upon which he sets down the cause as ready for trial, give notice to each party for whom an appearance has been entered of his having done so; and if he delay setting down the cause as ready for trial for the space of one month after the Court has directed the mode in which the question at issue shall be tried, the defendant may set the cause down as ready for trial, and give a similar notice to the plaintiff and the aforesaid other parties. A copy of every such notice shall be filed in the Registry; and the cause, excepting the Judge shall otherwise direct, shall come on in its turn.

28. In default of the appearance of the party cited, a record in Form No. 16, or as near thereto as can be, shall be filed in the Registry

29. Every subpoena shall be written or printed on parchment, and may include the names of any number of witnesses. The party, or his solicitor or attorney, shall take it, together with a præcipe (forms of which are given, marked 17, 18, 19, and 20), to the Registry, and there get it signed and sealed, and there deposit the præcipe.

30. Either the plaintiff or defendant may call upon the other party, by notice in writing in the Form annexed, No. 21, to admit any document, saving any just exceptions; and in case of refusal or neglect to admit the same, the costs of proving the document shall be paid by the party so neglecting or refusing, whatever the result of the cause may be, unless at the trial the Judge shall certify that the refusal to admit was reasonable; and no costs of proving any document shall be given except in cases where the omission to give the notice is, in the opinion of the registrar, a saving of expense.

31. Applications for the production of instruments purporting to be testamentary, and shewn to be in the possession or under the controul of any person or persons, as mentioned in the 26th section of the Act, may be made to the Judge, on motion or petition, or by summons served on the opposite party in any suit, and upon motion and affidavit in cases where no suit is pending. Forms of subpoenas applicable to these cases are given, Nos. 22, 23, 24, and 25.

32. The hearing of the case shall be conducted

in court, and the counsel shall address the Court, subject to the same rules and regulations as now obtain in the courts of common law.

33. After the conclusion of the trial, the registrar shall enter on the record the finding of the jury, or the decision of the Judge, in a form corresponding as near as may be with that given, Nos. 26. and 27, and shall sign the same.

34. Any person proceeding to prove a will in solemn form, or to revoke the probate of a will, may, if the will affects real estate, apply to the Judge for an order authorizing him to cite the heir or heirs-at-law or other person or persons pretending interest in such real estate; and the Judge, on being satisfied by affidavit that the will in question does affect or purport to affect the real estate, shall make an order authorizing the person applying to cite the heir or heirs-at-law or other such person or persons as aforesaid: Provided always, that the Judge may make any special directions as to the persons to be cited which he may think the justice of the case requires.

35. An application for a new trial may be made to the Court of Probate in respect to causes tried before a jury within ten days from the day on which the cause was tried, or on the first sitting of the Court after the cause has been tried.

36. An application for a re-hearing of any case tried before the Judge without a jury, and in which evidence is given *viâ voce*, may be made within ten days from the day on which the same was heard, or at the first sitting of the Court after the cause has been heard.

37. If the plaintiff or defendant in any cause, unless by leave of the Judge previously obtained, fail to deliver the declaration, plea, or other pleading within the time specified in these rules, the other party in the cause shall not be compelled to receive the same, unless by direction of the Judge. The expense of every such application to the Judge shall fall on the party who has caused the delay.

38. Citations, notices, and other processes heretofore in use and still retained, are to be inserted in the *London Gazette*, and in such of the leading morning and evening papers, and such local papers as the Judge may from time to time direct, instead of being served on the Royal Exchange.

39. Where a special time is limited for filing affidavits, no affidavit filed after that time shall be used in court, unless by leave of the Judge.

40. In contentious business, inventories, and not merely declarations of the personal estate and effects of the deceased, are to be used, unless by order of the Judge. The form of inventory is given, No. 28.

41. All notices required by these rules, or by the practice of the Court, are to be in writing.

Interest Causes.

42. In interest causes, as heretofore, each party shall be at liberty to deny the interest of the other; and in such cases both parties may, with and subject to the permission of the Judge, adduce proof on one and the same trial of their interest respectively.

43. In interest causes the pleading of each party must shew on the face of it that no other person exists having an interest superior to that of the claimant.

44. Forms of the declaration and plea in an interest cause are given, No. 9. and No. 11.

Proceedings by Petition.

45. In proceedings by petition the plaintiff shall, within four clear days after an appearance has been entered for the defendant, or, when the defendant is already before the Court, within four clear days from the day upon which he claims to be heard by petition, deliver his act to the defendant, and file a copy thereof in the Registry upon one and the same day.

46. The defendant shall, within eight days after the delivery of the act, deliver his answer

to the plaintiff, and file a copy thereof in the Registry upon one and the same day.

47. The same course shall be pursued until the petition is concluded.

48. Both plaintiff and defendant shall, within eight clear days from the day upon which the petition is concluded, file in the Registry such affidavits as may be necessary in support of their several averments therein. A Form of Petition is given, No. 29.

Appeals.

49. No petition of appeal shall be lodged against any sentence of the Court of Probate, unless within a month of the delivery of the sentence appealed from, or within such other time as the Judge shall direct, and unless notice of such appeal has been given to the opposite party in the cause, and filed in the Registry.

50. Parties may proceed to carry into effect the decision of the Court of Probate, notwithstanding any such notice of appeal, unless the Judge shall otherwise order.

51. After notice of appeal has been given, the Judge of the Court of Probate may order the execution of his decree to be suspended, upon such terms as he sees fit.

52. The Judge shall in every case in which a time is fixed by these rules for the performance of any act have power to extend the same to such time, and with such qualifications and restrictions, and on such terms, as to him may seem fit.

FORMS,

TO BE FOLLOWED AS NEARLY AS THE CIRCUMSTANCES
OF EACH CASE WILL ALLOW.

No. 1.—*Caveat.*

In Her Majesty's Court of Probate. The Principal Registry.

Let nothing be done in the goods of *A.B.*, late of _____ deceased, who died on the
day of _____ 18 _____ at _____ unknown to *C.D.* of _____ having interest
[or to *E.F.*, Proctor, Solicitor, or Attorney of parties having interest].

Dated this _____ day of _____ 18 _____
(Signed) *C.D.* of _____ [or *E.F.* of _____ the Proctor,
Solicitor, or Attorney of parties having interest.]

No. 2.—*Warning to Caveat.*

In Her Majesty's Court of Probate. The Principal Registry.

To *A.B.* of _____ [or to *C.D.* of _____ Proctor, Solicitor, or Attorney
of parties having interest].

You are hereby WARNED, within six days after the service of this warning upon you, inclusive of
the day of such service, to cause an appearance to be entered for you in the Principal Registry of the
Court of Probate to the Caveat entered by you in the goods of *E.F.*, late of _____ deceased,
who died at _____ on the _____ day of _____ 18 _____, and to set forth your
[or your client's] interest; and take notice that in default of your so doing the said Court will proceed
to do all such acts, matters, and things as shall be needful and necessary to be done in and about the
premises.

(Signed) *X.Y.*, One of the Registrars of Her
Majesty's Court of Probate.

Indorsement to be made after service.

This warning was served by *I.K.* on *A.B.* [or *C.D.*] of _____ the person named in the Caveat
entered in respect of the goods of the said deceased at _____ on the _____ day
of _____ 18 _____

(Signed) *I.K.*

[or The duplicate of this warning, signed by the said *X.Y.*, was sent by the public post directed to the
said *A.B.* [or *C.D.*] at _____ on the _____ day of _____ 18 _____

(Signed) *I.K.*]

No. 3.—*Citation.*

In Her Majesty's Court of Probate.

VICTORIA, by the Grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender
of the Faith.

To _____ of _____
in the County of _____

Whereas *A.B.* of _____ claiming to be the executor of *C.D.*, late of _____ deceased,
who died on or about the _____ day of _____ 18 _____ at _____ intends
to prove in solemn form of law as well the alleged last Will and Testament of the said deceased bearing
date the _____ day of _____ as also the [first] Codicil thereto, bearing date

the day of [and so on for any other Codicils]: NOW THIS IS TO COMMAND YOU, that within eight days after service hereof on you, inclusive of the day of such service, you do cause an appearance to be entered for you in our Court of Probate in support of any interest you may have in the estate and effects of the said deceased: AND TAKE NOTICE, that in default of your so doing the Judge of Our said Court will proceed to hear the said Will [and Codicils] proved in solemn form of law and to pronounce sentence in regard to the validity of the same, your absence notwithstanding.

(Signed) E.F., Registrar.

Indorsement to be made after Service.

This citation was served by G.H. on the within named of at
on the day of 18 .

(Signed) G.H.

No. 4.—*Citation to see Proceedings.*

In Her Majesty's Court of Probate.

VICTORIA, by the Grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith.

To of in the County of .

Whereas there is now depending in Our Court of Probate a Cause entitled A.B. v. C.D., wherein the said A.B. is proceeding to prove in solemn form of law the alleged last Will and Testament with Codicils, of E.F., late of deceased, who died on or about the day at .

And whereas it has been alleged that you are one of the next-of-kin [or interested under a former Will of the deceased, or that you are a party entitled in distribution to the personal estate and effects of the deceased, or as the case may be]. THIS IS TO GIVE YOU NOTICE to appear in the said cause, either personally or by your Proctor, Solicitor or Attorney, should you think it for your interest so to do, at any time during the dependence of the said cause, and before final judgment shall be given therein: AND TAKE NOTICE, that in default of your so doing the Judge of Our Court of Probate will proceed to hear the said Will [and Codicils] proved in solemn form of law, and pronounce judgment in the said cause, your absence notwithstanding.

(Signed) E.F., Registrar.

Indorsement to be made after Service.

This citation was served by G.H. on of at
day of 18 .

(Signed) G.H.

No. 5.—*Citation to bring in Probate.*

In Her Majesty's Court of Probate.

VICTORIA, by the Grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith.

To of in the County of .

WHEREAS Probate of the last Will and Testament [with Codicils] of A.B., late of deceased, was on or about the day of 18 granted to you by our Court of Probate: And whereas C.D., one of the natural and lawful brothers and next-of-kin [or interested under a former Will, or a Party interested in distribution in the Goods] of the said deceased, hath alleged that the said Probate ought to be called in, revoked, and declared null and void in law: NOW THIS IS TO COMMAND YOU, that within eight days after service hereof on you, inclusive of the day of such service, you do bring into and leave in the Principal Registry of Our said Court the aforesaid Probate, and further do shew cause (if you should think it for your interest so to do) why the same should not be revoked, and the said Will [and Codicils] pronounced to be null and invalid.

(Signed) E.F., Registrar.

Indorsement to be made after Service.

This citation was served by G.H. on the within-named of at
on the day of 18 .

(Signed) G.H.

No. 6.—*Præcipe for Citation.*

In Her Majesty's Court of Probate.

Citation [or citation to see proceedings] for *A.B.* of _____ against *C.D.*, in a matter of proving
 in solemn form of law the last Will and Testament with Codicils of *E.F.*, late of
 in the county of, &c., deceased [or generally describing the nature of the suit].

P.A., Proctor, Solicitor, or Attorney
 for [or *A.B.* in person].

The _____ day of _____ 18 _____

No. 7.—*Entry of an Appearance.*

In Her Majesty's Court of Probate.

A.B., Plaintiff, against *C.D.*,
 or
 Against *C.D.* and another,
 or
 Against *C.D.* and others.

The Defendant *C.D.* appears in person, or *E.F.*, proctor, solicitor or
 attorney for *C.D.*, appears for the Defendant.

[Here insert the address required by Rule No. 9.]

Entered the _____ day of _____ 18 _____

No. 8.—*Declaration.*

In Her Majesty's Court of Probate.

The _____ day of _____ 18 _____

A.B., by *C.D.*, his proctor, solicitor, or attorney, says, that *E.F.*, late of _____ deceased, who
 died on or about the _____ day of _____ at _____ made his last Will and
 Testament, with _____ Codicils, bearing date, to wit, the said Will on the _____ day
 of _____ 18 _____, the said first Codicil on the _____ day of _____ 18 _____,
 [and so on for any other Codicils,] and in the said Will appointed the said *A.B.* sole executor [or as the
 case may be]; that the said Will and Codicils respectively, after having been reduced into writing, were
 signed by the said testator in the presence of two witnesses present at the same time, and who subscribed
 the same in the presence of the said testator, and whose names severally appear upon the said Will and
 Codicils; and that the said testator was at the time of the execution of the said Will and Codicils respec-
 tively of perfect sound mind, memory, and understanding.

(Notice where the Defendant appears.)

The Defendant must plead hereto in eight days from the date hereof, otherwise the Plaintiff will
 proceed to obtain Probate of the said Will [and Codicils].

No. 9.—*Declaration in an Interest Cause.*

In Her Majesty's Court of Probate.

The _____ day of _____ 18 _____

A.B. [or *A.B.* by *C.D.*, his proctor, solicitor, or attorney,] saith, that *E.F.*, late of _____
 deceased, died on or about the _____ day of _____ 18 _____ at _____
 intestate, a widower, without child, parent, brother or sister, uncle or aunt, nephew or niece, leaving the
 said *A.B.* his lawful cousin-german and one of his next-of-kin [or as the case may be].

(Notice.)

The Defendant must plead hereto in eight days from the date hereof, otherwise the Plaintiff will
 proceed to obtain Letters of Administration to the personal estate and effects of the said Deceased.

No. 10.—*Plea.*

In Her Majesty's Court of Probate.

The day of 18 .
G.H. [or *G.H.* by *I.Z.*, his proctor, solicitor, or attorney,] saith, that the paper writing bearing date the day of 18 , and alleged by the Plaintiff to be the last Will and Testament of *A.B.*, late of in the county of deceased [or the first or any other Codicil thereto], was not executed according to the provisions of 1 Vict. c. 26. [or that the deceased at the time the said alleged Will [or alleged Codicil] bears date, to wit, on the day of 18 , was not of sound mind, memory, and understanding], [or any other averment in accordance with the circumstances of the case].

No. 11.—*Plea in an Interest Cause.*

In Her Majesty's Court of Probate.

The day of 18 .
G.H. [or *G.H.* by *I.K.*, his proctor, solicitor, or attorney,] saith, that *A.B.*, the Plaintiff, is not the lawful cousin-german of *E.F.*, who died on or about the day of 18 at the deceased in this cause. And further, that the said deceased died intestate, a widower, without child, parent, brother or sister, uncle or aunt, nephew or niece, or cousin-german, leaving him the said *G.H.* his lawful cousin-german once removed, as his only next-of-kin [or as the case may be].

No. 12.—*Affidavit of Scripts.*

In Her Majesty's Court of Probate.

A.B. v. C.D.

I, { *A.B.* } of in the county of party in this cause, make oath and say, that no paper or parchment writing, being or purporting to be or having the form or effect of a Will or Codicil or other testamentary disposition of *E.F.*, late of in the county of , deceased, the deceased in this cause, has at any time, either before or since his death, come to the hands, possession, or knowledge of me, this deponent, save and except the true and original last Will and Testament of the said deceased now remaining in the Registry of this Court, the said Will bearing date the day of 18 [or as the case may be], also save and except [here add any other testamentary papers of which the deponent has any knowledge].

(Signed) *A.B.*

Sworn before me

[person authorized to administer Oaths under the Act].

N.B.—All papers answering the description in the affidavit which are in the possession or under the controul of the party making the affidavit should be particularly described therein, and, if possible, brought into the Registry annexed thereto.

No. 13.—*The Issue.*

In Her Majesty's Court of Probate.

The day of 18 .
A.B. v. C.D.
A.B., by *P.Q.*, his proctor, solicitor, or attorney, [or in person,] did deliver, to wit, on the day of 18 to the said *C.D.*, his declaration in the words and figures following:

[Here insert Declaration at length.]

Whereupon the said *C.D.* did deliver, to wit, on the day of to the said *A.B.*, his plea, in the words and figures following:

[Here insert Plea at length.]

[Add any further Pleadings.]

Therefore the Plaintiff claimed that the cause should be tried as the Court shall direct.

No. 14.—*Notice as to Mode of Trial.*

In Her Majesty's Court of Probate.

A.B. v. C.D.

To _____ of _____

Take notice, that after the expiration of eight clear days from the service hereof the { Plaintiff }
 { Defendant }
 in this cause intends to apply to the Court to try the question at issue before itself [or by a Common or
 Special Jury before itself], [or to direct an issue to be tried before the Judge of Assize by a Special or
 Common Jury at the next assizes to be holden in and for the county of _____],
 [or as the case may be].

Dated this _____ day of _____ 18 ____

(Signed) { *A.B.* }
 { *C.D.* }or *E.F.*, proctor, solicitor, or attorney.for { *A.B.* }
 { *C.D.* }No. 15.—*Form of Record.*

In Her Majesty's Court of Probate.

The _____ day of _____ 18 ____

A.B. v. C.D.

A.B., by *E.F.*, his proctor, solicitor, or attorney, [or in person,] having cited *C.D.* to appear in
 support of any interest he may have in the estate and effects of *G.H.* [or according to the terms of the
 citation], late of _____, deceased, who died on or about the _____ day of _____
 18 ____, at _____, the said *C.D.* appeared thereto personally [or by his proctor, solicitor, or
 attorney]: Whereupon *A.B.*, to wit, on the _____ day of _____ 18 ____, did deliver
 his declaration to the said *C.D.*, in the words and figures following:

[Here insert Declaration at full length.]

Whereupon the said *C.D.* did deliver, to wit, on the _____ day of _____ to the
 said *A.B.*, his plea in the words and figures following:

[Here insert Plea at length.]

[Add any further Pleadings.]

Whereupon the Judge did order, as follows:

[Here set forth the order verbatim.]

No. 16.—*Form of Record in case of Party cited not appearing.*

In Her Majesty's Court of Probate.

The _____ day of _____ 18 ____

A.B. v. C.D.

A.B., by *E.F.*, his proctor, solicitor, or attorney, [or in person,] having cited *C.D.* to appear in support
 of any interest he may have in the estate and effects of *G.H.* [or according to the terms of the citation],
 late of _____, deceased, who died on or about the _____ day of _____ 18 ____,
 at _____, the said *C.D.* did not appear personally or by his proctor, solicitor, or attorney:
 Whereupon, in default of the appearance of the said *E.F.*, *A.B.* did file his declaration in the Registry
 in the words and figures following:

[Here insert Declaration at full length.]

Therefore *A.B.* claimed that the cause should be tried as the Court shall direct:

Whereupon the Judge did direct the said cause to be heard before himself [or as the case may be].

No. 17.—*Form of Subpoena ad testificandum.*

VICTORIA, by the grace of God of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith, to [names of all witnesses included in the subpoena], Greeting. We command you and every of you, that, all other things set aside, and ceasing every excuse, you and every of you be and appear in your proper persons before [insert the name of the Judge], Judge of Our Court of Probate at Our Court of Probate at _____ on _____ the _____ day of _____ by _____ of the clock in the forenoon of the same day, and so from day to day until the cause or proceeding is tried, to testify the truth according to your knowledge in a certain cause now in Our Court before our said Judge depending, between _____ Plaintiff and _____ Defendant [or in a certain cause or proceeding now in Our Court before Our said Judge depending, in default of the appearance of parties cited, entitled _____], on the part of the _____ [Plaintiff, Defendant, or as the case may be], and at the aforesaid day, between the parties aforesaid, to be tried [or in default aforesaid, between the parties aforesaid, to be tried]; and this you nor any of you shall in nowise omit, under the penalty of every of you of 100*l*. Witness [insert the name of the Judge], at the Court of Probate, the _____ day of _____ in the _____ year of Our reign.

(Signed)

No. 18.—*Subpoena duces tecum.*

VICTORIA, by the Grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, to [names of all parties included in the subpoena], Greeting. We command you and every of you, that, all other things set aside, and ceasing every excuse, you and every of you be and appear in your proper persons before [insert the name of the Judge], Judge of Our Court of Probate at _____ on _____ the _____ day of _____ by _____ of the clock in the forenoon of the same day, and so from day to day until the cause or proceeding is heard, and also that you bring with you, and produce at the time and place aforesaid [here describe shortly the deeds, letters, papers, &c. required to be produced], then and there to testify and shew all and singular those things which you or either of you know or the said deed or instrument doth import of and concerning a certain cause or proceeding now in Our said Court before our said Judge depending, between _____ Plaintiff and _____ Defendant, [or a certain cause or proceeding now in Our said Court before Our said Judge depending, in default of the appearance of parties cited, and entitled _____], on the part of the [Plaintiff or Defendant, or as the Case may be], and at the aforesaid day between the parties aforesaid to be tried. And this you nor any of you shall in nowise omit, under the penalty of every of you of 100*l*. Witness [insert the name of the Judge], at the Court of Probate the _____ day of _____ in the _____ year of our reign.

(Signed) E.F., Registrar.

No. 19.—*Præcipe for Subpoena ad testificandum.*

In Her Majesty's Court of Probate.

Subpoena of W.W., T.W., S.W., G.W., and F.W., to testify between A.B. Plaintiff, and C.D. Defendant, on the part of the Plaintiff [or Defendant], the _____ day of _____ 18 ____.

(Signed) { A.B. } or { P.A., Plaintiff's [or Defendant's] proctor,
 { C.D. } solicitor, or attorney.

No. 20.—*Præcipe for Subpoena duces tecum.*

In Her Majesty's Court of Probate.

Subpoena for W.W. to testify and produce, &c. between A.B. Plaintiff, and C.D. Defendant, on the part of the Plaintiff, [or Defendant], the _____ day of _____ 18 ____.

(Signed) { A.B. } or { P.A., Plaintiff's [or Defendant's] proctor,
 { C.D. } solicitor, or attorney.

No. 21.—*Notice to admit Documents.*

In Her Majesty's Court of Probate.

that the { Plaintiff } in this cause proposes to adduce in evidence the several { Defendant } specified, and that the same may be inspected by the { Defendant } at { Plaintiff } on between the hours of and the { Defendant } { Plaintiff } is hereby required, from the last-mentioned hour, to admit that such of the said documents as are specified were respectively written, signed, or executed as they purport respectively to have been, as are specified to be copies are true copies, and such documents as are stated to have been served, or delivered were so served, sent, or delivered respectively, saving all just exceptions to the admissibility of all such documents as evidence in the cause. Dated, &c.

To { A.B. } or to E.F., attorney or solicitor or agent for { Defendant. }
{ C.D. } { Plaintiff. }

(Signed) { C.D. } or G.H., attorney or solicitor or agent for { Plaintiff. }
{ A.B. } { Defendant. }

[Here describe the documents. The same form may be employed in describing the documents as is now in use in the Common Law Courts.]

No. 22.—*Subpoena to bring in a Script in a Cause.*

VICTORIA, by the Grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith.

To of

WHEREAS there is now proceeding in Our Court of Probate a certain business of proving in solemn form of law the last Will and Testament of A.B., late of deceased, who died on or about at the said Will bearing date the day of 18, promoted by C.D., the sole executor, [or as the case may be] therein named, against E.F., the natural and lawful brother and one of the next-of-kin of the said deceased [or as the case may be]: And whereas it appears by a certain affidavit of the said C.D. made in the said cause, bearing date the day of 18, and now remaining in the Registry of Our said Court, that a certain original Paper Writing or Script, purporting to be testamentary, to wit, [here describe the paper accurately.] is now in your possession or under your controul: NOW THIS IS TO COMMAND YOU, that, within eight days after service hereof on you, inclusive of the day of such service, you do bring into and leave in the Registry of Our said Court the aforesaid Script, or in case the said Script be not in your possession or under your controul, that you, within eight days after the service hereof on you, exclusive of the day of such service, do file in the Registry of Our said Court an affidavit to that effect, and therein set forth what knowledge you have of and respecting the said Script; and this you shall nowise omit, under the penalty of 100*l.* Witness [insert the name of the Judge], at the Court of Probate, the day of 18 in the year of Our reign.

Indorsement to be made after Service.

This citation was served by I.K. on the within named of at
on the day of 18
(Signed) I.K.

No. 23.—*Subpoena to a Witness to be examined touching a Testamentary Paper of which he is supposed to have knowledge.*

VICTORIA, by the Grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith.

To of, Greeting. We command you, that, all other things set aside, and ceasing every excuse, you do appear before A.B., the Judge of Our Court of Probate, at Our Court of Probate, at on the day of 18, by of the clock in the forenoon of the same day, and so from day to day until you be dismissed by Our said Judge, to testify the truth according to your knowledge [or to answer to certain interrogatories to be administered to you], touching a certain Paper Writing or Script, purporting to be

testamentary, of which reasonable grounds have been furnished to Our said Judge for believing that you have knowledge. And this you shall nowise omit, under the penalty of 100*l*. Witness [insert the name of the Judge], at the Court of Probate, the day of 18, in the year of Our reign.

Indorsement to be made after Service.

This citation was served by *I.K.* on the within-named on the day of 18 (Signed) *I.K.*

No. 24.—*Præcipe for a Witness to bring in a Script.*

In Her Majesty's Court of Probate.

Subpoena for *W.W.* to bring into and leave in the Registry, [here accurately describe the Script].

The day of 18 (Signed) { *A.B.* } or { *P.A.*, Plaintiff's [or Defendant's] proctor, *C.D.* } solicitor, or attorney.

No. 25.—*Præcipe for a Witness to be examined touching a Testamentary Paper, of which he is supposed to have knowledge.*

In Her Majesty's Council of Probate.

Subpoena for *W.W.* to testify respecting of a Paper Writing or Script purporting to be testamentary, to wit, [describing it], of which he has knowledge, on the part of this day of

(Signed) { *A.B.* } or { *P.A.*, Plaintiff's [or Defendant's] proctor, *C.D.* } solicitor, or attorney.

No. 26.—*Entry on the Record of a Verdict for Plaintiff.*

Afterwards, on the day of 18, before the Judge of Her Majesty's Court of Probate, come the parties within mentioned, by their respective attorneys [or as the case may be] within mentioned, and a jury duly summoned also come, who, being sworn to try the matters in question between the parties, upon their oath say, that [state the affirmative or negative of the issue, as it is found for the Plaintiff, and in the terms adopted in the pleading].

[If there be several issues joined and tried, then say] as to the first issue within joined upon their oath say, that [here state the affirmative or negative of issue, as found for Plaintiff], and as to the second issue within joined, the jury aforesaid upon their oath say, &c. [so proceed to state the finding of the Jury on all the issues]; and that with respect to the costs in the said cause the said Judge on the same day [as the case may be] directed [here insert direction as to costs].

(Signed) *A.B.*, Registrar.

No. 27.—*Entry on the Record of a Judgment for Plaintiff.*

Afterwards, on the day of 18, before the Judge of Her Majesty's Court of Probate, come the parties within mentioned, by their respective attorneys [or as the case may be] within mentioned: Whereupon the Judge decreed [here insert the tenour of the decree].

(Signed) *A.B.*, One of the Registrars of Her Majesty's Court of Probate.

No. 28.—*Inventory.*

A true, full, and particular inventory of all and singular the personal estate and effects of *A.B.*, late of _____, deceased, which have at any time since his death come to the hands, possession, or knowledge of *C.D.*, the sole executor named in the last Will and Testament of the said *A.B.* [or administrator, as the case may be], made and exhibited upon and by virtue of the corporal oath [or solemn affirmation] of the said *C.D.*, as follows, to wit:

First, this exhibitant saith, that the said deceased was at the time of his death | £. | s. | d.
possessed of

[The details of the deceased's effects must be here inserted in as many sheets of paper as may be necessary, and the value inserted opposite to each particular.]

Lastly, this exhibitant saith, that no personal estate or effects of or belonging to the said deceased have at any time since his death come to the hands, possession, or knowledge of this exhibitant, save as is hereinbefore set forth.

On the _____ day of _____ 18 _____ the said *C.D.* was duly sworn to [or solemnly affirmed] the truth of the above inventory,
Before me,

[person authorized to administer Oaths under the Act].

No. 29.—*Petition.*

The _____ day of _____ 18 _____
A.B. or [*A.B.*, proctor, solicitor, or attorney for *C.D.*,] says, that

[Here insert all the facts which are to be alleged]:

Wherefore the said *A.B.* prays, that

[Here end with the prayer of the Petitioner.]

(Signed) *A.B.*

Answer.

The _____ day of _____ 18 _____
E.F. [or *E.F.*, proctor, solicitor, or attorney for *G.H.*,] says that

[Here insert the facts alleged in answer.]

Wherefore the said *E.F.* prays, that

[Here insert the prayer of the Defendant.]

(Signed) *E.F.*

The reply, rejoinder, &c. (if any such be necessary,) are to be followed out in the same form.

F E E S

TO BE TAKEN IN

COURT AND CONTENTIOUS BUSINESS

IN THE COURT OF PROBATE.

	£.	s.	d.		£.	s.	d.
On every citation	0	5	0	On every subpoena	0	2	6
On every citation to see proceedings ...	0	5	0	On every commission issuing under seal of the Court	1	0	0
On entering appearance	0	2	6	Writ of attachment	0	7	6
Filing declaration	0	5	0	Writ of sequestration	1	0	0
Filing plea... ..	0	5	0	Filing certificate of County Court Judge	0	1	0
Filing act on petition	0	5	0	Search in Court books, if within the last five years	0	1	0
Filing answer	0	5	0	If at an earlier period than within the last five years... ..	0	2	6
Filing reply	0	5	0	Bond to be executed as security for costs or by a receiver of real estate, or for any other purpose or by any other person :			
Filing any further writing to the act ...	0	5	0	If three folios of seventy-two words or under	0	5	0
Filing inventory	0	5	0	If above three folios of seventy-two words, per folio	0	2	0
On pleadings amended or reformed ...	0	2	6	Assignment of bond	0	5	0
Filing interrogatories	0	5	0	Filing and entry of remission of appeal	0	10	0
Filing answers to interrogatories ...	0	5	0	Filing exhibits, not exceeding ten folios each exhibit	0	1	0
Filing affidavit as to scripts	0	2	6	If exceeding ten but not exceeding twenty... ..	0	10	0
Filing every script annexed to such affidavit... ..	0	5	0	If exceeding twenty but not exceeding fifty	0	15	0
Filing case for motion	0	5	0	If exceeding fifty	1	0	0
For entering the order of Court on motion... ..	0	5	0	Office copies of orders or decrees, Judge's notes, or other documents filed in a cause :			
Summons to attend in chambers	0	2	6	If five folios of seventy-two words or under	0	2	6
For entering the order of Court on summons	0	2	6	If exceeding five folios of seventy-two words, per folio	0	0	6
Filing notices	0	1	0	Filing every affidavit or other document brought into Court, and deposited in the registry, not otherwise specified...	0	2	6
On depositing the record	1	0	0	Taxing every bill of costs :—			
Setting a cause down for hearing or trial	0	5	0	If three folios of seventy-two words or under	0	2	6
Entering the final decree in a cause ...	0	10	0	If exceeding three folios of seventy-two words :			
Entering special verdict, if five folios of seventy-two words or under... ..	0	2	6	When taxed as between party and party, per folio	0	0	6
If exceeding five folios, per folio of seventy-two words	0	0	6	When taxed as between practitioner and client, per folio	0	1	0
Entering order appointing a receiver of real estate	1	0	0	Office copy of will under seal of the Court :			
Entering decree or order in pursuance of judgment of an extinct Court ...	0	10	0	In addition to fees of the office copy of the will... ..	1	0	0
Entering any order or decree made with consent of parties by the Judge ...	0	10	0	Commissioner of the Court for administering oaths to each deponent ...	0	1	6
Entering any order or decree in the Court book, not otherwise specified...	0	2	6	Examiner appointed to take depositions under a commission for examination of witnesses, for each day's attendance, besides travelling expenses	3	3	0
On withdrawal of a cause after the same is set down for hearing or trial, to be paid by the party at whose instance it is withdrawn	0	5	0				
On the hearing or trial of a cause :							
From the plaintiff	1	0	0				
From the defendant	0	15	0				
If the hearing or trial continues more than one day, for each day :							
From the plaintiff	0	10	0				
From the defendant	0	10	0				
Reducing into writing any question to be submitted to a jury under the Judge's direction	1	0	0				
Producing the Judge's notes	0	5	0				
Bill of exceptions signed by the Judge	0	5	0				
Entering on the record the finding of the jury or the decision of the Judge	0	5	0				

F E E S

TO BE TAKEN BY

OFFICERS OF THE COUNTY COURTS

In respect of Business under the Act.

The same Fees as in case of a Plaint for a sum of £20.

F E E S

TO BE TAKEN FOR THEIR OWN USE

BY THE

PROCTORS, SOLICITORS, AND ATTORNIES,

Practising in the Court of Probate

IN CONTENTIOUS BUSINESS.

	£. s. d.		£. s. d.
Citation including præcipe	0 7 6		
Citation to see proceedings, including præcipe	0 7 6		
Certificate of service	0 2 6		
Subpœna ad testificandum	0 5 0		
Subpœna duces tecum, or to bring in a script, if five folios of seventy-two words, or under	0 5 0		
If exceeding five folios, per folio	0 1 0		
Writ of attachment, including præcipe	0 7 6		
Writ of sequestration, including præcipe	0 7 6		
Service of citation or subpœna, if within two miles of the place of business of the practitioner or of the person employed to effect the service	0 5 0		
If beyond that distance and not exceeding ten miles, for every mile one way	0 1 0		
Affidavit of service, if three folios of seventy-two words or under	0 5 0		
If above, for every folio, including copy	0 1 4		
In cases in which the person to be served shall avoid service, or shall reside beyond the jurisdiction, except in Scotland and Ireland, a sum to be allowed for service according to the circumstances.			
		<i>Instructions.</i>	
		Instructions for citation, for pleadings, for interrogatories, for special affidavits, or for inventories	0 6 8
		Ditto to defend suit	0 6 8
		Ditto for brief, or case for hearing	0 13 4
		<i>Pleadings and Copies.</i>	
		Drawing and engrossing declaration, if ten folios of seventy-two words or under	1 0 0
		If exceeding ten folios, for every additional folio	0 1 4
		Drawing and engrossing pleas, replications, and other pleadings, if ten folios of seventy-two words or under	1 0 0
		If exceeding ten folios, for every additional folio	0 1 4
		Copies of declaration or pleas to file, at per folio of seventy-two words	0 0 4
		Drawing the issue, if fifteen folios, of seventy-two words or under, including copy	0 10 0
		If exceeding fifteen folios, per folio, including copy	0 0 8

	£. s. d.		£. s. d.
Engrossing record to file, at per folio of seventy-two words	0 0 6	Attendance on examination of witnesses under a commission—	
All copies on parchment, per folio of seventy-two words, including the parchment	0 0 6	If in England or Wales, per diem	2 2 0
Drawing and engrossing demurrer, inclusive of the statement of any matter of law, to be argued, for ten folios of seventy-two words or under	0 10 0	If elsewhere... ..	3 3 0
If exceeding ten folios of seventy-two words, per folio	0 1 0	For all necessary attendances in chambers before the Judge or before a Commissioner, on counsel, in the Registry, or upon the adverse parties or practitioner, for which no other fee is herein allowed... ..	0 6 8
Copy to file, at per folio of seventy-two words	0 0 4		
Copy of the issue on demurrer, at per folio of seventy-two words	0 0 4	<i>Briefs and Cases for Hearing.</i>	
Drawing and engrossing special case, or case for motion, per folio of seventy-two words	0 1 4	For drawing same, per folio of seventy-two words	0 1 0
Drawing bill of costs and copy for taxation, per folio of seventy-two words... ..	0 1 0	For each copy, per folio of seventy-two words	0 0 4
Copy for the adverse party, per folio of seventy-two words	0 0 4	Letters. Every necessary letter during the dependence of the cause... ..	0 3 6
Drawing any instrument to be filed in or issued by the Registry for which no other fee is herein allowed, and for fair copy to be filed or issued, per folio of seventy-two words	0 1 4	Term fees and letters and messengers each term in which any business is done	0 15 0
		For maps or plans ... each from	1 1 0
			3 3 0
		Copies of same if required each from	0 10 0
			1 0 0

Notices.

All necessary notices, if three folios or under, inclusive of copy and service	0 5 0
If exceeding three folios, for every additional folio	0 1 0
In all cases where service of a notice is necessary beyond two miles of the place of business of the practitioner, the same fee as upon the service of a citation.	
Copy of summons or order of the Judge, and service	0 5 0

Attendances.

Attendance to search for appearance to citation, or subpoena to bring in scripts	0 6 8
For attendance on counsel with brief, when the fee to counsel is one guinea	0 3 4
When the fee to counsel exceeds one guinea and is under five guineas ...	0 6 8
When the fee is five guineas and upwards	0 13 4
Attendance on consultation	0 13 4
Attendance on conference	0 6 8
Attendance in pursuance of notice to admit	0 6 8
For every hour after the first	0 6 8
Attendance on trial or hearing when cause is in paper and not tried or heard, or on motion in court	0 13 4
On trial or hearing	1 1 0
If it lasts the whole day	2 2 0
Attendance on taxation of bill of costs	0 13 4
If very long an additional fee will be allowed.	

Affidavits.

Drawing special affidavits, per folio of seventy-two words, and copy for the Court	0 1 4
Common affidavit, if five folios or under, including copy for the Court or Registry	0 6 8
If above five folios, per folio including copy	0 1 4
Defendants—	
Entering appearance... ..	0 6 8

Interrogatories.

For drawing the same, at per folio of seventy-two words	0 1 0
Copy thereof to be delivered to the examiner and filed, at per folio of seventy-two words	0 0 4

Copies of Scripts or Exhibits.

For every plain copy of a script, exhibit, or other instrument filed in the Registry, per folio of seventy-two words	0 0 4
If the same or any part thereof are required to be made <i>fac simile</i> , in addition to the above per folio of seventy-two words	0 0 2

If in any Court or Contentious Business it should become necessary for Proctors, Solicitors, or Attornies to transact any business for which no fee is herein specified, such fee shall be taken by them as would be allowed for similar business done in the Courts of Common Law and Equity, as the case may be.

F E E S

TO BE TAKEN FOR THE USE OF OTHER PERSONS

BY THE

PROCTORS, SOLICITORS, AND ATTORNIES,

Practising in the Court of Probate

IN CONTENTIOUS BUSINESS.

	£.	s.	d.		£.	s.	d.
<i>Counsel's Clerks' Fees.</i>				<i>Professional men, including notaries, engineers, and surveyors, &c. :</i>			
Not to exceed as under :				If resident within five miles of the General Post Office, per diem	1	1	0
Upon a fee to counsel under 5 guineas	0	2	6	If resident beyond that distance, per diem	3	3	0
5 guineas and under 10 guineas	0	5	0	<i>Clerks to attornies or others :</i>			
10 guineas and under 20 guineas	0	10	0	If resident within five miles of the General Post Office, per diem	0	10	6
20 guineas and under 30 guineas	0	15	0	If resident beyond that distance, per diem	1	1	0
30 guineas and under 50 guineas	1	0	0	Equires, bankers, merchants, and gentlemen, per diem	1	1	0
50 guineas and upwards—at per cent. on the fee paid	2	10	0	Females according to station in life:			
On consultations :				If resident within five miles of the General Post Office, per diem, from	0	5	0
Senior's clerk	0	7	6	If resident beyond that distance, per diem, from	0	7	6
Junior's clerk	0	2	6	If resident beyond that distance, per diem, from	1	0	0
On general retainer	0	10	6	Police inspector :			
On common retainer	0	2	6	If resident within five miles of the General Post Office, per diem	0	7	6
On conference	0	5	0	If resident beyond that distance, per diem	0	10	0
<i>Witnesses' Expenses.</i>				Police constable:			
Allowance to witnesses, including their board and lodging, as between party and party :				If resident within five miles of the General Post Office, per diem	0	5	0
Common witnesses, such as labourers, journeymen, &c. &c. :				If resident beyond that distance, per diem	0	7	6
If resident within five miles of the General Post Office, per diem	0	5	0	The travelling expenses of witnesses will be allowed according to the sums reasonably and actually paid ; but in no case will there be an allowance for such expenses of more than 1s. per mile one way.			
If beyond that distance, per diem	0	7	6				
Master tradesmen, yeomen, farmers, &c. :							
If resident within five miles of the General Post Office, per diem	0	10	0				
If resident beyond that distance, per diem	0	15	0				
Auctioneers and accountants :							
If resident within five miles of the General Post Office, per diem	1	1	0				
If resident beyond that distance, per diem	2	2	0				

RULES, ORDERS, AND INSTRUCTIONS

FOR THE

REGISTRARS OF THE PRINCIPAL REGISTRY

OF

THE COURT OF PROBATE,

IN RESPECT OF

NON-CONTENTIOUS BUSINESS.

NON-CONTENTIOUS BUSINESS shall include all Common Form business as defined by the Act, and the warning of Caveats.

1. *Application for Probate or Letters of Administration* may be made at the Principal Registry in all Cases.

2. For the present such applications are to be made through a proctor, solicitor, or attorney.

3. In no case should the Registrars allow the Probate or Administration to issue until all the inquiries which they may see fit to institute have been answered to their satisfaction. The Registrars are, notwithstanding, to afford as great facility for the obtaining grants of Probate or Administration as is consistent with a due regard to the prevention of error or fraud.

As to Probate of Wills and Codicils and Letters of Administration, with the Will [or Will and Codicils] annexed, where the Wills and Codicils or the Codicils only are dated after 31st December 1837.

4. If there be no attestation clause to a Will presented for Probate, or if the attestation clause thereto be insufficient, the Registrars

must require an affidavit from at least one of the subscribing witnesses, if either of them are living, to prove that the provisions of 1 Vict. c. 26. s. 9. and 15 & 16 Vict. c. 24, in reference to the execution of the Will were in fact complied with; and such affidavit must be engrossed and form part of the Probate, so that the same may be a perfect document on the face of it.

5. If on perusing the affidavit it appear that the requirements of the statute were not complied with, the Registrars must refuse Probate.

6. If on perusing the affidavit or affidavits setting forth the facts of the case, it appear doubtful whether the Will has been duly executed, the Registrars may require the parties to bring the matter before the Judge on motion.

7. If both the subscribing witnesses are dead, or if from other circumstances no affidavit can be obtained from either of them, resort must be had to other persons (if any) who may have been present at the execution of the Will: but if no affidavit of any such other person can be obtained, in order to Probate evidence on affidavit must be procured of that fact and of the handwriting of the subscribing witnesses, and also of any circumstances which may raise a presumption in favour of the due execution of the Will.

8. Interlineations and alterations are invalid unless they existed in the Will at the time of

its execution, or if made afterwards unless they have been executed and attested in the mode required by the statute, or unless they have been rendered valid by the re-execution of the Will, or by the subsequent execution of some Codicil thereto.

9. Where interlineations or alterations appear in the Will (unless duly executed or duly accounted for by the attestation clause), an affidavit or affidavits in proof of their having existed in the Will before its execution, must be filed, except when the alterations are merely verbal or are of but small importance, and are evidenced by the initials of the attesting witnesses.

10. In like manner, erasures and obliterations are not to prevail unless proved to have existed in the Will at the time of its execution, or unless the alterations thereby effected in the Will are duly executed and attested, or unless they have been rendered valid by the re-execution of the Will, or by the subsequent execution of some Codicil thereto. If no satisfactory evidence is adduced as to the time when such erasures and obliterations were made, and the words erased or obliterated be not entirely effaced, but can upon inspection of the paper be readily ascertained, they must form part of the Probate.

11. In every case of words having been erased which might have been of importance, an affidavit should be required.

12. If a Will contain a reference to any deed, paper, memorandum, or other document, of such a nature as to raise a question whether it ought or ought not to form a constituent part of such Will, the production of such deed, paper, memorandum, or other document should be required, with a view to ascertain whether it be entitled to probate; and if not produced its non-production should be accounted for.

13. No deed, paper, memorandum, or other document can form part of a Will or Codicil unless it were in existence at the time when the Will or Codicil was executed.

14. If any vestiges of sealing wax or wafers or other appearances are observable, leading to the inference that any paper, memorandum, or other document may have been annexed or attached to the Will, they should be satisfactorily accounted for, or the production of such paper, memorandum, or other document must be required; and if not produced its non-production must be accounted for.

15. The above rules and orders respecting Wills apply equally to Codicils,

16. In case of Probate of a married woman's Will or of Administration with the Will of a married woman annexed made by virtue of a power, the power under which the Will purports to have been made must be specified in the grant.

As to Probate of Wills, Codicils, and Testamentary Papers relating to Personality, and dated before the 1st of January 1838.

17. It is not necessary that a Will, Codicil, or Testamentary Paper dated before the 1st of January 1838 should be attested by witnesses to constitute it a valid disposition of a testator's personal property. Although neither signed by the testator nor attested by witnesses, it may nevertheless be valid; but in such cases the testator's intention that it should operate as his Will, Codicil, or Testamentary Disposition must be proved clearly by circumstances.

18. A Will, Codicil, or Testamentary Paper, signed by the testator at the end of it, and attested by two disinterested witnesses (although there be no clause of attestation) is *prima facie* entitled to Probate.

19. In cases where a Will, Codicil, or Testamentary Paper is attested by two witnesses, such witnesses are not required to have been present with the testator at the same time. It is sufficient if the testator subscribed his name or made his mark to it in the presence of, or produced it with his name already written or his mark already made, to one attesting witness, and afterwards to the other attesting witness, provided that on each occasion he declared it to be his Will or Codicil, or otherwise notified his intention that it should operate as such.

20. If the Will, Codicil, or Testamentary Paper is signed at the end of it by the testator but is unattested, and there is nothing to shew an intention that it should be attested by witnesses, the affidavit of two disinterested persons to prove the signature to be of the handwriting of the testator will be sufficient to entitle the paper to probate.

21. If the Will, Codicil, or Testamentary Paper is signed at the end of it by the testator, and attested by one witness only, and there is nothing to shew the testator's intention that it should be attested by a second witness, the affidavit of one disinterested person to prove the signature to be of the handwriting of the testator will be sufficient to entitle the paper to probate.

22. The circumstance of a person being named as an executor in the Will, Codicil, or Testamentary Paper, or being interested as a legatee or as the husband or wife of a legatee under such Will, Codicil, or Testamentary Paper, rendered him incompetent to become an attesting witness to it, so that if the name of a person so interested appears as that of a subscribing witness to the Will or Testamentary Paper, the same, so far as regards his attestation, must be considered as unattested, and his evidence in support thereof will be inadmissible, unless he shall first release his interest thereunder.

23. If an attestation clause, or the word "witnesses," appear written at the foot of the paper, the same being unattested, or if the paper purport on the face of it to be a draft of a Will, the copy of a Will, or instructions for a Will, it must *prima facie* be considered as an incomplete paper, and not, save under special circumstances, entitled to probate.

24. Any appearance of an attempted cancellation of a paper by burning, tearing, obliteration, or otherwise must be accounted for.

25. Every fact leading to a presumption of abandonment or revocation of a paper on the part of the testator must be accounted for.

26. Alterations and interlineations made by the testator, if unattested, are to be proved by an affidavit of two persons to his handwriting. If the same are in the handwriting of any person other than the testator, it will suffice to prove by affidavit that they were known to and approved of by the testator. Proof by affidavit that they existed in the paper at the time it was found in the repositories of the testator recently after his death may, under circumstances, suffice. Alterations and interlineations made since the 31st of December 1837, are subject to the provisions of 1 Vict. c. 38.

27. With respect to deeds, papers, memoranda, or other documents mentioned in a Testamentary Paper, or appearing to have been annexed or attached thereto, the foregoing rules, orders, and instructions as to Wills bearing date since the 31st of December 1837 will apply.

28. A Will made before the 1st of January 1838 is confirmed by a Codicil duly executed bearing date on or after that day.

As to Letters of Administration.

29. Where Administration is applied for by one or some of the next-of-kin only, there

being another or other next-of-kin equally entitled thereto, the Registrars may require proof by affidavit or statutory declaration that notice of such application has been given to such other next-of-kin.

30. *Limited Administrations* are not to be granted unless every person entitled to the general grant has consented or renounced, or has been cited and failed to appear, except under the direction of the Judge.

31. Whenever the Court under sect. 73 appoints an Administrator other than the person who prior to the Act would have been entitled to the grant, the same is to be made plainly to appear in the oath of the administrator, in the Letters of Administration, and in the Administration Bond.

32. The Registrars are to take care (as far as possible) that the sureties to Administration Bonds are responsible persons.

33. In all cases where Grants of Administration are made for the use and benefit of minors, the administrators are required to exhibit a declaration on oath of the personal estate and effects of the deceased, except where the effects are sworn under twenty pounds, or where the administrators are the guardians appointed by the High Court of Chancery, or are the testamentary guardians of the minors; and in all cases of persons cited, but not personally, and not appearing, the administrators are required to exhibit a similar declaration, and the sureties are required to justify.

34. In all Administrations of a special character the recitals in the oath and in the Letters of Administration must be framed in accordance with the facts of the case.

35. Grants of Administration will continue to be made as heretofore to the guardians of minors and infants, for the use and benefit of such minors and infants during their minority; and elections by minors of their next-of-kin or next friend, as the case may be, to such guardianship, will continue to be required; but proxies accepting such guardianship will in future be dispensed with.

General Rules and Orders for the Principal Registrars.

36. No Probate or Letters of Administration, with the Will annexed, shall issue until after the lapse of seven days from the death of the deceased unless under the direction of the Judge.

37. No Letters of Administration shall issue until after the lapse of fourteen clear days from the death of the deceased, unless under the direction of the Judge.

38. The Registrars may, in cases where they deem it necessary, require proof, in addition to the oath of the executor or administrator, of the identity of the deceased, or of the party applying for the grant.

39. In every case where Probate or Administration is, for the first time, applied for after the lapse of three years from the death of the deceased, the reason of the delay is to be certified to the Registrars. Should the certificate be unsatisfactory the Registrars are to require an affidavit.

40. The oath of administrators, and of administrators with the Will annexed, is to be so worded as to clear off all persons having a prior right to the grant, and the grant is to shew on the face of it how the prior interests have been cleared off.

41. The usual oath of administrators is, as well as that of executors and administrators with the Will, to be reduced into writing, and to be subscribed and sworn by them as an affidavit, and then filed in the Registry.

42. Every Will or copy of a Will to which an executor or administrator with the Will is sworn should be marked by such executor or administrator and by the person before whom he is sworn.

43. After motions have been made before the Judge in Court with regard to applications for Probate and Administration made at the District Registries, the Registrars are, unless the Judge shall otherwise direct, to return to the District Registrars the original papers and documents, with the directions of the Judge thereon.

44. Papers and other documents may be transmitted by the Registrars of the Principal Registry to the District Registrars through the Post Office. Such letters or packets are to be superscribed with the Words, "On Her Majesty's Service," and may be registered, if thought necessary.

45. In the case of persons residing out of England, Administrations with the Will annexed, and Administrations, may be granted to their attorney, acting under a power of attorney duly attested.

46. The addition and true place of abode of

every person making an affidavit is to be inserted therein.

47. In every affidavit made by two or more persons, the names of the several persons making it are to be written in the jurat.

48. No affidavit will be admitted in any matter depending in the Court of Probate in the jurat of which there is any interlineation or erasure.

49. Where an affidavit is made by any person who is blind, or who, from his or her signature or otherwise, appears to be illiterate, the Registrar, Commissioner, or other person before whom such affidavit is made is to state in the jurat that the affidavit was read in the presence of the party making the same, and that such party seemed perfectly to understand the same, and also that the said party made his or her mark, or wrote his or her signature, in the presence of the Registrar, Commissioner, or other person before whom the affidavit was made.

50. No affidavit is to be deemed sufficient which has been sworn before the party on whose behalf the same is offered, or before his proctor, solicitor, or attorney, or before a clerk of his proctor, solicitor, or attorney.

51. Proctors, solicitors, and attornies, and their clerks respectively, if acting for any other proctors, solicitors, or attornies, shall be subject to the rules in respect of taking affidavits which are applicable to those in whose stead they are acting.

52. A caveat shall remain in force for the space of six months only, and then expire and be of no effect; but caveats may be renewed from time to time as heretofore.

53. The Registrars shall, immediately upon a caveat being lodged, send notice thereof to the Registrars of any District in which it is alleged the deceased resided at the time of his death, or in which he is known to have had a fixed place of abode at the time of his death.

54. No caveat shall affect any grant made on the day on which the caveat is entered, unless notice of such caveat has been received prior to the grant passing the seal.

55. A caveat shall be warned at the place mentioned in it as the address of the person who entered it.

56. It shall be sufficient for the warning of a caveat that a Registrar send by the public post

a warning signed by himself, and directed to the person who entered it, at the address mentioned in it.

57. Any person intending to oppose a Grant of Probate or Letters of Administration must appear, either personally, or by his proctor, solicitor, or attorney, and enter an appearance in the Principal Registry. This rule is to apply whether the person intending to oppose the grant has or has not been previously warned to a caveat or served with a citation.

58. Citations against all persons in general, and other instruments, heretofore required to be served by affixing them in some public place, are in future to be served by the insertion of the same as advertisements in such of the leading morning and evening papers, and such of the local papers, as the Judge may from time to time direct. Such citations can only be allowed to issue in cases where there is an affidavit to lead them.

59. The Registrars are not to allow Probate of the Will, or Administration with the Will annexed, of any blind person, or of any obviously illiterate or ignorant person, to issue, unless they have previously satisfied themselves that the said Will was read over to the deceased before its execution, or that the deceased had at such time knowledge of its contents.

60. Whenever, subsequently to a grant having been made, the value of the personal estate and effects of the deceased person is re-sworn under a different amount, or any renunciation is filed, or any alteration is made in the grant, notice of such re-swearing, renunciation, or alteration is without delay to be forwarded

by the Registrars of the Principal Registry to all the District Registrars.

61. The Seal is not to be affixed to any Probate or Letters of Administration granted in Ireland, so as to give operation thereto as if the grant had been made by the Court of Probate in England, unless such Probate or Administration be duly stamped in respect of the personal estate and effects of which the deceased died possessed in England, and unless the same appear from a stamp on the Probate or Letters of Administration expressly denoting the same, or unless the same appear from a Certificate of the Commissioners of Inland Revenue or their proper officer.

62. In all cases where application is made for Letters of Administration (either with or without a Will annexed) of the goods of a bastard dying a bachelor, or a spinster, or a widower, or widow, without issue, or of a person dying without known relation, notice of such application is to be given to Her Majesty's Procurator General, in order that he may determine whether it will be expedient to interfere on the part of the Crown; save and except that when the deceased is domiciled within the Duchy of Lancaster, notice is to be given to the Solicitor for the Duchy in London; and no grant is to be issued until that officer has signified the course it will be proper to take under the circumstances of each particular case.

63. The Registrars are to take care that the copies of Wills to be annexed to the Probate or Letters of Administration are fairly and properly written in the engrossing hand heretofore in use in the Prerogative Court, and are to reject those which are otherwise.

FORMS

OF INSTRUMENTS TO BE ADOPTED IN THE PRINCIPAL REGISTRY OF
THE COURT OF PROBATE, AS NEARLY AS THE CIRCUMSTANCES
OF EACH CASE WILL ALLOW.

No. 1.—*Notice of the Entry of a Caveat in the Principal Registry.*

To the Registrar of the District Registry of _____ Her Majesty's Court of Probate.
You are requested to take notice, that a Caveat has been entered in this Registry of the following
tenour [*set out the Caveat at full length*].
This _____ day of _____ 18 .
(Signed) C.D.
Registrar.

No. 2.—*Affidavit of attesting Witness in proof of the due Execution of a Will or Codicil dated after 31st December 1837.*

In Her Majesty's Court of Probate. The Principal Registry.

In the goods of A.B. deceased.
I C.D. of _____ in the county of _____ make oath [or solemnly affirm], that I
am one of the subscribing witnesses to the last Will and Testament [or Codicil, *as the case may be*,] of the
said C.D., late of _____ in the county of _____ deceased, the said Will [or Codicil] being
now hereunto annexed, bearing date _____, and that the said Testator executed the said
Will [or Codicil] on the day of the date thereof, by signing his name at the foot or end thereof [or in
the testimonium clause thereof, or in the attestation clause thereto, *as the case may be*], as the same now
appears thereon, in the presence of me and of _____ the other subscribed witness thereto, both of
us being present at the same time, and we thereupon attested and subscribed the said Will [or Codicil]
in the presence of the said testator.

(Signed) C.D.
Sworn at _____ on the _____ day of _____ 18 , before me [person authorized
to administer oaths under the Act].

N.B.—If the signature is in testimonium clause or attestation clause, it must be shewn in the affidavit
that the testator fully intended the same as his final signature to his will.

No. 3.—*Affidavit for the Commissioners of Inland Revenue.—For Executors.*

In Her Majesty's Court of Probate. The Principal Registry.

In the goods of A.B. deceased.

The _____ day of _____ 18 .
I C.D. of (1) _____ make oath [or solemnly affirm], that I am one of the executors [or the
executor] named in the last Will and Testament (2) of the said A.B., late of _____ deceased; that
the said deceased died on or about the _____ day of _____ in the year of our Lord One
thousand _____ hundred and _____ at (3) _____, and that the personal estate and effects
of the said deceased, which he any way died possessed of or entitled to, and for or in respect of which a

(1) Insert the names, residences, and titles, or profession of the persons making the affidavit.

(2) Insert Codicils, if any.

(3) Insert place of death, or set forth the reason why the same cannot be furnished.

Probate of the said Will is to be granted, exclusive of what the said deceased may have been possessed of or entitled to as a trustee for any other person or persons, and not beneficially [if any leaseholds insert clause No. 1. *hereon indorsed*], and without deducting anything on account of the debts due and owing from the said deceased, are under the value of pounds, to the best of my knowledge, information, and belief [if no leaseholds insert clause No. 2. *hereon indorsed*].

(Signed) C.D.

Sworn at on the day of before me [person authorized to administer oaths under the Act.]

N.B.—Forms for the two leasehold clauses to be printed on the back of the affidavit.

No. 3 a.—*Affidavit for the Commissioners of Inland Revenue.—For Administrators with the Will annexed.*

In Her Majesty's Court of Probate. The Principal Registry.

In the goods of A.B. deceased.

I C.D. of (1) the party applying for Administration with the Will (2) annexed of the personal estate and effects of A.B., late of deceased, make oath [or solemnly affirm], that the said deceased died on or about the day of one thousand hundred and at (2), and that the personal estate and effects of the said deceased, which he any way died possessed of or entitled to, and for or in respect of which Letters of Administration with the said will (2) annexed are to be granted, exclusive of what the said deceased may have been possessed of or entitled to as a trustee for any other person or persons, and not beneficially [if leaseholds insert clause No. 1. *hereon indorsed*], and without deducting anything on account of the debts due and owing from the said deceased, are under the value of pounds, to the best of my knowledge, information, and belief [if no leaseholds insert clause No. 2. *hereon indorsed*].

(Signed) C.D.

Sworn at on the day of before me [person authorized to administer oaths under the Act.]

N.B.—Forms for the two leasehold clauses to be printed at the back of the affidavit.

- (1) Insert the names, residences, and titles, or professions of the persons making the affidavit.
 (2) Insert Codicils, if any.
 (2) Insert the place of death, or set forth the reason why the same cannot be furnished.

No. 3 b.—*Affidavit for the Commissioners of Inland Revenue.—For Administrators.*

In Her Majesty's Court of Probate. The Principal Registry.

In the goods of A.B. deceased.

The day of 18 I C.D. of (1) the party applying for Letters of Administration of the personal estate and effects of the said A.B., late of make oath [or solemnly affirm] and say as follows: That the said deceased died on or about the day of one thousand hundred and at (2), and that the personal estate and effects of the said deceased which he any way died possessed of or entitled to, and for or in respect of which Letters of Administration are to be granted, exclusive of what the said deceased may have been possessed of or entitled to as a trustee for any other person and persons, and not beneficially [if leaseholds insert clause No. 1.

- (1) Insert the names, residences, titles or profession of the persons making the affidavit.
 (2) Insert place of death, or set forth the reason why the same cannot be furnished.

Form of Leasehold Clause No. 1.

"Including the Leasehold Estate or Estates for years of the said deceased, whether absolute or determinable on a life or lives."

Form of Leasehold Clause No. 2.

"And I [or we] lastly make oath, that the said deceased was not possessed of or entitled to any leasehold estate or estates for years, whether absolute or determinable on a life or lives, to the best of my [or our] knowledge, information, and belief."

hereon indorsed], and without deducting anything on account of the debts due and owing from the said deceased, are under the value of _____ pounds, to the best of my knowledge, information, and belief [if no leaseholds insert clause No. 2. hereon indorsed].

(Signed) C.D.

Sworn at _____ on the _____ day of _____ before me [person authorized to administer oaths under the Act].

N.B.—Forms for the two leasehold clauses to be printed at the back of the affidavit.

No. 4.—Oath for Executor.

In Her Majesty's Court of Probate. The Principal Registry.

In the goods of A.B. deceased.

I C.D. of _____ in the county of _____ make oath and say [or solemnly affirm], that I believe this paper writing [or these paper writings] hereto annexed to contain the true and original last Will and Testament [or last Will and Testament with _____ Codicils] of A.B. late of _____ in the county of _____ deceased, and that I am the sole executor [or one of the executors] therein named [or executor according to the tenour thereof, executor during life, executrix during widowhood, or as the case may be,] and that I will faithfully administer the personal estate and effects of the said Testator by paying his just debts and the legacies contained in his Will [or Will and _____ Codicils], so far as the same shall thereto extend and the law bind me; that I will exhibit an inventory, and render an account of my executorship, whenever required by law so to do; that the testator died at _____ in the county of _____ on the _____ day of _____ 18 ____; and that the whole of the personal estate and effects of the said Testator does not amount in value to the sum of _____ pounds, to the best of my [or our] knowledge, information, and belief.

(Signed) C.D.

Sworn at _____ this _____ day of _____ 18 __, before me, E.P.

Each Testamentary Paper to be marked by the persons sworn and the person administering the oath.

No. 5.—Oath for Administrators with the Will.

In Her Majesty's Court of Probate. The Principal Registry.

In the goods of A.B. deceased.

I C.D. of _____ in the county of _____ make oath and say [or solemnly affirm], that I believe this paper writing [or these paper writings] hereunto annexed to contain the true and original last Will and Testament [or last Will and Testament with _____ Codicils] of A.B. late of _____ in the county of _____ deceased, and that the executor therein named is dead without having taken probate thereof [or as the fact may be], and that I am the residuary legatee in trust named therein [or as the fact may be], and that I will faithfully administer the personal estate and effects of the said deceased according to the tenour of his Will [or Will and _____ Codicils] by paying his just debts and the legacies contained in his Will [or Will and _____ Codicils], and distributing the residue of his estate according to law; that I will exhibit an inventory and render an account of my administration whenever required by law so to do; that the testator died at _____ on the _____ day of _____ 18 ____; and that the whole of the personal estate and effects of the said deceased does not amount in value to the sum of _____ pounds, to the best of my knowledge, information, and belief.

(Signed) C.D.

Sworn at _____ this _____ day of _____ 18 __, before me,

Each Testamentary Paper to be marked by the persons sworn and the person administering the oath.

No. 6.—Oath for Administrators.

In Her Majesty's Court of Probate. The Principal Registry.

In the goods of A.B. deceased.

I C.D. of _____ in the county of _____ make oath and say [or solemnly affirm], that A.B. late of _____ deceased, died a bachelor, without parent, brother or sister, uncle or aunt, nephew

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or niece, and intestate, and that I am the lawful cousin-german and one of the next-of-kin of the said deceased [*this must be altered in accordance with the circumstances of the case*]; that I will faithfully administer the personal estate and effects of the said deceased, by paying his just debts, and distributing the residue of his estate according to law; that I will exhibit an inventory and render an account of my administration whenever required by law so to do; that the said deceased died at _____ on the _____ day of _____ 18____; and that the whole of the personal estate and effects of the said deceased does not amount in value to the sum of _____ pounds, to the best of my knowledge, information, and belief.

Sworn at _____ this _____ day of _____ 18____, before me,

(Signed) A.B.

No. 7.—Probate.

In Her Majesty's Court of Probate. The Principal Registry.

BE IT KNOWN, that on the _____ day of _____ 18____ the last Will and Testament [or the last Will and Testament with _____ Codicils] hereunto annexed of A.B., late of _____ deceased, who died on or about _____ at _____, was proved, and registered in the said District Registry of _____ attached to Her Majesty's Court of Probate, and that the administration of all and singular the personal estate and effects of the said deceased was granted by the aforesaid Court to C.D., the sole executor [or as the case may be] named in the said Will, he having been first sworn well and faithfully to administer the same, by paying the just debts of the deceased and the legacies contained in his Will [or Will and _____ Codicils] so far as he is thereunto bound by law, and to exhibit a true and perfect inventory of all and singular the said estate and effects, and to render a just and true account thereof whenever required by law so to do.

(Signed) E.F.,
Registrar.
(L.S.)

Extracted by

To be written in } Sworn under £
the margin of } and that the Testator died
Probate - } on or about the _____ day
of _____ 18____.

No. 8.—Letters of Administration with the Will annexed.

In Her Majesty's Court of Probate. The Principal Registry.

BE IT KNOWN, that A.B., late of _____ in the county of _____ deceased, who died on or about the _____ day of _____, at _____, made and duly executed his last Will and Testament and did therein name _____ as _____, And BE IT FURTHER KNOWN, that on the _____ day of _____ 18____ Letters of Administration with the said Will annexed of all and singular the personal estate and effects of the said deceased were granted by Her Majesty's Court of Probate to C.D. [*insert the character in which the Grant is taken*], he having previously been sworn well and faithfully to administer the same according to the tenour of the said Will to pay the just debts of the said deceased, and to exhibit a true and perfect inventory of all and singular the said personal estate and effects and to render a just and true account thereof whenever required by law so to do.

(Signed) E.F.,
Registrar.
(L.S.)

Extracted by

Sworn under £
and that the Testator died
on or about the _____ day
of _____ 18____.

No. 9.—Letters of Administration.

In Her Majesty's Court of Probate. The Principal Registry.

BE IT KNOWN, that on the _____ day of _____ 18____, Letters of Administration of all and singular the personal estate and effects of A.B., late of _____ deceased, who died on or about _____ 18____, at _____, intestate, were granted by Her Majesty's Court of Probate to C.D. of _____ the widow [or as the case may be] of the said intestate, she having been first sworn well and faithfully to administer the same, by paying his just debts, and dis-

tributing the residue of his personal estate and effects according to law, and to exhibit a true and perfect inventory of all and singular the said estate and effects, and to render a just and true account thereof whenever required by law so to do.

Extracted by

(Signed) *E.F.*,
Registrar.
(L.S.)

To be written in }
margin of Admin- }
istration Will - } *Sworn under £*
and that the Intestate died
on or about the day
of 18 .

No. 10.—*Double Probate.*

In Her Majesty's Court of Probate. The Principal Registry.

BE IT KNOWN, that on the day of 18 , the last Will and Testament] or the last Will and Testament with [or Codicils] of *A.B.*, late of deceased, who died on or about , at , was proved and registered, and that administration of all and singular the personal estates and effects of the said deceased, and any way concerning his Will, was granted to *C.D.*, one of the executors named in the said Will [or Codicil], he having been already sworn well and faithfully to administer the same, and to make a true and perfect inventory of all the said personal estate and effects, and to render a just and true account thereof whenever required by law so to do, power being reserved of making the like grant to *E.F.*, the other executor named in the said Will, when he should apply for the same. And BE IT FURTHER KNOWN, that on the day of 18 , the said Will of the said deceased was also proved,* and that the like administration of all and singular the personal estate and effects of the said deceased, and any way concerning his Will, was granted to the said *E.F.*, he having been first duly sworn well and faithfully to administer the same, and to make a true and perfect inventory of the personal estate and effects of the said deceased, and to render a just account thereof whenever required by law so to do.

Extracted by

(Signed) *G.H.*,
Registrar.
(L.S.)

Sworn under £
and that the Testator died
on or about the day
of 18 .

* Former grant, Jan. 18 , under the same sum.

No. 11.—*Exemplification of Probate or of Letters of Administration with Will annexed.*

In Her Majesty's Court of Probate. The Principal Registry.

BE IT KNOWN, that upon search being made in the Principal Registry of Her Majesty's Court of Probate, it plainly appears that on the day of in the year of our Lord 18 the last Will and Testament with Codicils of *A.B.*, late of deceased, who died at on or about 18 was proved by *C.D.*, the executor named therein [or Letters of Administration with the last Will and Testament [and Codicils] annexed of the personal estate and effects of *A.B.*, late of, &c., were granted to *C.D.*, as the], and which Probate or Letters of Administration now remain of Record in the said Registry. The true tenour of the said Probate [or Letters of Administration with the Will annexed, as the case may be] is in the words following, to wit:

[*Here the Grant is to be recited verbatim.*]

In faith and testimony whereof these Letters Testimonial are issued.

Given at this day of as to the time of the aforesaid search, and the sealing of these presents, in the year of our Lord 18

Extracted by

(Signed) *E.F.*,
Registrar.
(L.S.)

Sworn under £
and that the Testator died
on the day
of 18 .

No. 12.—*Exemplification of Administration.*

In Her Majesty's Court of Probate. The Principal Registry.

BE IT KNOWN, that upon search being made in the Principal Registry of Her Majesty's Court of Probate, it appears that on the _____ day of _____ in the year of our Lord 18____ Letters of Administration of all and singular the personal estate and effects of A.B., late of _____ who died at _____ on or about _____, were granted to C.D., the _____ [or one of the _____] of the said deceased, and which Letters of Administration now remain of record in the said Registry. The true tenour of the said Letters of Administration is in the words following, to wit:

[Here the Letters of Administration are to be recited verbatim.]

In faith and testimony whereof these Letters Testimonial are issued.

Given at _____ as to the time of the aforesaid search, and sealing of these presents, this _____ day of _____ in the year of our Lord 18____

(Signed) K.L.,
Registrar.
(L.S.)

Extracted by

Sworn under £
and that the Intestate died
on the _____ day
of _____ 18 .

No. 13.—*Special Administration with the Will of a Married Woman annexed.*

In Her Majesty's Court of Probate. The Principal Registry.

BE IT KNOWN, that A.B., wife of C.B., late of _____ in the county of _____ died on the _____ day of _____ 18____, at _____, and having during her coverture with the said C.B., by virtue of certain powers and authorities given to and vested in her by a certain indenture of settlement bearing date the _____ day of _____ 18____, and of all other powers and authorities her enabling, made and executed her last Will and Testament bearing date the _____ day of _____ 18____, and thereof appointed her said husband, the said C.B., sole executor, and that the said C.B., as the lawful husband of the said deceased, is the sole person entitled to her personal estate and effects, over which she had no disposing power, and concerning which she is dead intestate. And BE IT ALSO KNOWN, that on the _____ day of _____ 18____ Letters of Administration (with the said Will annexed) of all and singular the personal estate and effects of the said deceased were granted and committed by Her Majesty's Court of Probate to the said C.B., on his giving the usual security, he having been first sworn well and faithfully to administer the same, to pay whatever debts the said deceased at the time of her death did owe, and to exhibit a true and perfect inventory of all and singular her personal estate and effects, and to render a just account thereof whenever required by law so to do.

(Signed) J.S.,
Registrar.
(L.S.)

Extracted by

Sworn under £100, and
that the Testatrix died
on the _____ day
of _____ 18 .

No. 13 a.—*Limited Probate of a Married Woman's Will.*

In Her Majesty's Court of Probate. The Principal Registry.

BE IT KNOWN, that A.B., wife of C.B., late of _____ in the county of _____ died on the _____ day of _____ 18____, at _____, and having during her coverture with the said C.B., by virtue of certain powers and authorities vested in her by a certain indenture of settlement, bearing date the _____ day of _____ 18____, and made between E.F. of _____ in the county of _____ esquire, of the first part, the said deceased, by her then name and description of A.G. of _____ in the county of _____ spinster, of the second part, and H.I. of _____ in the same county, gentleman, and the said C.B. of _____ aforesaid of the third part, made and executed her last Will and Testament bearing date the _____ day of _____ one thousand eight hundred and _____, and thereof appointed L.M. and O.P. executors.

And BE IT ALSO KNOWN, that on the _____ day of _____ 18____, the said last Will and Testament of the said A.B., hereunto annexed, was proved and registered in the said Principal Registry, and that Probate of the said Will of the said deceased, limited to the Administration of all such personal estate and effects as she the said deceased by virtue of the aforesaid indenture had a right to appoint or dispose of, and has in and by her said Will appointed or disposed of accordingly, but

no further or otherwise, was granted to the said *L.M.*, one of the executors named in the said Will as aforesaid, he having been first sworn well and faithfully to administer the same, by paying the just debts of the deceased, and the legacies contained in her said Will, as far as he is thereunto bound by law, and to exhibit a true and perfect inventory of the said limited estate and effects, and to render a just and true account thereof whenever required by law so to do, Power being reserved of making a like grant of Probate to the said *O.P.*, the other executor, when he shall apply for the same.

(Signed) *J.S.*,
Registrar.
(L.S.)

Extracted by

Sworn under £
and that the Testator died
on the day
of 18

No. 14.—*Special Administration of the rest of the Goods of a Married Woman.*

In Her Majesty's Court of Probate. The Principal Registry.

BE IT KNOWN, that *A.B.* [wife of *C.B.*], late of in the county of died on the day of 18, and having during her coverture with the said *C.B.*, by virtue of certain powers and authorities vested in her by a certain indenture bearing date the day of 18, and made between *D.E.* of in the county of esquire of the first part, the said *C.B.*, therein described, of in the county of gentleman of the second part, and the said *A.B.* by her then name and description of *A.F.* of in the county of widow, and *G.H.* of the same place, esquire, of the third part, made and executed her last Will and Testament, bearing date the day of 18, and thereof appointed *E.F.* and *G.H.* executors.

And BE IT ALSO KNOWN, that on the day of 18, Probate of the said Will, limited to the Administration of all such personal estate and effects as she the said deceased, by virtue of the said Indenture, had a right to appoint or dispose of, and hath in and by her said Will appointed or disposed of accordingly, but no further or otherwise, was granted by authority of to the said *E.F.* and *G.H.*, the executors named in the said Will. And BE IT FURTHER KNOWN, that on the day of 18, Letters of Administration of the rest of the personal estate and effects of the said *A.B.* deceased were granted to the said *C.B.*, the lawful husband of the said deceased, he having been first sworn faithfully to administer the same, and to exhibit a true and perfect inventory thereof, and also to render a just and true account thereof whenever required by law so to do.

(Signed) *R.S.*,
Registrar.
(L.S.)

Extracted by

Sworn under £
and that the Deceased died
on the day
of 18

No. 15.—*Administration de Bonis non.*

In Her Majesty's Court of Probate. The Principal Registry.

BE IT KNOWN, that *A.B.* late of in the county of deceased, died on or about 18, at intestate, and that since his death, to wit, in the month of 18, Letters of Administration of all and singular his personal estate and effects were committed and granted to *C.D.* [insert the relationship or character of administrator] (which Letters of Administration now remain of record in) who, after taking such Administration upon him, intermeddled in the personal estate and effects of the said deceased, and afterwards died, to wit, on leaving part thereof unadministered, and that on the day of 18, Letters of Administration of the said personal estate and effects so left unadministered were granted by Her Majesty's Court of Probate to he having been first sworn well and faithfully to administer the same, to pay his just debts, and exhibit a true and perfect inventory of the said personal estate and effects so left unadministered, and render a just and true account thereof whenever required by law so to do.

(Signed) *E.F.*,
Registrar.
(L.S.)

Extracted by

To be written in } Sworn under £
margin of Admi- } and that the Intestate died
nistration Will } on the day of

No. 16.—*Administration Bond.*

KNOW ALL MEN by these presents, that we, *A.B.* of *C.D.* of *E.F.* of *G.H.*, are jointly and severally bound unto *G.H.*, the Judge of Her Majesty's Court of Probate, in the sum of pounds of good and lawful money of Great Britain, to be paid to the said *G.H.* or to the Judge of the said Court for the time being, for which payment well and truly to be made we bind ourselves and of us for the whole, our heirs, executors, and administrators, firmly by these presents. Sealed with our seals. Dated the day of in the year of our Lord one thousand eight hundred and

The condition of this obligation is such, that if the above-named *A.B.*, the [as the case may be] of *I.J.*, late of deceased, who died on the day of do, when lawfully called on in that behalf, make or cause to be made a true and perfect inventory of all and singular the personal estate and effects of the said deceased which have or shall come to hands, possession, or knowledge, or into the hands and possession of any other person for , and the same so made do exhibit or cause to be exhibited into the Principal Registry of Her Majesty's Court of Probate, whenever required by law so to do, and the same personal estate and effects, and all other the personal estate and effects of the said deceased at the time of death, which at any time after shall come to the hands or possession of the said , or into the hands or possession of any other person or persons for , do well and truly administer according to law; (that is to say,) do pay the debts which did owe at decease, and further do make or cause to be made a true and just account of said administration whenever required by law so to do; and all the rest and residue of the said personal estate and effects do deliver and pay unto such person or persons as shall be entitled thereto under the Act of Parliament, intituled "*An Act for the better settling of Intestates Estates*;" and if it shall hereafter appear that any last Will and Testament was made by the said deceased, and the executor or executors therein named do exhibit the same into the said Court, making request to have it allowed and approved accordingly, if the said , being thereunto required, do render and deliver the said Letters of Administration (approbation of such Testament being first had and made) in the said Court, then this obligation to be void and of none effect, or else to remain in full force and virtue.

Signed, sealed, and delivered in the presence of

K.L., Registrar

[or

O.P., a Clerk in the Principal Registry of Her Majesty's Court of Probate.]

No. 17.—*Administration Bond for Administrators with the Will.*

KNOW ALL MEN by these presents, that we, *A.B.* of *C.D.* of *E.F.* of *G.H.*, are jointly and severally bound unto *G.H.*, the Judge of Her Majesty's Court of Probate, in the sum of pounds of good and lawful money of Great Britain, to be paid to the said *G.H.* or to the Judge of the said Court for the time being, for which payment well and truly to be made we bind ourselves and of us for the whole, our heirs, executors, and administrators, firmly by these presents. Sealed with our seals. Dated the day of in the year of our Lord one thousand eight hundred and

The condition of this obligation is such that if the above-named *A.B.*, the [as the case may be] of *I.J.*, late of deceased, who died on the day of do, when lawfully called on in that behalf, make or cause to be made a true and perfect inventory of all and singular the personal estate and effects of the said deceased which have or shall come to hands, possession, or knowledge, and the same so made do exhibit or cause to be exhibited into the Principal Registry of Her Majesty's Court of Probate, whenever required by law so to do, and the same personal estate and effects do well and truly administer, (that is to say,) do pay the debts of the said deceased which did owe at decease, and then the legacies contained in the said Will annexed to the said Letters of Administration so to committed, as far as personal estate and effects will thereto extend, and the law charge , and further do make or cause to be made a true and just account of said Administration when shall be thereunto lawfully required, and all the rest and residue of the said personal estate and effects shall deliver and pay unto such person or persons as shall be by law entitled thereto, then this obligation to be void and of none effect, or else to remain in full force and virtue.

Signed, sealed, and delivered in the presence of

K.L., Registrar

[or

O.P., a Clerk in the Principal Registry of Her Majesty's Court of Probate.]

No. 18.—*Declaration of the Personal Estate and Effects of a Testator or an Intestate.*

A true declaration of all and singular the personal estate and effects of *A.B.*, late of
deceased, who died on the day of at , and had at the time of his death
a fixed place of abode at within the district of , which have at any time
since his death come to the hands, possession, or knowledge of *C.D.*, the administrator with the Will of
the said *A.B.* [or administrator, as the case may be], made and exhibited upon and by virtue of the corporal
oath [or solemn affirmation] of the said *C.D.*, as follows, to wit:

First, this declarant declares that the said deceased was at the time of his death | £. | s. | d.
possessed of or entitled to
[The details of the deceased's effects must be here inserted, and the value inserted
opposite to each particular.]

Lastly, this declarant saith, that no personal estate or effects of or belonging to the said deceased have
at any time since his death come to the hands, possession or knowledge of this declarant, save as is
hereinbefore set forth.

On the day of 18 the said *C.D.* was duly sworn to [or solemnly affirmed] the
truth of the above inventory, before me [person authorized to administer oaths under the Act.] (Signed) *C.D.*

No. 19.—*Justification of Sureties.*

In Her Majesty's Court of Probate. The Principal Registry.

In the goods of *A.B.* deceased.

The day of 18 .
We, *C.D.* of and *E.F.* of , jointly
and severally make oath, that we are the proposed sureties on behalf of *G.H.*, the intended administrator
of all and singular the personal estate and effects of the said *A.B.*, late of deceased, in the
penal sum of pounds, for his faithful administration of the said personal estate and effects
of the said deceased; and I the said *C.D.* for myself make oath, that I am, after payment
of all my just debts, well and truly worth in money and effects the sum of ; and I the said
E.F. for myself make oath, that I am, after payment of all my just debts, well and truly
worth in money and effects the sum of pounds.

Same day the said *C.D.* and }
E.F. were duly sworn }
to the truth of this affidavit.

Before me, [person authorized to administer
oaths under the Act.]

No. 20.—*Election by Minors of a Guardian.*

In Her Majesty's Court of Probate. The Principal Registry.

WHEREAS *A.B.*, late of in the county of deceased, died on or about
the day of 18 , at intestate, a widower, leaving *C.D.*, *E.F.*, and
G.H. his natural and lawful children and only next-of-kin, the said *C.D.* being a minor of the age of
twenty years only, the said *E.F.* being also a minor of the age of nineteen years only, and the said *G.H.*
being an infant of the age of six years only:

NOW we, the said *C.D.* and *E.F.*, do hereby make choice of and elect *K.L.* of in the
county of our lawful maternal uncle and one of our next-of-kin, to be our curator or
guardian, for the purpose of his obtaining Letters of Administration of the personal estate and effects
of the said *A.B.* deceased to be granted to him, for our use and benefit, and until one of us attain the
age of twenty-one years [or for the purpose of renouncing for us, and on our behalf all our right, title,
and interest to and in the Letters of Administration, &c. as the case may be] [add, in cases where a proctor,
solicitor or attorney appears for the minors, and we hereby appoint *M.N.* of our proctor,
solicitor, or attorney, to file or cause to be filed this our election for us in the said Principal Registry of
Her Majesty's Court of Probate.]

IN WITNESS whereof we have hereunto set our hands and seals this day
of in the year 18 .
Signed, sealed, and delivered in the presence of

[One disinterested witness sufficient.]

No. 21.—*Renunciation of Probate and Administration with the Will annexed.*

In Her Majesty's Court of Probate. The Principal Registry.

WHEREAS A.B., late of in the county of deceased, died on the day of 18, at ; and whereas he made and duly executed his last Will and Testament bearing date the day of 18 (1), and thereof appointed C.D. executor and residuary legatee in trust [or as the case may be]:

NOW I, the said C.D., do hereby declare, that I have not intermeddled in the personal estate and effects of the said deceased, and will not hereafter intermeddle therein with intent to defraud creditors, and I do hereby expressly renounce all my right and title to the probate and execution of the said Will [and Codicils, if any], and to the Letters of Administration with the said Will [and Codicils, if any] annexed, of the personal estate and effects of the said deceased [add in cases where a proctor, solicitor, or attorney appears for the person renouncing, and I hereby appoint E.F. of my proctor, solicitor, or attorney, to file or cause to be filed this renunciation for me in the said Principal Registry of Her Majesty's Court of Probate.]

IN WITNESS whereof I have hereto set my hand and seal, this day of 18 .
C.D.

Signed, sealed, and delivered by the said C.D. in the presence of

G.H.

[One disinterested witness sufficient.]

(1) If there are codicils their dates should be also inserted.

No. 22.—*Renunciation of Administration.*

In Her Majesty's Court of Probate. The Principal Registry.(1)

WHEREAS A.B., late of in the county of deceased, died on the day of 18, at intestate, a widower; and whereas I, C.D. of , am his natural lawful child, and his only next-of-kin:

NOW I, the said C.D. do hereby declare that I have not intermeddled in the personal estate and effects of the said deceased, and do hereby expressly renounce all my right and title to the Letters of Administration of the personal estate and effects of the said deceased [add in cases where a proctor, solicitor, or attorney appears for the person renouncing, and I hereby appoint E.F. of my proctor, solicitor, or attorney, to file or cause this renunciation to be filed for me in the Principal Registry of Her Majesty's Court of Probate].

IN WITNESS whereof I have hereto set my hand and seal, this day of 18 .
C.D.

Signed, sealed, and delivered by the said C.D. in the presence of

G.H.

[One disinterested witness sufficient.]

(1) This to be varied according to the fact.

No. 23.—*Subpoena in a Proceeding in Common Form to bring in a Script.*

VICTORIA, by the Grace of God of the United Kingdom of Great Britain and Ireland Queen,
Defender of the Faith.

To of

WHEREAS it appears by a certain affidavit filed in the Principal Registry of Our Court of Probate [or filed in the District Registry of attached to our Court of Probate], bearing date the day of 18, and made by of , that a certain original Paper or Script, being or purporting to be Testamentary, to wit [here describe the paper], bearing date the day of 18, is now in your possession or under your controul:

NOW THIS IS TO COMMAND YOU, that within eight days after service hereof on you, inclusive of the day of such service, you do bring into and leave in the Principal Registry of Our said Court [or the District Registry of attached to our said Court] the said original paper now in the possession of you the said or in case the said original paper be not in your possession or under your controul, that you, within eight days after the service hereof on you, inclusive of the day of such service, do file in the Principal Registry of Our said Court, [or in the District Registry of attached to Our said Court], an affidavit to that effect, and therein set forth what knowledge you have of and respecting the said Script: And this you shall in nowise omit under the penalty of One hundred

pounds. Witness [insert the name of the Judge], at the Court of Probate, the
of 18, in the year of Our reign.

day

Indorsement to be made of the Service.

This subpoena was served by G.H. on of on the
day of 18.

(Signed) G.H.

No. 24.—*Affidavit of Handwriting.*

In Her Majesty's Court of Probate. The Principal Registry.

I A.B. of in the county of make oath [or solemnly affirm], that I knew and was well acquainted with C.D., late of in the county of deceased, who died on the day of at for many years before and down to the time of his death, and that during such period I have frequently seen him write and also subscribe his name to writings, whereby I have become well acquainted with his manner and character of handwriting and subscription, and having now with care and attention perused and inspected the paper writing hereunto annexed, purporting to be and contain the last Will and Testament of the said deceased, beginning thus ending thus and being subscribed thus ⁽¹⁾ "C.D." I further make oath, that I verily and in my conscience believe the whole body, series, and contents of the said Will, together with the names "C.D." subscribed thereto as aforesaid, to be of the true and proper handwriting and subscription of the said "C.D." deceased.

On the day of 18 the said A.B. was duly sworn at to the truth of this affidavit [or made this solemn affirmation],

Before me,
E.F.

[person authorized to administer oaths under the Act.]

(¹) Include in these recitals the date of the will.

No. 25.—*Affidavit of Plight and Condition and Finding.*

In Her Majesty's Court of Probate. District Registry of

I A.B. of in the county of make oath [or solemnly affirm], that I am the sole executor named in the paper writing now hereunto annexed, purporting to be and contain the last Will and Testament of E.F., late of in the county of deceased (who died on the day of at) the said Will bearing date the day of beginning thus ending thus and being subscribed thus "C.D.", and having viewed and perused the said Will and particularly observed that [here recite the finding of the Will, and the various obliterations, interlineations, erasures, and alterations (if any), and the general plight and condition of the Will, or any other matters requiring to be accounted for, and clearly trace the Will from the possession of the deceased in his lifetime up to the time of making this Affidavit]; I the deponent lastly make oath that the same is now in all respects in the same state, plight, and condition as when found [or as the case may be].

On the day of 18 the said A.B. and C.D. were duly sworn at to the truth of this affidavit [or made this solemn affirmation] before me,

I.J.

[person authorized to administer oaths under this Act.]

No. 26.—*Affidavit of Search.*

In Her Majesty's Court of Probate. The Principal Registry

I A.B., of in the county of , make oath [or solemnly affirm] that I am the sole executor named in the paper writing hereunto annexed, purporting to be and contain the last Will and Testament of C.D., late of deceased, who died on the day of in the year 18, at the said Will beginning thus, " ending thus, "In witness whereof, I have hereunto set my hand this day of in the year of our Lord one thousand eight hundred and fifty-four" [or as the case may be], and being thus subscribed, "C.D." And referring particularly to the fact that the blank spaces originally left in the said Will for the insertion of the day and month of the date thereof have never been supplied [or that the said Will is without date,

or as the case may be], I further make oath [or solemnly affirm] that I have made inquiry of *E.F.*, the solicitor of the said deceased, and that I have also made diligent and careful search in all places where he the said deceased usually kept his papers of moment and concern, and in his depositories, in order to ascertain whether he had or had not left any other Will, but that I have been unable to discover any such Will. And I lastly make oath [or solemnly affirm], that I verily believe the said deceased died without having left any Will, Codicil, or Testamentary Paper whatever other than the said Will by me hereinbefore deposed of. *A.B.*

On the day of 18 the said *A.B.* was duly sworn at to the truth of this affidavit [or made this solemn affirmation] before me,

G.H.

[person authorized to administer oaths under the Act.]

This form of affidavit to be used when it is shewn by affidavit that neither the subscribed witnesses nor any other person can depose to the precise time of the execution of the Will.

No. 27.—*Caveat.*

In Her Majesty's Court of Probate. The Principal Registry.

Let nothing be done in the goods of *A.B.*, late of deceased, who died on the day of at unknown to *C.D.* of having interest [or to *E.F.* of proctor, solicitor, or attorney of parties having interest].

Dated this day of 18 .
(Signed) *C.D.* of [or *E.F.* of the proctor, solicitor, or attorney of parties having interest.]

No. 28.—*Warning to Caveat.*

In Her Majesty's Court of Probate. The Principal Registry.

To *A.B.* of [or to *C.D.* of proctor, solicitor, or attorney of parties having interest].

You are hereby WARNED, within six days⁽¹⁾ after the service of this warning upon you, inclusive of the day of such service, to cause an appearance to be entered for you in the said District Registry attached to the said Court of Probate to the Caveat entered by you in the personal estate and effects of *E.F.*, late of deceased, who died at on or about the day of 18 , and to set forth your (or your client's) interest; and take notice, that in default of your so doing the said Court will proceed to do all such acts, matters, and things as shall be needful and necessary to be done in and about the premises.

(Signed) *X.Y.*, District Registrar.

Indorsement to be made after Service.

This warning was served by *I.K.* on *A.B.* of [or on *C.D.* of the proctor, solicitor, or attorney] by whom the Caveat was entered in respect of the personal estate and effects of the within-named deceased at on the day of 18 .

(Signed) *I.K.*
[or, The duplicate of this warning signed by the said *X.Y.*, was sent by the public post, directed to the said *A.B.* [or *C.D.*] by whom the Caveat was entered in respect of the personal estate and effects of the within-named deceased at on the day of 18 .
(Signed) *I.K.*]

⁽¹⁾ Note.—These six days are to be exclusive of Sunday.

F E E S

TO BE TAKEN IN THE

PRINCIPAL REGISTRY OF THE COURT OF PROBATE

IN

NON-CONTENTIOUS BUSINESS.

<i>Probates or Letters of Administration with Will annexed.</i>		<i>£. s. d.</i>	
For every Probate when the Personal Estate is sworn to be under £100, or any Sum less than £100...	0 1 0		
For every Probate when the Personal Estate is of the value of £100 and under £4,000, or any sum less than £4,000, a fee of 1s. 6d. in the pound on the amount of stamp duty payable on such Probate.			
For every Probate when the Personal Estate is of the value of £4,000 and upwards, the following fees:—			
If the Personal Estate is sworn to be—			
Under the value of - £ 5,000 ...	4 15 0	For registering and collating Wills, if three folios of ninety words each, or under ...	0 4 6
6,000 ...	5 0 0	If above three folios of ninety words each, per folio ...	0 1 6
7,000 ...	5 5 0	In cases of Probate for Queen's Pay or Prize Money, the effects being under £100, without reference to the length of the Will ...	0 4 6
8,000 ...	5 10 0	For engrossing and collating a Will for a double, or duplicate, or triplicate, or litigated, or cessate Probate, if the Will is four folios of ninety words each or under, including parchment ...	0 6 0
9,000 ...	5 15 0	If above four folios of ninety words each, per folio, including parchment ...	0 1 6
10,000 ...	6 0 0	For every double or cessate Probate, when the Personal Estate is under £450 or any smaller sum, the same fee as on the first Probate.	
12,000 ...	6 5 0	For every double or cessate Probate, when the Personal Estate is of the value of £450 and upwards ...	0 12 6
14,000 ...	6 10 0	For every duplicate and triplicate Probate, when the Personal Estate is under £450 or any smaller sum, the same fee as on the first Probate.	
16,000 ...	6 17 6	For every duplicate and triplicate Probate, when the Personal Estate is of the value of £450 and upwards ...	0 12 6
18,000 ...	7 5 0	For engrossing, exemplifying, and collating a Will of four folios of ninety words each or under, including parchment ...	0 6 0
20,000 ...	7 12 6	If above four folios of ninety words each; per folio (including parchment) ...	0 1 6
25,000 ...	8 2 6	For every exemplification of Probate ...	1 1 0
30,000 ...	8 15 0		
35,000 ...	9 7 6		
40,000 ...	10 6 3		
45,000 ...	11 5 0		
50,000 ...	12 3 9		
60,000 ...	13 2 6		
70,000 ...	15 0 0		
80,000 ...	16 17 6		
90,000 ...	18 15 0		
100,000 ...	20 12 6		
120,000 ...	21 11 3		
140,000 ...	23 8 9		
160,000 ...	25 6 3		
180,000 ...	27 3 9		
200,000 ...	29 1 3		
250,000 ...	30 18 9		
300,000 ...	35 12 6		
350,000 ...	40 6 3		
400,000 ...	41 17 6		
500,000 ...	43 8 9		
600,000 ...	46 6 3		
700,000 ...	49 13 9		
800,000 ...	52 16 3		
900,000 ...	55 18 9		
1,000,000 ...	59 1 3		
Above 1,000,000 ...	62 3 9		

Letters of Administration.

For every Grant of Letters of Administration, when the Personal Estate is sworn to be under £100 or any sum less than £100, a fee of ...	0 1 0
For every Grant of Letters of Administration, when the Personal Estate is of the value of £100 and under £2,000, or any sum less than £2,000, a fee of 1s. 6d. in the pound on the amount of Stamp Duty payable on such Letters of Administration.	

For every Grant of Letters of Administration, when the Personal Estate is of the value of £2,000 and upwards, the following fees:—

If the Personal Estate is sworn to be—

	£.	s.	d.
Under the value of £3,000 ...	4	13	9
4,000 ...	4	17	6
5,000 ...	5	5	0
6,000 ...	5	12	6
7,000 ...	6	0	0
8,000 ...	6	7	6
9,000 ...	6	15	0
10,000 ...	7	2	6
12,000 ...	7	10	0
14,000 ...	7	17	6
16,000 ...	8	8	9
18,000 ...	9	0	0
20,000 ...	9	11	3
25,000 ...	9	16	3
30,000 ...	11	5	0
35,000 ...	12	3	9
40,000 ...	13	11	3
45,000 ...	15	0	0
50,000 ...	16	7	6
60,000 ...	17	16	3
70,000 ...	20	12	6
80,000 ...	23	8	9
90,000 ...	26	5	0
100,000 ...	29	1	3
120,000 ...	30	9	6
140,000 ...	33	5	9
160,000 ...	36	2	0
180,000 ...	38	18	3
200,000 ...	41	14	6
250,000 ...	44	10	9
300,000 ...	46	17	6
350,000 ...	49	4	6
400,000 ...	51	11	3
500,000 ...	53	18	3
600,000 ...	58	12	0
700,000 ...	63	5	9
800,000 ...	67	19	6
900,000 ...	72	13	3
1,000,000 ...	77	7	0
Above 1,000,000 ...	82	0	9

For every duplicate and triplicate Letters of Administration when the Personal Estate is under £300 or any sum less than £300, the same fee as on the first Grant of Letters of Administration.

For every duplicate and triplicate Letters of Administration when the Personal Estate is of the value of £300 and upwards ... 0 12 6

For every exemplification of Letters of Administration ... 1 1 0

For every Grant of Letters of Administration with Will annexed de bonis non or cessate when the Personal Estate is under £450 or any smaller sum, the same fee as on the first Grant.

For every Grant of Letters of Administration with Will annexed de bonis non or cessate, when the Personal Estate is of the value of £450 and upwards... 0 12 6

For engrossing and collating a Will for a Grant of Letters of Administration with Will annexed de bonis non or cessate, if the Will is four folios of ninety words each, or under, including parchment ... 0 6 0

If above four folios of ninety words each, per folio, including parchment ... 0 1 6

For every Grant of Letters of Administration de bonis non or cessate, when the Personal Estate is under £300 or any smaller sum, the same fee as on the first Grant.

For every Grant of Letters of Administration de bonis non or cessate, when the Personal Estate is of the value of £300 and upwards ... 0 12 6

For every special or limited Grant of Probate or Letters of Administration with or without Will annexed, in addition to the ordinary fees, as under:

If the Personal Estate is under the value of £20, 1s. per folio of ninety words each on the bond, on the Act, and on the Grant of Probate or Letters of Administration.

If the Personal Estate is of the value of £20 and upwards, 2s. per folio of ninety words each on the bond, on the Act, and on the Grant of Probate or Letters of Administration.

For articles entered into by administrators to pay creditors *pro rata*, per folio of ninety words each ... 0 2 0

For the bond for the performance of the articles, per folio of ninety words ... 0 2 0

For noting on the Grant of Letters of Administration with or without Will annexed, and on the Act, that additional security has been given ... 0 5 0

For every certificate that additional security has been given ... 0 1 0

For every search for Will or Grant of Letters of Administration or any other document filed in the Principal Registry, including the looking up and inspecting an original Will before the same is registered, or a registered copy of a Will or an Administration Act ... 0 1 0

For every third Will or Administration Act looked up in addition to the above... 0 1 0

For looking up and inspecting an original Will after the same is registered in addition to the search ... 0 1 0

For looking up and producing any document filed in the Registry other than an original Will or Administration Act ... 0 1 0

	£. s. d.		£. s. d.
For every office copy or extract of a Record, Will, or Probate, or Administration Act, or other document filed in the Principal Registry, if five folios of ninety words or under	0 2 6	For the entry of every Caveat	0 1 0
If exceeding five folios of ninety words per folio	0 0 6	For each notice of such Caveat to the District Registrars	0 1 0
If the Will or other document is 200 years old and five folios of ninety words or under	0 5 0	For every warning to a Caveat issuing from the Principal Registry	0 5 0
If exceeding five folios of ninety words per folio	0 0 9	For messengers' attendance with warning to Caveat within three miles of the Principal Registry	0 2 6
If the office copy of a Will or any part of a Will or other document is required to be made fac simile, and such Will or part of a Will or other document is five folios of ninety words in length or under	0 3 6	For a search for a Will or Grant of Letters of Administration, and for reading the Will when the party applying is unable or unwilling to search for or read the same, such a reasonable fee as shall be agreed upon at the time.	
If exceeding five folios of ninety words, per folio	0 0 9	For every search by an officer of the Principal Registry in order to ascertain whether any Probate or Grant of Letters of Administration has already issued, or any application has been made for a Grant of Probate or Administration, as under :—	
For collating a Probate or copy of a Will or other document left in place of the original, if twenty folios in length or under	0 5 0	For every year after the year in which the deceased died	0 0 6
If exceeding twenty folios, for every additional two folios	0 0 3	In case it be requisite to extend the search to one or more District Registries, a similar additional fee for the search in each of such District Registries.	
If a copy is required to be printed, for every eight folios of ninety words (in addition to a manuscript copy for the printer, at 6d. per folio of ninety words)	0 5 0	For filing affidavit for the Inland Revenue Office on granting Probate on Letters of Administration for Queen's pay or prize money	0 1 0
For every copy of a Will made for the Inland Revenue Office, per folio	0 0 6	For filing every other affidavit and other document brought into and deposited in the Principal Registry, except the oaths for executors, administrators, or administrators with the Will, the first Administration Bond and the Testamentary Papers in respect of which Probate or Administration with Will annexed is granted	0 2 6
For every abstract of an Administration Act for the Inland Revenue Office	0 3 3	For every receipt for documents left in the Principal Registry in order to obtain a grant of Probate or Letters of Administration with or without Will annexed	0 1 0
For every attendance with any book or original document in any of the Courts of Law or Equity in London or Westminster, or elsewhere within three miles of the Principal Registry, except in the Court of Probate and the Court for Divorce and Matrimonial Causes at Westminster	1 1 0	For depositing every Will of a person deceased in the Principal Registry for safe Custody	0 10 0
For second and each subsequent attendance in any of the Courts of Law or Equity in London or Westminster, except as aforesaid, in the same term or sittings after term	0 10 6	For depositing every Will of a living person for safe custody, including the deposit receipt	1 1 0
For each day's attendance with any book or original document in any of the Courts of Law or Equity, or elsewhere beyond the distance of three miles from the Principal Registry, exclusive of travelling expenses	1 1 0	For taxing every Bill of Costs, inclusive of the Registrar's Certificate	0 5 0
For every receipt for a document or documents delivered out of the Principal Registry	0 1 0	For every oath administered by the Registrars	0 1 0
		For transfer of an articulated Clerk	1 0 0

F E E S

TO BE TAKEN FOR THEIR OWN USE

BY

PROCTORS, SOLICITORS, AND ATTORNIES

Practising in the Court of Probate and in the District Registries thereof,

IN NON-CONTENTIOUS BUSINESS.

F E E S OF PROBATES.

Effects sworn under	Oath of Executors and attendance on the party being sworn.	Affidavit for the Inland Revenue Office and attendance on the party being sworn.	Engrossing and collating the Will, three folios of ninety words or under.	Probate under seal.	Extracting.	Clerk's fee.
£.	£. s. d.	£. s. d.	£. s. d.	£. s. d.	£. s. d.	£. s. d.
5	0 2 6	0 2 6	0 4 6	0 1 0	0 1 0	—
20	0 2 6	0 2 6	0 4 6	0 1 0	0 3 4	0 1 0
100	0 5 0	0 5 0	0 4 6	0 1 0	0 6 8	0 2 0
200	0 6 8	0 6 8	0 4 6	0 3 0	0 6 8	0 2 0
300	0 10 0	0 10 0	0 4 6	0 7 6	0 6 8	0 2 0
450	0 10 0	0 10 0	0 4 6	0 12 0	0 6 8	0 2 0
600	0 10 0	0 10 0	0 4 6	0 16 6	0 6 8	0 2 0
800	0 10 0	0 10 0	0 4 6	1 2 6	0 6 8	0 2 0
1,000	0 10 0	0 10 0	0 4 6	1 13 0	0 6 8	0 2 0
1,500	0 10 0	0 10 0	0 4 6	2 5 0	0 6 8	0 5 0
2,000	0 10 0	0 10 0	0 4 6	3 0 0	0 6 8	0 5 0
3,000	0 10 0	0 10 0	0 4 6	3 15 0	0 13 4	0 5 0
4,000	0 10 0	0 10 0	0 4 6	4 10 0	0 13 4	0 5 0
5,000	0 10 0	0 10 0	0 4 6	4 15 0	0 13 4	0 7 6
6,000	0 10 0	0 10 0	0 4 6	5 0 0	0 13 4	0 7 6
7,000	0 10 0	0 10 0	0 4 6	5 5 0	0 13 4	0 7 6
8,000	0 10 0	0 10 0	0 4 6	5 10 0	0 13 4	0 7 6
9,000	0 10 0	0 10 0	0 4 6	5 15 0	0 13 4	0 7 6
10,000	0 10 0	0 10 0	0 4 6	6 0 0	0 13 4	0 7 6
12,000	0 10 0	0 10 0	0 4 6	6 5 0	0 13 4	0 7 6
14,000	0 10 0	0 10 0	0 4 6	6 10 0	0 13 4	0 7 6
16,000	0 10 0	0 10 0	0 4 6	6 17 6	0 13 4	0 7 6
18,000	0 10 0	0 10 0	0 4 6	7 5 0	0 13 4	0 7 6
20,000	0 10 0	0 10 0	0 4 6	7 12 6	0 13 4	0 7 6
25,000	0 10 0	0 10 0	0 4 6	8 2 6	0 13 4	0 7 6
30,000	0 10 0	0 10 0	0 4 6	8 15 0	0 13 4	0 7 6
35,000	0 10 0	0 10 0	0 4 6	9 7 6	0 13 4	0 7 6
40,000	0 10 0	0 10 0	0 4 6	10 6 3	0 13 4	0 7 6
45,000	0 10 0	0 10 0	0 4 6	11 5 0	0 13 4	0 7 6

Effects sworn under	Oath of Executors and attendance on the party being sworn.	Affidavit for the Inland Revenue Office and attendance on the party being sworn.	Engrossing and collating the Will, three folios of ninety words or under.	Probate under seal.	Extracting.	Clerk's fee.
£.	£. s. d.	£. s. d.	£. s. d.	£. s. d.	£. s. d.	£. s. d.
50,000	0 10 0	0 10 0	0 4 6	12 3 9	0 13 4	0 7 6
60,000	0 10 0	0 10 0	0 4 6	13 2 6	0 13 4	0 7 6
70,000	0 10 0	0 10 0	0 4 6	15 0 0	0 13 4	0 7 6
80,000	0 10 0	0 10 0	0 4 6	16 17 6	0 13 4	1 1 0
90,000	0 10 0	0 10 0	0 4 4	18 15 0	0 13 4	1 1 0
100,000	0 10 0	0 10 0	0 4 6	20 12 6	0 13 4	1 1 0
120,000	0 10 0	0 10 0	0 4 6	21 11 3	0 13 4	1 1 0
140,000	0 10 0	0 10 0	0 4 6	23 8 9	0 13 4	1 1 0
160,000	0 10 0	0 10 0	0 4 6	25 6 3	0 13 4	1 1 0
180,000	0 10 0	0 10 0	0 4 6	27 3 9	0 13 4	1 1 0
200,000	0 10 0	0 10 0	0 4 6	29 1 3	0 13 4	1 1 0
250,000	0 10 0	0 10 0	0 4 6	30 18 9	0 13 4	1 1 0
300,000	0 10 0	0 10 0	0 4 6	35 12 6	0 13 4	1 1 0
350,000	0 10 0	0 10 0	0 4 6	40 6 3	0 13 4	1 1 0
400,000	0 10 0	0 10 0	0 4 6	41 17 6	0 13 4	1 1 0
500,000	0 10 0	0 10 0	0 4 6	43 8 9	0 13 4	1 1 0
600,000	0 10 0	0 10 0	0 4 6	46 6 3	0 13 4	1 1 0
700,000	0 10 0	0 10 0	0 4 6	49 13 9	0 13 4	1 1 0
800,000	0 10 0	0 10 0	0 4 6	52 16 3	0 13 4	1 1 0
900,000	0 10 0	0 10 0	0 4 6	55 18 9	0 13 4	1 1 0
1,000,000	0 10 0	0 10 0	0 4 6	59 1 3	0 13 4	1 1 0
Above that sum }	0 10 0	0 10 0	0 4 6	62 3 9	0 13 4	1 1 0

For engrossing and collating the Will, if more than three folios of ninety words each, per folio 1s. 6d.

Fees of Letters of Administration with Will annexed.

In addition to the above Fees for attendance on execution of the Bond if the effects are—

	£.	s.	d.
£5 and under £20	0	0	10
£20 and under £100	0	1	8
£10 and upwards	0	3	4

FEES OF LETTERS OF ADMINISTRATION.

Effects sworn under	Oath of Administrator and attendance on his being sworn, and on execution of the Bond.	Affidavit for Inland Revenue and attendance on Administrator being sworn.	Letters of Administration under seal.	Extracting.	Clerk.
£.	£. s. d.	£. s. d.	£. s. d.	£. s. d.	£. s. d.
5	0 2 6	0 2 6	0 1 0	0 1 0	—
20	0 3 4	0 2 6	0 1 0	0 3 4	0 1 0
50	0 5 0	0 5 0	0 1 6	0 4 8	0 2 0
100	0 6 8	0 6 8	0 3 0	0 6 8	0 2 0
200	0 10 0	0 6 8	0 4 6	0 6 8	0 2 0
300	0 13 4	0 10 0	0 12 0	0 6 8	0 2 0
450	0 13 4	0 10 0	0 16 6	0 6 8	0 2 0
600	0 13 4	0 10 0	1 2 6	0 6 8	0 2 0
800	0 13 4	0 10 0	1 13 0	0 6 8	0 2 0
1,000	0 13 4	0 10 0	2 5 0	0 6 8	0 5 0
1,500	0 13 4	0 10 0	3 7 6	0 6 8	0 5 0
2,000	0 13 4	0 10 0	4 10 0	0 13 4	0 5 0
3,000	0 13 4	0 10 0	4 13 9	0 13 4	0 7 6
4,000	0 13 4	0 10 0	4 17 6	0 13 4	0 7 6
5,000	0 13 4	0 10 0	5 5 0	0 13 4	0 7 6
6,000	0 13 4	0 10 0	5 12 6	0 13 4	0 7 6
7,000	0 13 4	0 10 0	6 0 0	0 13 4	0 7 6
8,000	0 13 4	0 10 0	6 7 6	0 13 4	0 7 6
9,000	0 13 4	0 10 0	6 15 0	0 13 4	0 7 6
10,000	0 13 4	0 10 0	7 2 6	0 13 4	0 7 6
12,000	0 13 4	0 10 0	7 10 0	0 13 4	0 7 6
14,000	0 13 4	0 10 0	7 17 6	0 13 4	0 7 6
16,000	0 13 4	0 10 0	8 8 9	0 13 4	0 7 6
18,000	0 13 4	0 10 0	9 0 0	0 13 4	0 7 6
20,000	0 13 4	0 10 0	9 11 3	0 13 4	0 7 6
25,000	0 13 4	0 10 0	9 16 3	0 13 4	0 7 6
30,000	0 13 4	0 10 0	11 5 0	0 13 4	0 7 6
35,000	0 13 4	0 10 0	12 3 9	0 13 4	0 7 6
40,000	0 13 4	0 10 0	13 11 3	0 13 4	0 7 6
45,000	0 13 4	0 10 0	15 0 0	0 13 4	0 7 6
50,000	0 13 4	0 10 0	16 7 6	0 13 4	0 7 6
60,000	0 13 4	0 10 0	17 16 3	0 13 4	0 7 6
70,000	0 13 4	0 10 0	20 12 6	0 13 4	0 7 6
80,000	0 13 4	0 10 0	23 8 9	0 13 4	1 1 0
90,000	0 13 4	0 10 0	26 5 0	0 13 4	1 1 0
100,000	0 13 4	0 10 0	29 1 3	0 13 4	1 1 0
120,000	0 13 4	0 10 0	30 9 6	0 13 4	1 1 0
140,000	0 13 4	0 10 0	33 5 9	0 13 4	1 1 0
160,000	0 13 4	0 10 0	36 2 0	0 13 4	1 1 0
180,000	0 13 4	0 10 0	38 18 3	0 13 4	1 1 0
200,000	0 13 4	0 10 0	41 14 6	0 13 4	1 1 0
250,000	0 13 4	0 10 0	44 10 9	0 13 4	1 1 0
300,000	0 13 4	0 10 0	46 17 6	0 13 4	1 1 0
350,000	0 13 4	0 10 0	49 4 6	0 13 4	1 1 0
400,000	0 13 4	0 10 0	51 11 3	0 13 4	1 1 0
500,000	0 13 4	0 10 0	53 18 3	0 13 4	1 1 0
600,000	0 13 4	0 10 0	58 12 0	0 13 4	1 1 0
700,000	0 13 4	0 10 0	63 5 9	0 13 4	1 1 0
800,000	0 13 4	0 10 0	67 19 6	0 13 4	1 1 0
900,000	0 13 4	0 10 0	72 13 3	0 13 4	1 1 0
1,000,000	0 13 4	0 10 0	77 7 0	0 13 4	1 1 0
Above } that sum }	0 13 4	0 10 0	82 0 9	0 13 4	1 1 0

FEES OF DOUBLE OR CESSATE PROBATES.

If the effects are sworn under	Attendance in the Registry and looking up the Will and bespeaking the engrossment.	Oath of the executor and attendance on his being sworn.	Affidavit for Inland Revenue Office, and attendance on the executor being sworn.	Drawing and copying Statement in support of application for the duty-paid stamp.	Attending the Commissioners of Stamps and procuring the duty-paid stamp.	Double Probate under seal.	Extracting.	Clerk.
£.	£. s. d.	£. s. d.	£. s. d.	£. s. d.	£. s. d.	£. s. d.	£. s. d.	£. s. d.
5	0 3 4	0 2 6	0 2 6	—	—	0 1 0	0 1 0	—
20	0 3 4	0 2 6	0 2 6	—	—	0 1 0	0 3 4	0 1 0
100	0 6 8	0 5 0	0 5 0	0 6 8	0 13 4	0 1 0	0 6 8	0 2 0
200	0 6 8	0 6 8	0 6 8	0 6 8	0 13 4	0 3 0	0 6 8	0 2 0
300	0 6 8	0 10 0	0 10 0	0 6 8	0 13 4	0 7 6	0 6 8	0 2 0
450	0 6 8	0 10 0	0 10 0	0 6 8	0 13 4	0 12 0	0 6 8	0 2 0
600	0 6 8	0 10 0	0 10 0	0 10 0	0 13 4	0 12 6	0 6 8	0 2 0
800	0 6 8	0 10 0	0 10 0	0 10 0	0 13 4	0 12 6	0 6 8	0 2 0
1,000	0 6 8	0 10 0	0 10 0	0 10 0	0 13 4	0 12 6	0 6 8	0 2 0
1,500	0 6 8	0 10 0	0 10 0	0 10 0	0 13 4	0 12 6	0 6 8	0 5 0
2,000	0 6 8	0 10 0	0 10 0	0 10 0	0 13 4	0 12 6	0 6 8	0 5 0
3,000	0 6 8	0 10 0	0 10 0	0 10 0	0 13 4	0 12 6	0 13 4	0 5 0
4,000	0 6 8	0 10 0	0 10 0	0 10 0	0 13 4	0 12 6	0 13 4	0 5 0
5,000	0 6 8	0 10 0	0 10 0	0 10 0	0 13 4	0 12 6	0 13 4	0 7 6
Above 5,000	The fees to be taken are the same as above, except the Clerk's fee, which, if the effects are of the value of 70,000 <i>l.</i> or upwards is 1 <i>l.</i> 1 <i>s.</i>							

Exemplification of Probate or Letters of Administration with or without Will annexed.

	£. s. d.
Attending in the Registry, looking up the Grant of Probate and original Will, or Grant of Administration and bespeaking Exemplification	0 6 8
Exemplification under seal and stamp	1 1 0
Extracting	0 6 8
Clerks	0 2 6

Duplicate and Triplicate Probates or Letters of Administration with or without Will annexed.

	£. s. d.
Attending in the Registry, looking up the Will, and bespeaking Duplicate or Triplicate Probate and Engrossment	0 6 8
Drawing and copying Statement in support of application to the Inland Revenue Office for the duty-paid stamp	0 10 0
Attending at the Inland Revenue Office and procuring the duty-paid stamp	0 13 4
Duplicate or Triplicate probate or letters of Administration with or without the will annexed.	
If the personal estate is under 450 <i>l.</i> or any smaller sum, the same fee as on the first grant.	
If the personal estate is of the value of 450 <i>l.</i> and upwards	0 12 6
Extracting	0 6 8
Clerks	0 2 6

**LETTERS OF ADMINISTRATION WITH OR WITHOUT WILL ANNEXED
DE BONIS NON OR CESSATE.**

If the effects are sworn under	Attending in the Registry, looking up and perusing the Will, and taking an account of the former Grant.	Oath of the Administrator and attendance on his being sworn, and on execution of the Bond.	Affidavit for Inland Revenue Office and attendance on administrator being sworn.	Drawing and copying Statement in support of application to the Inland Revenue Office for the duty-paid stamp.	Attending at the Inland Revenue Office and procuring the duty-paid stamp.	De bonis administration with Will under seal and duty-paid stamp.	Extracting.	Clerks.
£.	£. s. d.	£. s. d.	£. s. d.	£. s. d.	£. s. d.	£. s. d.	£. s. d.	£. s. d.
5	0 6 8	0 5 0	0 2 6	—	—	0 1 0	0 1 0	—
20	0 6 8	0 5 0	0 2 6	—	—	0 1 0	0 3 4	0 1 0
50	0 6 8	0 6 8	0 5 0	—	—	0 1 6	0 4 8	0 2 0
100	0 6 8	0 10 0	0 6 8	0 5 0	0 6 8	0 3 0	0 6 8	0 2 0
200	0 6 8	0 13 4	0 6 8	0 6 8	0 13 4	0 4 6	0 6 8	0 2 0
300	0 6 8	0 16 8	0 10 0	0 6 8	0 13 4	0 12 0	0 6 8	0 2 0
450	0 6 8	0 16 8	0 10 0	0 6 8	0 13 4	0 12 6	0 6 8	0 2 0
Above 450	The fees to be taken are the same as above, except the Extracting fee, which, if the effects are 1,500 <i>l.</i> and upwards, is 13 <i>s.</i> 4 <i>d.</i> , and the Clerk's fee, which, if the effects are 600 <i>l.</i> and upwards, is 5 <i>s.</i>							

Probates, Special or Limited.

	£.	s.	d.
Consulting fee	0 6 8
Affidavit for Inland Revenue Office and attendance on the Executor being sworn:—The same fee as on ordinary probates.
Drawing Special Oath of Executor, per folio of seventy-two words	0 1 0
Fair copy of the Oath for the Registrar, per folio of seventy-two words	0 0 4
Attending the Registrar thereon	0 13 4
Engrossing same, per folio of seventy-two words	0 0 4
Attendance on the Executor being sworn	0 6 8
Engrossing and collating the Will, three folios of ninety words or under
Special or limited Probate, under seal
Extracting
Clerk
The same fees as on ordinary Probates.			

Letters of Administration, Special or Limited.

	£.	s.	d.
Consulting fee	0 6 8
Perusing and abstracting Deeds or other Instruments, when necessary, at per folio of ninety words	0 0 4
Proxy of Nomination	0 13 4
Affidavit for Inland Revenue Office and attendance on the Administrator being sworn:—The same fees as on ordinary Grants of Letters of Administration.
Drawing Special Oath of the Administrator, per folio of seventy-two words	0 1 0
Fair copy of the Oath for the Registrar to peruse, per folio of seventy-two words	0 0 6
Attending the Registrar thereon	0 13 4
Engrossing same, per folio of seventy-two words	0 0 4
Attendance when the Administrator was sworn, and on execution of the Bond
Letters of Administration, under seal and stamp
Extracting
Clerks
The same fees as on ordinary Grants of Letters of Administration.			

Office Copies of, or Extracts from, Records, Wills, and other Documents.

	£.	s.	d.
For attendance in the Registry for searching for a Record, Will, or other Document, or for a Grant of Probate, or Letters of Administration, with or without a Will annexed, for the first five years, or any period less than five years, including the ordering of a copy...	0	5	0
For every five years after the first five years	0	3	4
For the perusal of a Record, Will, or other Document, when necessary, for the purpose of ordering extracts or for any other purpose, including the ordering of extracts, per folio of ninety words	0	0	4
For collating an Office Copy or Extract of a Record, Will, or other Document, with the original, including Extracting fee, per folio of ninety words	0	0	2
For collating an Office Copy of the Act on granting Probate or Administration with the original entry thereof, including Extracting fee	0	1	0

Caveats.

	£.	s.	d.
For attendance in the Registry and entering Caveat	0	6	8
For attendance in the Registry and giving instructions for warning Caveators to enter an appearance	0	6	8

Affidavits other than the Affidavits and Oaths included in the Fees of Probate and Letters of Administration and Declarations of Personal Estate and Effects.

	£.	s.	d.
For taking instructions for every Affidavit or Declaration of Personal Estate and Effects	0	6	8
For drawing and fair copy of the same, per folio of seventy-two words	0	1	0
For every copy thereof, per folio of seventy-two words	0	0	4

Instruments of Renunciation and Consent, Letters of Attorney, and other Documents prepared by Proctors, Solicitors or Attorneys.

	£.	s.	d.
For drawing and fair copy of every Instrument of Renunciation, Consent, Letter of Attorney, or other Document prepared as above, per folio of seventy-two words	0	1	0
For every fair copy, per folio of seventy-two words	0	0	4

RULES, ORDERS, AND INSTRUCTIONS

FOR THE

DISTRICT REGISTRARS

OF

THE COURT OF PROBATE,

IN RESPECT OF

NON-CONTENTIOUS BUSINESS.

NON-CONTENTIOUS BUSINESS shall include all Common Form business as defined by the Act, and the warning of Caveats.

with a due regard to the prevention of error or fraud.

5. No District Registrar shall take out Probate or Letters of Administration for himself in his own district.

1. *Application for Probate or Letters of Administration* may be made at the Principal Registry in all cases. Application may be also made at a District Registry in cases where the deceased at the time of his death had a fixed place of abode within the district in which the application is made, and not otherwise.

2. Such applications may be made through a proctor, solicitor, or attorney, or in person.

3. The District Registrar, before he enters any application for Probate or Administration, will take care to ascertain that the deceased had at the time of his death a fixed place of abode within his district.

4. In no case should the District Registrar allow the Probate or Letters of Administration to issue until all the inquiries which he may see fit to institute have been answered to his satisfaction, and this refers more particularly to applications made by a party in person. The District Registrar is, notwithstanding, to afford as great facility for the obtaining grants of Probate or Administration as is consistent

As to Probate of Wills and Codicils and Letters of Administration, with the Will [or Will and Codicils] annexed, where the Wills and Codicils or the Codicils only are dated after 31st December 1837.

6. Upon receiving an application for Probate or Letters of Administration with the Will annexed, the District Registrar must inspect the Will, and see whether it purport to be signed by the testator or by some other person in his presence and by his direction, and subscribed by two witnesses, according to the provisions of 1 Vict. c. 26. s. 9, and 15 & 16 Vict. c. 24, and in no case must he proceed further if the Will be not so signed and subscribed.

7. If the Will be signed by or for the testator and subscribed by two witnesses, the District Registrar must then refer to the attestation clause (if any), and consider whether from the wording thereof the Will purports to have been executed in accordance with 1 Vict. c. 26. s. 9.

8. If there be no attestation clause to the Will, or if the attestation clause thereto be insufficient, the District Registrar must require an affidavit from at least one of the subscribing witnesses, if either of them are living, to prove that the provisions of the Act in reference to the execution of the Will were in fact complied with; and such affidavit must be engrossed and form part of the Probate, so that the same may be a perfect document on the face of it.

9. If on perusing the affidavit it appear that the requirements of the statute were not complied with, the District Registrar must refuse Probate.

10. If, on perusing the affidavit or affidavits, setting forth the facts of the case, it appear doubtful whether the Will has been duly executed, the District Registrar must transmit a statement of the matter to the Registrars of the Principal Registry, whose duty it will then be to obtain the directions of the Judge thereon.

11. If both the subscribing witnesses are dead, or if from other circumstances no affidavit can be obtained from either of them, resort must be had to other persons (if any) who may have been present at the execution of the Will; but if no affidavit of any such other person can be obtained, evidence on affidavit must be procured of that fact and of the handwriting of the subscribing witnesses, and also of any circumstances which may raise a presumption in favour of the due execution of the Will.

12. Having satisfied himself that the Will was duly executed, the District Registrar must carefully inspect the same, to see whether there are any interlineations or alterations appearing in it and requiring to be accounted for. Interlineations and alterations are invalid unless they existed in the Will at the time of its execution, or, if made afterwards, unless they have been executed and attested in the mode required by the statute, or unless they have been rendered valid by the re-execution of the Will, or by the subsequent execution of some Codicil thereto.

13. Where interlineations or alterations appear in the Will (unless duly executed or accounted for by the attestation clause), an affidavit or affidavits in proof of their having existed in the Will before its execution, must be filed, except when the alterations are merely verbal or are of but small importance, and are evidenced by the initials of the attesting witnesses.

14. In like manner, with regard to erasures

and obliterations, they are not to prevail unless proved to have existed in the Will at the time of its execution, or unless the alterations thereby effected in the Will are duly executed and attested, or unless they have been rendered valid by the re-execution of the Will, or by the subsequent execution of some Codicil thereto. If no satisfactory evidence is adduced as to the time when such erasures and obliterations were made, and the words erased or obliterated can, upon inspection of the paper, be readily ascertained, they must form part of the Probate.

15. In every case of words having been erased which might have been of importance, an affidavit must be required.

16. If reasonable doubt exist in regard to any interlineation, alteration, erasure, or obliteration, the District Registrar should, before proceeding to grant Probate, communicate with the Registrars of the Principal Registry as directed by the statute (sect. 50.)

17. If a Will contain a reference to any deed, paper, memorandum, or other document, of such a nature as to raise a question whether it ought or ought not to form a constituent part of such Will, the production of such deed, paper, memorandum, or other document should be required, with a view to ascertain whether it be entitled to Probate; and if not produced, its non-production should be accounted for.

18. No deed, paper, memorandum, or other document can form part of a Will or Codicil unless it were in existence at the time when the Will or Codicil was executed.

19. If any vestiges of sealing wax or wafers or other appearances are observable, leading to the inference that any paper, memorandum, or other document may have been attached to the Will, they should be satisfactorily accounted for, or the production of such paper, memorandum, or other document should be required, and if not produced its non-production should be accounted for. If doubt exists as to whether any deed, paper, memorandum, or other document be entitled to Probate, the District Registrar should, before proceeding to grant Probate, communicate with the Registrars of the Principal Registry, as directed by section 50. of the statute.

20. The above rules and orders respecting Wills apply equally to Codicils.

21. In case of Probate or Administration with the Will of a married woman annexed made by virtue of a power, the power or powers under which the Will purports to have been made should be specified in the grant.

22. No grant of Probate or Administration with the Will annexed, the Will being *simply* an execution of a special power, should be made without communication with the Registrars of the Principal Registry.

23. The right of parties to Administration with the Will annexed, and Administration (with the Will annexed) *de bonis non*, depends so entirely upon the circumstances of each particular case taken in connexion with the wording of the Will, that no general rules, other than those which have obtained a judicial sanction, can be laid down for the guidance of the District Registrars. Whenever the right of the party applying is at all questionable, a statement of the case, accompanied by a copy of the Will, must be transmitted to the Registrars of the Principal Registry for the directions of the Judge thereon.

As to Probate of Wills, Codicils, and Testamentary Papers relating to Personality, and dated before the 1st of January 1838.

24. It is not necessary that a Will, Codicil, or Testamentary Paper made before the 1st of January 1838 should be attested by witnesses to constitute it a valid disposition of a testator's personal property. Although neither signed by the testator nor attested by witnesses, it may nevertheless be valid; but in such cases the testator's intention that it should operate as his Will, Codicil, or Testamentary Disposition must be proved clearly by circumstances.

25. If the Will, Codicil, or Testamentary Paper be signed by the testator at the end of it, and attested by two disinterested witnesses, the District Registrar (although there be no clause of attestation) must consider it as *prima facie* entitled to Probate.

26. In cases where the Will, Codicil, or Testamentary Paper is attested by two witnesses, such witnesses are not required to have been present with the testator at the same time. It is sufficient if the testator subscribed his name or made his mark to it in the presence of, or produced it with his name already written, or his mark already made, to one attesting witness, and afterwards to the other attesting witness, provided that on each occasion he declared it to be his Will, or otherwise notified his intention that it should operate as such.

27. If the Will, Codicil, or Testamentary Paper is signed at the end of it by the testator

but is unattested, and there is nothing to shew an intention that it should be attested by witnesses, the affidavit of two disinterested persons to prove the signature to be of the handwriting of the testator will be sufficient to entitle the paper to Probate.

28. If the Will, Codicil, or Testamentary Paper is signed at the end of it by the testator, and attested by one witness only, and there is nothing to shew the testator's intention that it should be attested by a second witness, the affidavit of one disinterested person to prove the signature to be of the handwriting of the testator will be sufficient to entitle the paper to Probate.

29. The circumstance of a person being named as an executor in the Will, Codicil, or Testamentary Paper, or being interested as a legatee, or as the husband or wife of a legatee under such Will, Codicil, or Testamentary Paper, rendered him incompetent to become an attesting witness to it, so that if the name of a person so interested appears as that of a subscribing witness to the Will, Codicil, or Testamentary Paper, the same, so far as regards his attestation, must be considered as unattested, and his evidence in support thereof will be inadmissible, unless he shall first release his interest thereunder.

30. In all cases the District Registrar should carefully inspect and peruse the Will or Testamentary Paper, with a view to ascertain that it is a complete document. If, for example, an attestation clause, or the words "witnesses," appear written at the foot of the paper, the same being unattested; or if the paper purport on the face of it to be a draft of a Will, the copy of a Will, or instructions for a Will, it must *prima facie* be considered as an incomplete paper, and not, save under special circumstances, entitled to Probate. Also, any appearance of an attempted cancellation of a paper by burning, tearing, obliteration, or otherwise must be accounted for.

31. Every fact leading to a presumption of abandonment or revocation of the paper on the part of the testator must be accounted for.

32. Such cases will generally, in consequence of the lapse of time, be doubtful cases, and proper to be transmitted to the Registrars of the Principal Registry, under section 50. of the Act.

33. Alterations and interlineations made by the testator, if unattested, are to be proved by an affidavit of two persons to his handwriting. If the same are in the handwriting of any person other than the testator, it will suffice to

prove by affidavit that they were known to and approved of by the testator. Proof by affidavit that they existed in the paper at the time it was found in the repositories of the testator recently after his death may, under circumstances, suffice. Alterations and interlineations made since the 31st of December 1837, are subject to the provisions of 1 Vict. c. 26.

34. With respect to deeds, papers, memoranda, or other documents mentioned in a Testamentary Paper, or appearing to have been annexed or attached thereto, the foregoing instructions as to Wills bearing date since the 31st of December 1837 will apply.

35. It is to be remembered that a Will made before the 1st of January 1838 is confirmed by a Codicil duly executed on or after that day.

As to Letters of Administration.

36. The duties of the District Registrar in granting Administration are in many respects the same as in cases of Probate. He is to ascertain the time and place of the deceased's death, and the value of the property to be covered by the administration, and to see that the applicant has been sworn as required by statute 55 Geo. 3. c. 184.

37. Where Administration is applied for by one or some of the next-of-kin only, there being another or other next-of-kin equally entitled thereto, the District Registrar may require proof by affidavit or statutory declaration that notice of such application has been given to such other next-of-kin.

38. *Limited Administrations* are not to be granted unless every person entitled in distribution to the personal estate has consented or renounced, or has been cited and failed to appear, except under the direction of the Judge.

39. No person entitled to a grant of administration of the personal estate and effects of the deceased generally will be permitted to take a limited grant.

40. The District Registrars are to take care (as far as possible) that the sureties to Administration Bonds are responsible persons.

41. In all cases where Grants of Administration are made for the use and benefit of minors, the administrators are required to ex-

hibit a declaration on oath of the personal estate and effects of the deceased, except where the effects are sworn under twenty pounds, or where the administrators are the guardians appointed by the High Court of Chancery, or are the testamentary guardians of the minors; and in all cases of persons cited, but not personally, and not appearing, the administrators are required to exhibit a similar declaration, and the sureties are required to justify.

42. There are many Administrations of a special character which will need attention on the part of the District Registrars. In special cases the recitals in the oath and in the Letters of Administration must be framed in accordance with the facts of the case.

43. Grants of Administration will continue to be made as heretofore to the guardians of infants and minors, for the use and benefit of such infants and minors during their minority; and elections by minors of their next-of-kin or next friend, as the case may be, to such guardianship, will continue to be required; but proxies accepting such guardianship will in future be dispensed with.

44. No Probate or Letters of Administration with the Will annexed shall issue until after the lapse of seven days from the death of the deceased, unless under the direction of the Judge.

45. No Administration shall issue until after the lapse of fourteen clear days from the death of the deceased, unless under the direction of the Judge.

General Instructions for the District Registrars.

46. In cases where the District Registrar receives his instructions from the parties interested, and without the intervention of any proctor, solicitor, or attorney, he will take care to ascertain the value of the estate and effects of the deceased as correctly as circumstances allow.

47. No Administration shall issue until after the lapse of fourteen clear days from the death of the deceased unless under the direction of the Judge.

48. The District Registrars may, in cases where they deem it necessary, require proof, in addition to the oath of the executor or ad-

ministrator, of the identity of the deceased, or of the party applying for the grant.

49. In every case where a grant of Probate or Administration is, for the first time, applied for after the lapse of three years from the death of the deceased, the reason of the delay is to be certified to the District Registrar. If the certificate is not satisfactory the District Registrar is to require an affidavit, or to communicate with the Principal Registry.

50. Notices of applications for grants of Probate or Administration, with the Will annexed, transmitted by the District Registrar to the Registrars of the Principal Registry (as directed by section 49.), are to contain (in addition to the particulars therein specified) an extract of the words of the Will or Codicil by which the applicant has been appointed executor, or of the words (if any) upon which he founds his claim to such administration.

51. District Registrars should take care that the oath of Administrators, and of Administrators with the Will annexed, is so worded as to clear off all persons having a prior right to the grant. In these cases, the grant should shew on the face of it how the prior interests have been cleared off.

52. Under the statute the Court of Probate has power to appoint an Administrator other than the person who prior to the Act would have been entitled to the grant (sect. 73.) Whenever the Court sees fit to exercise such a power, the fact should be made plainly to appear in the oath of the Administrator, in the Letters of Administration, and in the Administration Bond.

53. The usual oath of administrators is, as well as that of executors and administrators with the Will, to be reduced into writing, and to be subscribed and sworn by them as an affidavit, and then filed in the Registry.

54. Every Will or copy of a Will to which an executor or administrator with the Will is sworn should be marked by such executor or administrator and by the person before whom he is sworn.

55. In cases where it is necessary to issue a citation to accept or refuse Probate of a Will, or to accept or refuse Letters of Administration, or where it is necessary to issue a subpoena to bring in a Testamentary Paper, and in all similar cases, the District Registrar is to communicate with the Registrars of the Principal Registry, who will then issue such citation, sub-

pœna, or other requisite instrument in accordance with the direction of the Judge.

56. The District Registrar is not, in any case in which a Will has been produced to him for Probate, or for Administration with the Will annexed, to grant Probate of any former Will, or Administration with any former Will annexed, or Administration to the deceased as having died intestate, without previous communication with the Registrars of the Principal Registry.

57. When motions are to be made before the Judge in Court with regard to applications for Probate and Administration made at the District Registries, the District Registrars are to transmit all original papers and documents to the Principal Registry, and the same, after the directions of the Court have been taken, will be returned, with the directions of the Judge thereon.

58. The original papers are also to be forwarded whenever an inspection of them is necessary, in order to enable the Registrars of the Principal Registry to answer the questions submitted to them by the District Registrar.

59. Papers and other documents may be transmitted by the District Registrars to the Registrars of the Principal Registry through the Post Office. Such letters or packets are to be superscribed with the words, "On Her Majesty's Service," and may be registered, if thought necessary.

60. In the case of persons residing out of England, Administrations with the Will annexed, and Administrations, may be granted to their attorney, acting under a power of attorney properly attested.

61. The addition and true place of abode of every person making an affidavit is to be inserted therein.

62. In every affidavit made by two or more persons, the names of the several persons making it are to be written in the jurat.

63. No affidavit will be admitted in any matter depending in the Court of Probate in the jurat of which there is any interlineation or erasure.

64. Where an affidavit is made by any person who is blind, or who, from his or her signature or otherwise, appears to be illiterate, the District Registrar, Commissioner, or other person before whom such affidavit is made is to state in the jurat that the affidavit was read

in the presence of the party making the same, and that such party seemed perfectly to understand the same, and also that the said party made his or her mark, or wrote his or her signature, in the presence of the District Registrar, Commissioner, or other person before whom the affidavit was made.

65. No affidavit is to be deemed sufficient which has been sworn before the party on whose behalf the same is offered, or before his proctor, solicitor, or attorney, or before a clerk of his proctor, solicitor, or attorney.

66. A proctor, solicitor, or attorney, and their clerks respectively, if acting for any other proctor, solicitor, or attorney, shall be subject to the rules in respect of taking affidavits which are applicable to those in whose stead they are acting.

67. A caveat shall remain in force for the space of six months only, and then expire and be of no effect; but caveats may be renewed from time to time as heretofore.

68. The District Registrar shall, immediately upon a caveat being lodged, send a copy thereof to the Registrars of the Principal Registry, and also to the Registrars of any other district in which it is alleged the deceased resided at the time of his death, or in which he is known to have had a fixed place of abode at the time of his death.

69. No caveat shall affect any grant made on the day on which the caveat is entered, unless notice of such caveat has been received prior to the grant passing the seal.

70. A caveat shall be warned at the place mentioned in it as the address of the person who entered it.

71. It shall be sufficient for the warning of a caveat that the District Registrar send by the public post a warning signed by himself, and directed to the person who entered it, at the address mentioned in it.

72. Any person intending to oppose a Grant of Probate or Administration for which application has been made to a District Registrar is to appear before such District Registrar, either personally, or by his proctor, solicitor, or attorney, and signify such his intention: otherwise such person is to cause an appearance to be entered for him in the Principal Registry. This rule is to apply whether the person intending to oppose the grant has or has not been previously warned to a caveat or served with a citation.

73. The District Registrar shall, upon being informed of any such intention to oppose a grant, require the person intending to oppose the same to furnish him with his name and address, and in case of a proctor, solicitor, or attorney, with his client's name and address, and shall forward a notice of such declared intention, with the name and address of the party, and of his proctor, solicitor, or attorney (if any), to the Registrars of the Principal Registry.

74. The District Registrar shall in no case, after he has forwarded to the Registrars of the Principal Registry a notice of intention to oppose a grant, take any further step in respect of such grant, except under the directions of the Judge of the Court of Probate or of a County Court Judge.

75. Citations against all persons in general, and other instruments, heretofore required to be served by affixing them in some public place, are in future to be served by the insertion of the same as advertisements in such of the leading morning and evening papers, and such of the local papers, as the Judge may from time to time direct. Such citations can only be allowed to issue in cases where there is an affidavit to lead them.

76. The lists of Grants of Probate and Administration required under section 51. are to be furnished by the District Registrars on the first and every other Thursday in the month, and are to contain, the date of each grant; the name of the Registry in which each grant was made; the Christian and surname of each testator and intestate; the place and time of death of such testator and intestate; the names and description of each executor and administrator to whom the grant has been made; and the value of the personal estate and effects in each case.

77. A District Registrar is not to grant Probate, or Administration with the Will annexed, of the Will of any blind person, or of any obviously illiterate or ignorant person, unless he has previously satisfied himself that the said Will was read over to the deceased before its execution, or that the deceased had at such time knowledge of its contents. Where such information is not forthcoming, the District Registrars are to communicate with the Registrars of the Principal Registry.

78. In ordinary cases where the property is *bonâ fide* under the value of fifty pounds, one surety only may be taken to the Administration Bond.

79. In all cases of limited or special Admi-

nistration two sureties are always to be required to the Administration Bond, and the Bond is to be given in double the amount of the fund to be dealt with under the Administration.

80. Whenever the value of the personal estate and effects of any deceased person is re-sworn under a different amount, or any renunciation is subsequently filed, or any alteration is subsequently made in the grant, notice of such re-swearing, renunciation, or alteration is to be immediately forwarded by the District Registrar to the Registrars of the Principal Registry.

81. In all cases where application is made for Letters of Administration (either with or without a Will annexed) of the goods of a bastard dying a bachelor, or a spinster, or a widower, or widow, without issue, or of a person dying without known relation, notice of such application is to be given to her Majesty's Procurator General, in order that he may determine whether it will

be expedient to interfere on the part of the Crown, save and except that when the deceased is domiciled within the duchy of Lancaster, notice is to be given to the solicitor for the duchy in London; and no grant is to be issued until that officer has signified the course it will be proper to take under the circumstances of each particular case.

82. Bills of proctors, solicitors, or attorneys, presented to the District Registrars for taxation, are to be forwarded to the Principal Registrars, with any remarks which the District Registrars may see necessary.

83. The District Registrar is to take care that the copies of Wills to be annexed to the Probate or Letters of Administration are fairly and properly written, and are to reject those which are not so.

84. The District Registrars are in every case of doubt or difficulty to communicate with the Registrars of the Principal Registry.

FORMS

OF INSTRUMENTS TO BE ADOPTED BY THE DISTRICTS, AS NEARLY
AS THE CIRCUMSTANCES OF EACH CASE WILL ALLOW.

No. 1.—*Notice to be transmitted by the District Registrar of Application having been made to him for Grant of Probate.*

The District Registry of

To the Registrars of the Principal Registry of Her Majesty's Court of Probate.

You are requested to take notice, that application has been made to me for a Grant of Probate of the Will, bearing date the day of 18 [and Codicil or Codicils bearing date the day of 18] of A.B., late of deceased, who died on or about the day of 18 at having at the time of his death a fixed place of abode at within the said District of by C.D. of the executor [or by E.F. of the proctor, solicitor, or attorney of C.D. the executor] named in the said Will [or Codicil], in the words following :

[Here insert the extract from the Will or Codicil.]

(Signed) G.H.,
District Registrar.

No. 1 a.—*Notice to be transmitted by the District Registrar of Application having been made to him for Grant of Administration with the Will annexed.*

The District Registry of

To the Registrars of the Principal Registry of Her Majesty's Court of Probate.

You are requested to take notice, that application has been made to me for a Grant of Letters of Administration with the Will annexed, the said Will bearing date the day of 18 [or Will and Codicil or Codicils annexed, the said Will bearing date the day of 18 and the said Codicil bearing date the day of 18] of the personal estate and effects of A.B., late of deceased, who died on or about the day of 18 at having at the time of his death a fixed place of abode at within the said District of by C.D. of the residuary legatee [or as the case may be] named in the said Will [or by E.F. of the proctor, solicitor, or attorney of C.D., the residuary legatee named in the said Will], in the words following :

[Here insert the extract from the Will or Codicil.]

(Signed) G.H.,
District Registrar.

No. 1 b.—*Notice to be transmitted by the District Registrar of Application having been made to him for Grant of Administration.*

The District Registry of

To the Registrars of the Principal Registry of Her Majesty's Court of Probate.

You are requested to take notice, that application has been made to me for a Grant of Letters of Administration of the personal estate and effects of A.B. late of deceased, who died on or about the day of 18 at intestate, having at the time of his

death a fixed place of abode at _____ within the said District of _____, a widower, without
 child or parent, brother or sister, uncle or aunt, nephew or niece, by C.D. of _____ one of the
 lawful cousins-german and next-of-kin of the deceased [or by E.F. of _____ the proctor, solicitor,
 or attorney of U.D., one of the, &c.]

(Signed) G.H.,
 District Registrar.

No. 1 c.—*Notice of the Entry of a Caveat in a District Registry.*

To the Registrars of the Principal Registry of _____ Her Majesty's Court of Probate.
 You are requested to take notice, that a Caveat has been entered in the District Registry of
 attached to Her Majesty's Court of Probate, of the following tenour [set out the Caveat at full
 length].
 This _____ day of _____ 18 .

(Signed) C.D.
 District Registrar.

No. 2.—*Affidavit of attesting Witness in proof of the due Execution of a Will or Codicil dated after
 31st December 1837.*

In Her Majesty's Court of Probate. The District Registry of _____
 In the goods of A.B. deceased.

I C.D. of _____ in the county of _____ make oath [or solemnly affirm], that I
 am one of the subscribing witnesses to the last Will and Testament [or Codicil, as the case may be,] of the
 said C.D., late of _____ in the county of _____ deceased, the said Will [or Codicil] being
 now hereunto annexed, bearing date _____, and that the said Testator executed the said
 Will [or Codicil] on the day of the date thereof, by signing his name at the foot or end thereof [or in
 the testimonium clause thereof, or in the attestation clause thereto, as the case may be], as the same now
 appears thereon, in the presence of me and of _____ the other subscribed witness thereto, both of
 us being present at the same time, and we thereupon attested and subscribed the said Will [or Codicil]
 in the presence of the said testator.

(Signed) C.D.
 Sworn at _____ on the _____ day of _____ 18 , before me [person authorised
 to administer oaths under the Act].

N.B.—If the signature is in testimonium clause or attestation clause, it must be shewn in the affidavit
 that the testator fully intended the same as his final signature to his will.

No. 3.—*Affidavit for the Commissioners of Inland Revenue.—For Executors.*

In Her Majesty's Court of Probate. The District Registry of _____
 In the goods of A.B. deceased.

The _____ day of _____ 18 .
 I C.D. of (1) _____ make oath [or solemnly affirm], that I am one of the executors [or the
 executor] named in the last Will and Testament (2) of the said A.B., late of _____ deceased; that
 the said deceased died on or about the _____ day of _____ in the year of our Lord One
 thousand _____ hundred and _____ at (3) _____, and that the said deceased at the time
 of his death had a fixed place of abode within the said district of _____, at _____, and that the
 personal estate and effects of the said deceased, which _____ he any way died possessed of or entitled to, and
 for or in respect of which a Probate of the said Will _____ is to be granted, exclusive of what
 the said deceased may have been possessed of or entitled to as a trustee for any other person or persons,

(1) Insert the names, residences, and titles, or profession of the persons making the affidavit.

(2) Insert Codicils, if any.

(3) Insert place of death, or set forth the reason why the same cannot be furnished.

and not beneficially [if any leaseholds insert clause No. 1. hereon indorsed], and without deducting anything on account of the debts due and owing from the said deceased, are under the value of pounds, to the best of my knowledge, information, and belief [if no leaseholds insert clause No. 2. hereon indorsed].

(Signed) C.D.

Sworn at _____ on the _____ day of _____ before me [person authorized to administer oaths under the Act.]

N.B.—Forms for the two leasehold clauses to be printed on the back of the affidavit.

No. 3 a.—*Affidavit for the Commissioners of Inland Revenue.—For Administrators with the Will annexed.*

In Her Majesty's Court of Probate. The District Registry of _____

In the goods of A.B. deceased.

The _____ day of _____ 18 ____
I C.D. of (1) _____ the party applying for Administration with the Will (2) annexed of the personal estate and effects of A.B., late of _____ deceased, make oath [or solemnly affirm], that the said deceased died on or about the _____ day of _____ one thousand _____ hundred and _____ at (3) _____, and that the said deceased at the time of his death had a fixed place of abode within the said district of _____ at _____, and that the personal estate and effects of the said deceased, which he any way died possessed of or entitled to, and for or in respect of which Letters of Administration with the said Will (2) annexed are to be granted, exclusive of what the said deceased may have been possessed of or entitled to as a trustee for any other person or persons, and not beneficially [if any leaseholds insert clause No. 1. hereon indorsed], and without deducting anything on account of the debts due and owing from the said deceased, are under the value of _____ pounds, to the best of my knowledge, information, and belief [if no leaseholds insert clause No. 2. hereon indorsed].

(Signed) C.D.

Sworn at _____ on the _____ day of _____ before me [person authorized to administer oaths under the Act.]

N.B.—Forms for the two leasehold clauses to be printed at the back of the affidavit.

(1) Insert the names, residences, and titles, or professions of the persons making the affidavit.

(2) Insert Codicils, if any.

(3) Insert the place of death, or set forth the reason why the same cannot be furnished.

No. 3 b.—*Affidavit for the Commissioners of Inland Revenue.—For Administrators.*

In Her Majesty's Court of Probate. The District Registry of _____

In the goods of A.B. deceased.

The _____ day of _____ 18 ____
I C.D. of (1) _____ the party applying for Letters of Administration of the personal estate and effects of the said A.B., late of _____ make oath [or solemnly affirm] and say as follows: That the said deceased died on or about the _____ day of _____ one thousand _____ hundred and _____ at (2) _____, and at the time of his death had a fixed place of abode within the said district of _____ at _____, and that the personal estate and effects of the said deceased which he any way died possessed of or entitled to, and for or in respect of which Letters of Administration are to be granted, exclusive of what the said deceased may have been possessed of or entitled

(1) Insert the names, residences, and titles or profession of the person making the affidavit.

(2) Insert place of death, or set forth the reason why the same cannot be furnished.

Form of Leasehold Clause No. 1.

"Including the Leasehold Estate or Estates for years of the said deceased, whether absolute or determinable on a life or lives."

Form of Leasehold Clause No. 2.

"And I [or we] lastly make oath, that the said deceased was not possessed of or entitled to any leasehold estate or estates for years, whether absolute or determinable on a life or lives, to the best of my [or our] knowledge, information, and belief."

to as a trustee for any other person and persons, and not beneficially [if any leaseholds insert clause No. 1. hereon indorsed], and without deducting anything on account of the debts due and owing from the said deceased, are under the value of _____ pounds, to the best of my knowledge, information, and belief [if no leaseholds insert clause No. 2. hereon indorsed].

(Signed) C.D.

Sworn at _____ on the _____ day of _____ before me [person authorised to administer oaths under the Act].

N.B.—Forms for the two leasehold clauses to be printed at the back of the affidavit.

No. 4.—Oath for Executor.

In Her Majesty's Court of Probate. The District Registry of _____

In the goods of A.B. deceased.

I C.D. of _____ in the county of _____ make oath and say [or solemnly affirm], that I believe this paper writing [or these paper writings] hereto annexed to contain the true and original last Will and Testament [or last Will and Testament with _____ Codicils] of A.B. late of _____ in the county of _____ deceased, and that I am the sole executor [or one of the executors] therein named [or executor according to the tenour thereof, executor during life, executrix during widowhood, or as the case may be,] and that I will faithfully administer the personal estate and effects of the said Testator by paying his just debts and the legacies contained in his Will [or Will and _____ Codicils], so far as the same shall thereto extend and the law bind me; that I will exhibit an inventory, and render an account of my executorship, whenever required by law so to do; that the testator died at _____ in the county of _____ on the _____ day of _____ 18____, and that he had at the time of his death a fixed place of abode at _____ within the said district of _____; and that the whole of the personal estate and effects of the said Testator does not amount in value to the sum of _____ pounds, to the best of my [or our] knowledge, information, and belief.

(Signed) C.D.

Sworn at _____ this _____ day of _____ 18____, before me, E.F.

Each Testamentary Paper to be marked by the persons sworn and the person administering the oath.

No. 5.—Oath for Administrators with the Will.

In Her Majesty's Court of Probate. The District Registry of _____

In the goods of A.B. deceased.

I C.D. of _____ in the county of _____ make oath and say [or solemnly affirm], that I believe this paper writing [or these paper writings] hereto annexed to contain the true and original last Will and Testament [or the last Will and Testament with _____ Codicils] of A.B. late of _____ in the county of _____ deceased, and that the executor therein named is dead without having taken probate thereof [or as the fact may be], and that I am the residuary legatee in trust named therein [or as the fact may be], and that I will faithfully administer the personal estate and effects of the said deceased according to the tenour of his Will [or Will and _____ Codicils] by paying his just debts and the legacies contained in his Will [or Will and _____ Codicils], and distributing the residue of his estate according to law; that I will exhibit an inventory and render an account of my administration whenever required by law so to do; that the testator died at _____ on the _____ day of _____ 18____; that the said testator at the time of his death had a fixed place of abode at _____ within the said district of _____; and that the whole of the personal estate and effects of the said deceased does not amount in value to the sum of _____ pounds, to the best of my knowledge, information, and belief.

(Signed) C.D.

Sworn at _____ this _____ day of _____ 18____, before me, E.F.

Each Testamentary Paper to be marked by the persons sworn and the person administering the oath.

No. 6.—Oath for Administrators.

In Her Majesty's Court of Probate. The District Registry of _____

In the goods of A.B. deceased.

I C.D. of _____ in the county of _____ make oath and say [or solemnly affirm], that A.B. late of _____ deceased, died a bachelor, without parent, brother or sister, uncle or aunt, nephew or niece, and intestate, and that I am the lawful cousin-german and one of the next-of-kin of the said

deceased [*this must be altered in accordance with the circumstances of the case*]; that I will faithfully administer the personal estate and effects of the said deceased, by paying his just debts, and distributing the residue of his estate according to law; that I will exhibit an inventory and render an account of my administration whenever required by law so to do; that the said deceased died at _____ on the _____ day of _____ 18 ____; that at the time of his death he had a fixed place of abode at _____ within the said district of _____; and that the whole of the personal estate and effects of the said deceased does not amount in value to the sum of _____ pounds, to the best of my knowledge, information, and belief.

Sworn at _____ this _____ day of _____ 18 __, before me, *E.F.* (Signed) *A.B.*

No. 7.—Probate.

In Her Majesty's Court of Probate. The District Registry of _____

BE IT KNOWN, that on the _____ day of _____ 18 __ the last Will and Testament [or the last Will and Testament with _____ Codicils] hereunto annexed of *A.B.*, late of _____ deceased, who died on or about _____ at _____, and who at the time of his death had a fixed place of abode at _____ within the district of _____, was proved, and registered in the said District Registry of _____ attached to Her Majesty's Court of Probate, and that the administration of all and singular the personal estate and effects of the said deceased was granted by the aforesaid Court to *C.D.*, the sole executor [*or as the case may be*] named in the said Will, he having been first sworn well and faithfully to administer the same, by paying the just debts of the deceased and the legacies contained in his Will [or Will and _____ Codicils] so far as he is thereunto bound by law, and to exhibit a true and perfect inventory of all and singular the said estate and effects, and to render a just and true account thereof whenever required by law so to do.

Extracted by _____

(Signed) *E.F.*,
District Registrar.
(*L.B.*)

To be written in } Sworn under £
the margin of } and that the Testator died
Probate - } on or about the _____ day
of _____ 18 __.

No. 8.—Letters of Administration with the Will annexed.

In Her Majesty's Court of Probate. The District Registry of _____

BE IT KNOWN, that *A.B.*, late of _____ in the county of _____ deceased, who died on or about the _____ day of _____, at _____, and who at the time of his death had a fixed place of abode at _____ within the said district of _____ made and duly executed his last Will and Testament and did therein name _____ day of _____ 18 __ And BE IT FURTHER KNOWN, that on the _____ day of _____ 18 __ Letters of Administration with the said Will annexed of all and singular the personal estate and effects of the said deceased were granted by Her Majesty's Court of Probate to *C.D.* [*insert the character in which the Grant is taken*], he having previously been sworn well and faithfully to administer the same according to the tenour of the said Will to pay the just debts of the said deceased, and to exhibit a true and perfect inventory of all and singular the said personal estate and effects and to render a just and true account thereof whenever required by law so to do.

Extracted by _____

(Signed) *E.F.*,
District Registrar.
(*L.B.*)

Sworn under £
and that the Testator died
on or about the _____ day
of _____ 18 __.

No. 9.—Letters of Administration.

In Her Majesty's Court of Probate. The District Registry of _____

BE IT KNOWN, that on the _____ day of _____ 18 __, Letters of Administration of all and singular the personal estate and effects of *A.B.*, late of _____ deceased, who died on or about _____ 18 __, at _____, intestate, and had at the time of his death a fixed place of abode at _____ within the said district of _____ were granted by Her Majesty's Court of Probate to *C.D.* of _____ the widow [*or as the case may be*] of the said intestate, she having been first sworn well and faithfully to administer the same, by paying his just debts, and dis-

tributing the residue of his personal estate and effects according to law, and to exhibit a true and perfect inventory of all and singular the said estate and effects, and to render a just and true account thereof whenever required by law so to do.

(Signed) *E.F.*,
District Registrar.
(L.S.)

Extracted by

To be written in } Sworn under £
margin of Admin- } and that the Intestate died
istration Will . } on or about the day
 of 18 .

No. 10.—*Double Probate.*

In Her Majesty's Court of Probate. The District Registry of

BE IT KNOWN, that on the _____ day of _____ 18____, the last Will and Testament] or the last Will and Testament with _____ Codicils] of A.B., late of _____, who died on or about _____, at _____, and had at the time of his death a fixed place of abode at _____ within the said district of _____ was proved and registered, and that administration of all and singular the personal estate and effects of the said deceased, and any way concerning his Will, was granted to C.D., one of the executors named in the said Will [or Codicil], he having been already sworn well and faithfully to administer the same, and to make a true and perfect inventory of all the said personal estate and effects, and to render a just and true account thereof whenever required by law so to do, power being reserved of making the like grant to E.F., the other executor named in the said Will, when he should apply for the same. And BE IT FURTHER KNOWN, that on the _____ day of _____ 18____, the said Will of the said deceased was also proved (1), and that the like administration of all and singular the personal estate and effects of the said deceased, and any way concerning his Will, was granted to the said E.F., he having been first duly sworn well and faithfully to administer the same, and to make a true and perfect inventory of the personal estate and effects of the said deceased, and to render a just account thereof whenever required by law so to do.

(Signed) *G.H.*,
District Registrar.
(L.B.)

Extracted by

Sworn under &
and that the Testator died
on or about the day
of 18 .

(1) Former grant, Jan. 18 , under the same sum.

No. 11.—Exemplification of Probate or Letters of Administration with Will annexed.

In Her Majesty's Court of Probate. The District Registry of

BE IT KNOWN, that upon search being made in the District Registry of Her Majesty's Court of Probate, it plainly appears that on the _____ day of _____ in the year of our Lord 18 _____ the last Will and Testament with _____ Codicils of A.B., late _____ of _____ deceased, who died at _____ on or about _____ and had at the time of his death a fixed place of abode at _____ within the said district of _____ was proved by C.D., the executor named therein [or Letters of Administration with the last Will and Testament and _____ Codicils annexed of the personal estate and effects of A.B., late of, &c., were granted to C.D., as the _____], and which Probate [or Letters of Administration now remain] now remains of Record in the said Registry. The true tenour of the said Probate [or Letters of Administration with the Will annexed, as the case may be] is in the words following, to wit:

[Here the Grant is to be recited verbatim.]

In faith and testimony whereof these Letters Testimonial are issued.

Given at
this day of as to the time of the aforesaid search, and the sealing of these presents,
in the year of our Lord 18 .

(Signed) *E.F.*,
District Registrar.
(L.S.)

Extracted by

Sworn under &
and that the Testator died
on the day
of 18 .

No. 12.—*Exemplification of Administration.*

In Her Majesty's Court of Probate. The District Registry of

BE IT KNOWN, that upon search being made in the District Registry of attached
to Her Majesty's Court of Probate, it appears that on the day of in
the year of our Lord 18 Letters of Administration of all and singular the personal estate and effects
of A.B., late of who died at on or about , and
had at the time of his death a fixed place of abode at within the said District of
were granted to C.D., the [or one of the] of the said deceased, and
which Letters of Administration now remain of record in the said Registry. The true tenour of the
said Letters of Administration is in the words following, to wit:

[Here the Letters of Administration are to be recited verbatim.]

In faith and testimony whereof these Letters Testimonial are issued.

Given at as to the time of the aforesaid search, and sealing of these presents,
this day of in the year of our Lord 18

(Signed) K.L.,
District Registrar.
(L.S.)

Extracted by

Sworn under £
and that the Intestate died
on the day
of 18

No. 13.—*Special Administration with the Will of a Married Woman annexed.*

In Her Majesty's Court of Probate. The District Registry of

BE IT KNOWN, that A.B., wife of C.B., late of in the county of
died on the day of 18, at , having at the time
of her death a fixed place of abode at within the said district of , and having during
her coverture with the said C.B., by virtue of certain powers and authorities given to and vested in her
by a certain indenture of settlement bearing date the day of 18 ,
and of all other powers and authorities her enabling, made and executed her last Will and Testament
bearing date the day of 18 , and thereof appointed her said husband, the
said C.B., sole executor, and that the said C.B., as the lawful husband of the said deceased, is the sole
person entitled to her personal estate and effects, over which she had no disposing power, and concerning
which she is dead intestate. And BE IT ALSO KNOWN, that on the day of 18
Letters of Administration (with the said Will annexed) of all and singular the personal estate and effects
of the said deceased were granted and committed by Her Majesty's Court of Probate to the said C.B., on
his giving the usual security, he having been first sworn well and faithfully to administer the same, to
pay whatever debts the said deceased at the time of her death did owe, and to exhibit a true and perfect
inventory of all and singular her personal estate and effects, and to render a just account thereof when-
ever required by law so to do.

(Signed) J.S.,
District Registrar.
(L.S.)

Extracted by

Sworn under £100, and
that the Testatrix died
on the day
of 18

No. 13 a.—*Limited Probate of a Married Woman's Will.*

In Her Majesty's Court of Probate. The District Registry

BE IT KNOWN, that A.B., wife of C.B., late of in the county of
died on the day of 18, at , having at the time of
her death a fixed place of abode at within the said district of , and having during her
coverture with the said C.B., by virtue of certain powers and authorities vested in her by a certain
indenture of settlement, bearing date the day of 18 , and made between
E.F. of in the county of esquire, of the first part, the said deceased,
by her then name and description of A.G. of in the county of
spinster, of the second part, and H.I. of in the same county, gentleman, and the said
C.B. of aforesaid of the third part, made and executed her last Will and Testament
bearing date the day of one thousand eight hundred and ,
and thereof appointed L.M. and O.P. executors.

And BE IT ALSO KNOWN, that on the day of 18 , the said
last Will and Testament of the said A.B., hereunto annexed, was proved and registered in the said
District Registry of attached to Her Majesty's Court of Probate, and that Probate of
the said Will of the said deceased, limited to the Administration of all such personal estate and effects as
she the said deceased by virtue of the aforesaid indenture had a right to appoint or dispose of, and has

in and by her said Will appointed or disposed of accordingly, but no further or otherwise, was granted to the said *L.M.*, one of the executors named in the said Will as aforesaid, he having been first sworn well and faithfully to administer the same, by paying the just debts of the deceased, and the legacies contained in her said Will, as far as he is thereunto bound by law, and to exhibit a true and perfect inventory of the said limited estate and effects, and to render a just and true account thereof whenever required by law so to do. Power being reserved of making a like grant of Probate to the said *O.P.*, the other executor, when he shall apply for the same.

Extracted by

(Signed) *J.S.*,
District Registrar.
(L.S.)

Sworn under £
and that the Testator died
on the day
of 18

No. 14.—*Special Administration of the rest of the Goods of a Married Woman.*

In Her Majesty's Court of Probate. The District Registry of

BE IT KNOWN, that *A.B.* [wife of *C.B.*], late of in the county of died on the day of 18 , at , having at the time of her death a fixed place of abode at within the said District of , and having during her coverture with the said *C.B.*, by virtue of certain powers and authorities vested in her by a certain indenture bearing date the day of 18 , and made between *D.E.* of in the county of esquire of the first part, the said *C.B.*, therein described, of in the county of gentleman of the second part, and the said *A.B.* by her then name and description of *A.F.* of in the county of widow, and *G.H.* of the same place, esquire, of the third part, made and executed her last Will and Testament, bearing date the day of 18 , and thereof appointed *E.F.* and *G.H.* executors. And BE IT ALSO KNOWN, that on the day of 18 , Probate of the said Will, limited to the Administration of all such personal estate and effects as she the said deceased, by virtue of the said Indenture, had a right to appoint or dispose of, and hath in and by her said Will appointed or disposed of accordingly, but no further or otherwise, was granted by authority of to the said *E.F.* and *G.H.*, the executors named in the said Will. And BE IT FURTHER KNOWN, that on the day of 18 , Letters of Administration of the rest of the personal estate and effects of the said *A.B.* deceased were granted to the said *C.B.*, the lawful husband of the said deceased, he having been first sworn faithfully to administer the same, and to exhibit a true and perfect inventory thereof, and also to render a just and true account thereof whenever required by law so to do.

Extracted by

(Signed) *R.S.*,
District Registrar.
(L.S.)

Sworn under £
and that the Deceased died
on the day
of 18

No. 15.—*Administration de Bonis non.*

In Her Majesty's Court of Probate. The District Registry of

BE IT KNOWN, that *A.B.* late of in the county of deceased, died on or about 18 , at , intestate, and had at the time of his death a fixed place of abode at within the said district of , and that since his death, to wit, in the month of 18 Letters of Administration of all and singular his personal estate and effects were committed and granted to *C.D.* [insert the relationship or character of administrator] (which Letters of Administration now remain of record in the District Registry of ,) who, after taking such Administration upon him, intermeddled in the personal estate and effects of the said deceased, and afterwards died, to wit, on leaving part thereof unadministered, and that on the day of 18 , Letters of Administration of the said personal estate and effects so left unadministered were granted by Her Majesty's Court of Probate to he having been first sworn well and faithfully to administer the same, to pay his just debts, and exhibit a true and perfect inventory of the said personal estate and effects so left unadministered, and render a just and true account thereof whenever required by law so to do.

Extracted by

(Signed) *E.F.*,
District Registrar.
(L.S.)

To be written in } Sworn under £
margin of Admin- } and that the Intestate died
istration Will - } on the day of

No. 16.—*Administration Bond.*

KNOW ALL MEN by these presents, that we, *A.B.* of *C.D.* of *E.F.* of *G.H.*, are jointly and severally bound unto *G.H.*, the Judge of Her Majesty's Court of Probate, in the sum of pounds of good and lawful money of Great Britain, to be paid to the said *G.H.* or to the Judge of the said Court for the time being, for which payment well and truly to be made we bind ourselves and of us for the whole, our heirs, executors, and administrators, firmly by these presents. Sealed with our seals. Dated the day of in the year of our Lord one thousand eight hundred and

The condition of this obligation is such, that if the above-named *A.B.*, the [as the case may be] of *I.J.*, late of deceased, who died on the day of do, when lawfully called on in that behalf, make or cause to be made a true and perfect inventory of all and singular the personal estate and effects of the said deceased which have or shall come to hands, possession, or knowledge, or into the hands and possession of any other person for , and the same so made do exhibit or cause to be exhibited into the District Registry of attached to Her Majesty's Court of Probate, whenever required by law so to do, and the same personal estate and effects, and all other the personal estate and effects of the said deceased at the time of death, which at any time after shall come to the hands or possession of the said , or into the hands or possession of any other person or persons for , do well and truly administer according to law; (that is to say,) do pay the debts which did owe at decease, and further do make or cause to be made a true and just account of said administration whenever required by law so to do; and all the rest and residue of the said personal estate and effects do deliver and pay unto such person or persons as shall be entitled thereto under an Act of Parliament, intituled "*An Act for the better settling of Intestate Estates;*" and if it shall hereafter appear that any last Will and Testament was made by the said deceased, and the executor or executors therein named do exhibit the same into the said Court, making request to have it allowed and approved accordingly, if the said , being thereunto required, do render and deliver the said Letters of Administration (approbation of such Testament being first had and made) in the said Court, then this obligation to be void and of none effect, or else to remain in full force and virtue.

Signed, sealed, and delivered in the presence of

K.L., Commissioner,
M.N., District Registrar, of
[or

O.P., Clerk to the District Registrar of

].

No. 17.—*Administration Bond for Administrators with the Will.*

KNOW ALL MEN by these presents, that we, *A.B.* of *C.D.* of *E.F.* of *G.H.*, are jointly and severally bound unto *G.H.*, the Judge of Her Majesty's Court of Probate, in the sum of pounds of good and lawful money of Great Britain, to be paid to the said *G.H.* or to the Judge of the said Court for the time being, for which payment well and truly to be made we bind ourselves and of us for the whole, our heirs, executors, and administrators, firmly by these presents. Sealed with our seals. Dated the day of in the year of our Lord one thousand eight hundred and

The condition of this obligation is such that if the above-named *A.B.*, the [as the case may be] of *I.J.*, late of deceased, who died on the day of do, when lawfully called on in that behalf, make or cause to be made a true and perfect inventory of all and singular the personal estate and effects of the said deceased which have or shall come to hands, possession, or knowledge, and the same so made do exhibit or cause to be exhibited into the District Registry of attached to Her Majesty's Court of Probate, whenever required by law so to do, and the same personal estate and effects do well and truly administer, (that is to say,) do pay the debts of the said deceased which did owe at decease, and then the legacies contained in the said Will annexed to the said Letters of Administration so to committed, as far as personal estate and effects will thereto extend, and the law charge , and further do make or cause to be made a true and just account of said Administration when shall be thereunto lawfully required, and all the rest and residue of the said personal estate and effects shall deliver and pay unto such person or persons as shall be by law entitled thereto, then this obligation to be void and of none effect, or else to remain in full force and virtue.

Signed, sealed, and delivered in the presence of

K.L., Commissioner,
M.N., District Registrar of
[or

O.P., Clerk to the District Registrar of

].

No. 18.—*Declaration of the Personal Estate and Effects of a Testator or an Intestate.*

A true declaration of all and singular the personal estate and effects of *A.B.*, late of deceased, who died on the day of at , and had at the time of his death a fixed place of abode at within the district of , which have at any time since his death come to the hands, possession, or knowledge of *C.D.*, the administrator with the Will of the said *A.B.* [or administrator, as the case may be], made and exhibited upon and by virtue of the corporal oath [or solemn affirmation] of the said *C.D.*, as follows, to wit:

First, this declarant declares that the said deceased was at the time of his death possessed of or entitled to	£.	s.	d.
[The details of the deceased's effects must be here inserted, and the value inserted opposite to each particular.]			

Lastly, this declarant saith, that no personal estate or effects of or belonging to the said deceased have at any time since his death come to the hands, possession or knowledge of this declarant, save as is hereinbefore set forth.

On the day of 18 the said *C.D.* was duly sworn to [or solemnly affirmed] the truth of the above inventory, before me [person authorized to administer oaths under the Act.] (Signed) *C.D.*

No. 19.—*Justification of Sureties.*

In Her Majesty's Court of Probate. The District Registry of

In the goods of *A.B.* deceased.

The day of 18 .
We, *C.D.* of and *E.F.* of , jointly and severally make oath, that we are the proposed sureties on behalf of *G.H.*, the intended administrator of all and singular the personal estate and effects of the said *A.B.*, late of deceased, in the penal sum of pounds, for his faithful administration of the said personal estate and effects of the said deceased; and I the said *C.D.* for myself make oath, that I am, after payment of all my just debts, well and truly worth in money and effects the sum of ; and I the said *E.F.* for myself make oath, that I am, after payment of all my just debts, well and truly worth in money and effects the sum of pounds.

Same day the said *C.D.* and *E.F.* were duly sworn }
to the truth of this affidavit.

Before me, [person authorized to administer oaths under the Act.]

No. 20.—*Election by Minors of a Guardian.*

In Her Majesty's Court of Probate. The District Registry of

WHEREAS *A.B.*, late of in the county of deceased, died on or about the day of 18 , at intestate, a widower, leaving *C.D.*, *E.F.*, and *G.H.* his natural and lawful children and only next-of-kin, the said *C.D.* being a minor of the age of twenty years only, the said *E.F.* being also a minor of the age of nineteen years only, and the said *G.H.* being an infant of the age of six years only:

NOW we, the said *C.D.* and *E.F.*, do hereby make choice of and elect *K.L.* of in the county of our lawful maternal uncle and one of our next-of-kin, to be our curator or guardian, for the purpose of his obtaining Letters of Administration of the personal estate and effects of the said *A.B.* deceased to be granted to him, for our use and benefit, and until one of us attain the age of twenty-one years [or for the purpose of renouncing for us, and on our behalf all our right, title, and interest to and in the Letters of Administration, &c. as the case may be] [add, in cases where a proctor, solicitor or attorney appears for the minors, and we hereby appoint *M.N.* of our proctor, solicitor, or attorney, to file or cause to be filed this our election for us in the said District Registry of attached to Her Majesty's Court of Probate.]

IN WITNESS whereof we have hereunto set our hands and seals this day of in the year 18 .

Signed, sealed, and delivered in the presence of

[One disinterested witness sufficient.]

No. 21.—*Renunciation of Probate and Administration with the Will annexed.*

In Her Majesty's Court of Probate. The District Registry of

WHEREAS A.B., late of in the county of deceased, died on the day of 18, at , and had at the time of his death a fixed place of abode at within the said District of ; and whereas he made and duly executed his last Will and Testament bearing date the day of 18 (1), and thereof appointed C.D. executor and residuary legatee in trust [or as the case may be]:

NOW I, the said C.D., do hereby declare, that I have not intermeddled in the personal estate and effects of the said deceased, and will not hereafter intermeddle therein with intent to defraud creditors, and I do hereby expressly renounce all my right and title to the probate and execution of the said Will [and Codicils, if any], and to the Letters of Administration with the said Will [and Codicils, if any] annexed, of the personal estate and effects of the said deceased [add in cases where a proctor, solicitor, or attorney appears for the person renouncing, and I hereby appoint E.F. of my proctor, solicitor, or attorney, to file or cause to be filed this renunciation for me in the said District Registry of attached to Her Majesty's Court of Probate].

IN WITNESS whereof I have hereto set my hand and seal, this day of 18 .
C.D.

Signed, sealed, and delivered by the said C.D. in the presence of

G.H.

[One disinterested witness sufficient.]

(1) If there are codicils their dates should be also inserted.

No. 22.—*Renunciation of Administration.*

In Her Majesty's Court of Probate. The District Registry of (1)

WHEREAS A.B., late of in the county of deceased, died on the day of 18, at intestate, a widower, and had at the time of his death a fixed place of abode at within the said district of ; and whereas I, C.D. of , am his natural lawful child, and his only next-of-kin:

NOW I, the said C.D. do hereby declare that I have not intermeddled in the personal estate and effects of the said deceased, and do hereby expressly renounce all my right and title to the Letters of Administration of the personal estate and effects of the said deceased [add in cases where a proctor, solicitor, or attorney appears for the person renouncing, and I hereby appoint E.F. of my proctor, solicitor, or attorney, to file or cause this renunciation to be filed for me in the District Registry of attached to Her Majesty's Court of Probate].

IN WITNESS whereof I have hereto set my hand and seal, this day of 18 .
C.D.

Signed, sealed, and delivered by the said C.D. in the presence of

G.H.

[One disinterested witness sufficient.]

(1) This to be varied according to the fact.

No. 23.—*Subpoena in a Proceeding in Common Form to bring in a Script.*

VICTORIA, by the Grace of God of the United Kingdom of Great Britain and Ireland Queen,
Defender of the Faith.

To of

WHEREAS it appears by a certain affidavit filed in the Principal Registry of Our Court of Probate [or filed in the District Registry of attached to our Court of Probate], bearing date the day of 18, and made by of , that a certain original Paper or Script, being or purporting to be Testamentary, to wit [here describe the paper], bearing date the day of 18, is now in your possession or under your controul:

NOW THIS IS TO COMMAND YOU, that within eight days after service hereof on you, inclusive of the day of such service, you do bring into and leave in the Principal Registry of Our said Court [or the District Registry of attached to our said Court] the said original paper now in the possession of you the or in case the said original paper be not in your possession or under your controul, that you, within eight days after the service hereof on you, inclusive of the day of such service, do file in the Principal Registry of Our said Court, [or in the District Registry of

attached to Our said Court], an affidavit to that effect, and therein set forth what knowledge you have of and respecting the said Script: And this you shall in nowise omit under the penalty of One hundred pounds. Witness [insert the name of the Judge], at the Court of Probate, the day of 18 , in the year of Our reign.

Indorsement to be made of the Service.

This subpoena was served by G.H. on of on the day of 18 .

(Signed) G.H.

No. 24.—*Affidavit of Handwriting.*

In Her Majesty's Court of Probate. The District Registry of

I A.B., of in the county of make oath [or solemnly affirm], that I knew and was well acquainted with C.D., late of in the county of deceased (who died on the day of at and had at the time of his death a fixed place of abode at within the said district of), for many years before and down to the time of his death, and that during such period I have frequently seen him write and also subscribe his name to writings, whereby I have become well acquainted with his manner and character of handwriting and subscription, and having now with care and attention perused and inspected the paper writing hereunto annexed, purporting to be and contain the last Will and Testament of the said deceased, beginning thus ending thus and being subscribed thus ⁽¹⁾ "C.D." I further make oath, that I verily and in my conscience believe the whole body, series, and contents of the said Will, together with the names "C.D." subscribed thereto as aforesaid, to be of the true and proper handwriting and subscription of the said "C.D." deceased.

On the day of 18 the said A.B. was duly sworn at to the truth of this affidavit [or made this solemn affirmation],

Before me,
E.F.

[person authorised to administer oaths under the Act.]

(¹) Include in these recitals the date of the will.

No. 25.—*Affidavit of Plight and Condition and Finding.*

In Her Majesty's Court of Probate. The District Registry of

I A.B., of in the county of make oath [or solemnly affirm], that I am the sole executor named in the paper writing now hereunto annexed, purporting to be and contain the last Will and Testament of E.F., late of in the county of deceased (who died on the day of at and had at the time of his death a fixed place of abode at within the said district of) the said Will bearing date the day of beginning thus ending thus and being subscribed thus "C.D.", and having viewed and perused the said Will and particularly observed that [here recite the finding of the Will, and the various obliterations, interlineations, erasures, and alterations (if any), and the general plight and condition of the Will, or any other matters requiring to be accounted for, and clearly trace the Will from the possession of the deceased in his lifetime up to the time of making this Affidavit]; I the deponent lastly make oath that the same is now in all respects in the same state, plight, and condition as when found [or as the case may be].

On the day of 18 the said A.B. and C.D. were duly sworn at to the truth of this affidavit [or made this solemn affirmation] before me,

I.J.
[person authorised to administer oaths under the Act.]

No. 26.—*Affidavit of Search.*

In Her Majesty's Court of Probate. The District Registry of

I A.B., of in the county of , make oath [or solemnly affirm] that I am the sole executor named in the paper writing hereunto annexed, purporting to be and contain the last Will and Testament of C.D., late of deceased (who died on the day of in the year 18 , at and had at the time of his death a fixed place of abode at within the

said district of _____), the said Will beginning thus, "
 whereof, I have hereunto set my hand this _____ day of _____ " ending thus, "In witness
 one thousand eight hundred and fifty-four" [or as the case may be], and being thus subscribed, "C.D."
 And referring particularly to the fact that the blank spaces originally left in the said Will for the insertion
 of the day and month of the date thereof have never been supplied [or that the said Will is without date,
 or as the case may be], I further make oath [or solemnly affirm] that I have made inquiry of E.F., the
 solicitor of the said deceased, and that I have also made diligent and careful search in all places where
 he the said deceased usually kept his papers of moment and concern, and in his depositories, in order to
 ascertain whether he had or had not left any other Will, but that I have been unable to discover any such
 Will. And I lastly make oath [or solemnly affirm], that I verily believe the said deceased died without
 having left any Will, Codicil, or Testamentary Paper whatever other than the said Will by me herein-
 before deposed of. A.B.

On the _____ day of _____ 18 _____ the said A.B. was duly sworn at _____ to the
 truth of this affidavit [or made this solemn affirmation] before me,

G.H.

[person authorized to administer oaths under the Act.]

This form of affidavit to be used when it is shewn by affidavit that neither the subscribed witnesses nor
 any other person can depose to the precise time of the execution of the Will.

No. 27.—Caveat.

In Her Majesty's Court of Probate. The District Registry of _____.

Let nothing be done in the goods of A.B., late of _____ deceased, who died on the _____ day
 of _____ at _____ and had at the time of his death a fixed place of abode at _____ within the
 said district of _____ unknown to C.D. of _____ having interest [or to E.F. of _____ the proctor,
 solicitor, or attorney of parties having interest].

Dated this _____ day of _____ 18 _____
 (Signed) C.D. of _____ [or E.F. of _____ the proctor, solicitor,
 or attorney of parties having interest].

No. 28.—Warning to Caveat.

In Her Majesty's Court of Probate. The District Registry of _____.

To A.B. of _____ [or to C.D. of _____ proctor, solicitor, or attorney of parties having
 interest].

You are hereby WARNED, within six days⁽¹⁾ after the service of this warning upon you, inclusive of
 the day of such service, to cause an appearance to be entered for you in the said District Registry attached
 to the said Court of Probate to the Caveat entered by you in the personal estate and effects of E.F., late
 of _____ deceased, who died at _____ on or about the _____ day of _____ 18 _____, and had at
 the time of his death a fixed place of abode at _____ within the said district of _____ and to set
 forth your (or your client's) interest; and take notice, that in default of your so doing the said Court will
 proceed to do all such acts, matters, and things as shall be needful and necessary to be done in and about
 the premises.

(Signed) X.Y., District Registrar.

Indorsement to be made after Service.

This warning was served by I.K. on A.B. of _____ [or on C.D. of _____ the
 proctor, solicitor, or attorney] by whom the Caveat was entered in respect of the personal estate and
 effects of the within-named deceased at _____ on the _____ day of _____ 18 _____

(Signed) I.K.

[or, The duplicate of this warning signed by the said X.Y., was sent by the public post, directed to
 the said A.B. [or C.D.] by whom the Caveat was entered in respect of the personal estate and effects of
 the within-named deceased at _____ on the _____ day of _____ 18 _____

(Signed) I.K.]

⁽¹⁾ Note.—These six days are to be exclusive of Sunday.

F E E S

TO BE TAKEN IN THE

DISTRICT REGISTRIES OF THE COURT OF PROBATE.

<i>Probates or Letters of Administration with Will annexed.</i>		<i>£. s. d.</i>		<i>£. s. d.</i>	
For every Probate when the Personal Estate is sworn to be under £100, or any Sum less than £100...	0 1 0			For registering and collating Wills, of three folios of ninety words each, or under ...	0 4 6
For every Probate when the Personal Estate is of the value of £100 and under £4,000, or any sum less than £4,000, a fee of 1s. 6d. in the pound on the amount of stamp duty payable on such Probate.				If above three folios of ninety words each, per folio ...	0 1 6
For every Probate when the Personal Estate is of the value of £4,000 and upwards, the following fees:—				In cases of a Grant for Queen's Pay or Prize Money (the effects being under £100) without reference to the length of the Will ...	0 4 6
If the Personal Estate is sworn to be—				For engrossing and collating a Will for a double, or duplicate, or triplicate Probate of the Will is four folios of ninety words each or under, including parchment ...	0 6 0
Under the value of - £ 5,000 ...	4 15 0			If above four folios of ninety words each, (including parchment), per folio ...	0 1 6
6,000 ...	5 0 0			For every double Probate, when the Personal Estate is under £450 or any smaller sum, the same fee as on the first Probate.	
7,000 ...	5 5 0			For every double Probate, when the Personal Estate is of the value of £450 and upwards ...	0 12 6
8,000 ...	5 10 0			For every duplicate and triplicate Probate, when the Personal Estate is under £450 or any smaller sum, the same fee as on the first Probate.	
9,000 ...	5 15 0			For every duplicate and triplicate Probate, when the Personal Estate is of the value of £450 or upwards ...	0 12 6
10,000 ...	6 0 0			For engrossing, exemplifying, and collating a Will of four folios of ninety words each or under, including parchment ...	0 6 0
12,000 ...	6 5 0			If above four folios of ninety words each; per folio (including parchment)	0 1 6
14,000 ...	6 10 0			For every exemplification of Probate	1 1 0
16,000 ...	6 17 6				
18,000 ...	7 5 0				
20,000 ...	7 12 6				
25,000 ...	8 2 6				
30,000 ...	8 15 0				
35,000 ...	9 7 6				
40,000 ...	10 6 3				
45,000 ...	11 5 0				
50,000 ...	12 3 9				
60,000 ...	13 2 6				
70,000 ...	15 0 0				
80,000 ...	16 17 6				
90,000 ...	18 15 0				
100,000 ...	20 12 6				
120,000 ...	21 11 3				
140,000 ...	23 8 9				
160,000 ...	25 6 3				
180,000 ...	27 3 9				
200,000 ...	29 1 3				
250,000 ...	30 18 9				
300,000 ...	35 12 6				
350,000 ...	40 6 3				
400,000 ...	41 17 6				
500,000 ...	43 8 9				
600,000 ...	46 11 3				
700,000 ...	49 13 9				
800,000 ...	52 16 3				
900,000 ...	55 18 9				
1,000,000 ...	59 1 3				
Above 1,000,000 ...	62 3 9				

Letters of Administration.

For every Grant of Letters of Administration, when the Personal Estate is sworn to be under £100 or any sum less than £100, a fee of ...	0 1 0
For every Grant of Letters of Administration, when the Personal Estate is of the value of £100 and under £2,000, or any sum less than £2,000, a fee of 1s. 6d. on the amount of Stamp Duty payable on such Letters of Administration.	

For every Grant of Letters of Administration, when the Personal Estate is of the value of £2,000 and upwards, the following fees:—

If the Personal Estate is sworn to be—

	£.	s.	d.
Under the value of £2,000 ...	4	13	9
4,000 ...	4	17	6
5,000 ...	5	5	0
6,000 ...	5	12	6
7,000 ...	6	0	0
8,000 ...	6	7	6
9,000 ...	6	15	0
10,000 ...	7	2	6
12,000 ...	7	10	0
14,000 ...	7	17	6
16,000 ...	8	8	9
18,000 ...	9	0	0
20,000 ...	9	11	3
25,000 ...	9	16	3
30,000 ...	11	5	0
35,000 ...	12	3	9
40,000 ...	13	11	3
45,000 ...	15	0	0
50,000 ...	16	7	6
60,000 ...	17	16	3
70,000 ...	20	12	6
80,000 ...	23	8	9
90,000 ...	26	5	0
100,000 ...	29	1	3
120,000 ...	30	9	6
140,000 ...	33	5	9
160,000 ...	36	2	0
180,000 ...	38	18	3
200,000 ...	41	14	6
250,000 ...	44	10	9
300,000 ...	46	17	6
350,000 ...	49	4	6
400,000 ...	51	11	3
500,000 ...	53	18	3
600,000 ...	58	12	0
700,000 ...	63	5	9
800,000 ...	67	19	6
900,000 ...	72	13	3
1,000,000 ...	77	7	0
Above 1,000,000 ...	82	0	9

For every duplicate and triplicate Letters of Administration when the Personal Estate is under £300 or any sum less than £300, the same fee as on the first Grant of Letters of Administration.

For every duplicate and triplicate Letters of Administration when the Personal Estate is of the value of £300 and upwards ... 0 12 6

For every exemplification of Letters of Administration ... 1 1 0

For every Grant of Letters of Administration with Will annexed de bonis non or cessate when the Personal Estate is under £450 or any smaller sum, the same fee as on the first Grant.

NEW SERIES, XXVII.—PROBATE.

For every Grant of Letters of Administration with Will annexed de bonis non or cessate, when the Personal Estate is of the value of £450 and upwards... 0 12 6

For engrossing and collating a Will for a Grant of Letters of Administration with Will annexed de bonis non or cessate, if the Will is four folios of ninety words each, or under, including parchment ... 0 6 0

If above four folios of ninety words each, per folio, including parchment ... 0 1 6

For every Grant of Letters of Administration de bonis non or cessate, if the Personal Estate is under £300 or any smaller sum, the same fee as on the first Grant.

For every Grant of Letters of Administration de bonis non or cessate, if the Personal Estate is of the value of £300 and upwards ... 0 12 6

For every special or limited Grant of Probate or Letters of Administration with or without the Will annexed, in addition to the ordinary fees, as under:

If the Personal Estate is under the value of £20, 1s. per folio of ninety words each on the bond, on the Act, and on the Grant of Probate or Letters of Administration.

If the Personal Estate is of the value of £20 and upwards, 2s. per folio of ninety words each on the bond, on the Act, and on the Grant of Probate or Letters of Administration.

For articles entered into by administrators to pay creditors *pro rata*, per folio of ninety words each ... 0 2 0

For the bond for the performance of the articles, per folio of ninety words ... 0 2 0

For noting on the Grant of Letters of Administration with or without Will annexed, and on the Act, that additional security has been given ... 0 5 0

For every search for Will or Grant of Letters of Administration or any other document filed in the District Registry, including the looking up and inspecting an original Will before the same is registered, or a registered copy of a Will or an Administration Act ... 0 1 0

For every third Will or Administration Act looked up in addition to the above... 0 1 0

For looking up and inspecting an original Will after the same is registered in addition to the search ... 0 1 0

For looking up and producing any document filed in the District Registry other than an original Will or Administration Act... 0 1 0

	£. s. d.		£. s. d.
For every office copy or extract of a Record, Will, or Probate, or Administration Act, or other document filed in the District Registry, if five folios of ninety words or under	0 2 6	For messenger's attendance with warning to Caveat within three miles of the District Registry	0 2 6
If exceeding five folios of ninety words per folio	0 0 6	For every notice of application for a Grant of Probate or Administration transmitted to Registrars of the Principal Registry	0 1 0
If the Will or other document is 200 years old and five folios of ninety words or under	0 5 0	For filing each of such notices in the Principal Registry	0 0 6
If exceeding five folios of ninety words per folio	0 0 9	For every search by the District Registrar in order to ascertain whether any Probate or Grant of Letters of Administration has already issued as under :—	
If the office copy of a Will or any part of a Will or other document is required to be made fac-simile, and such Will or part of a Will or other document is five folios of ninety words in length or under	0 3 6	For every year after the year in which the deceased died	0 0 6
If exceeding five folios of ninety words, per folio	0 0 9	And for every such search in the Principal Registry after the year in which the deceased died, a further fee of... ..	0 0 6
For collating a Probate or copy of a Will or other document left in place of the original, if twenty folios in length or under	0 5 0	For the certificate of the Registrar of the Principal Registry that no application has been made in respect of the goods of the deceased	0 1 0
If exceeding twenty folios, every additional two folios	0 0 3	For filing affidavit for the Inland Revenue Office on granting Probate or Letters of Administration for Queen's pay or prize money	0 1 0
For every attendance with any book or original document within three miles of the District Registry	1 1 0	For filing every other affidavit and other document brought into and deposited in the District Registry, except the oaths for executors, or administrators, or administrators with Will, the first Administration Bond and the Testamentary Papers in respect of which Probate or Administration with Will annexed is granted	0 2 6
For second and each subsequent attendance at the same place, and with the same document if within fourteen days	0 10 6	For every receipt for documents left in the District Registry in order to obtain a grant of Probate or Letters of Administration with or without Will annexed	0 1 0
For each day's attendance with any book or original document at any place beyond the distance of three miles from the District Registry, exclusive of travelling expenses	1 1 0	For depositing every Will of a person deceased in the District Registry, for safe custody	0 10 0
For every receipt for a document or documents delivered out of the District Registry	0 1 0	For every oath administered by the District Registrars	0 1 0
For the entry of every Caveat	0 1 0		
For each notice of such Caveat to the Principal Registry or any other District Registry	0 1 0		
For every warning to a Caveat issuing from the District Registry	0 5 0		

F E E S

TO BE TAKEN FOR THEIR OWN USE

BY

PROCTORS, SOLICITORS, AND ATTORNIES

Practising in the Court of Probate and in the District Registries thereof,

IN NON-CONTENTIOUS BUSINESS.

F E E S OF PROBATES.

Effects sworn under	Oath of Executors and attendance on the party being sworn.	Affidavit for the Inland Revenue Office and attendance on the party being sworn.	Engrossing and collating the Will, three folios of ninety words or under.	Probate under seal.	Extracting.	Clerk's fee.
£.	£. s. d.	£. s. d.	£. s. d.	£. s. d.	£. s. d.	£. s. d.
5	0 2 6	0 2 6	0 4 6	0 1 0	0 1 0	—
20	0 2 6	0 2 6	0 4 6	0 1 0	0 3 4	0 1 0
100	0 5 0	0 5 0	0 4 6	0 1 0	0 6 8	0 2 0
200	0 6 8	0 6 8	0 4 6	0 3 0	0 6 8	0 2 0
300	0 10 0	0 10 0	0 4 6	0 7 6	0 6 8	0 2 0
450	0 10 0	0 10 0	0 4 6	0 12 0	0 6 8	0 2 0
600	0 10 0	0 10 0	0 4 6	0 16 6	0 6 8	0 2 0
800	0 10 0	0 10 0	0 4 6	1 2 6	0 6 8	0 2 0
1,000	0 10 0	0 10 0	0 4 6	1 13 0	0 6 8	0 2 0
1,500	0 10 0	0 10 0	0 4 6	2 5 0	0 6 8	0 5 0
2,000	0 10 0	0 10 0	0 4 6	3 0 0	0 6 8	0 5 0
3,000	0 10 0	0 10 0	0 4 6	3 15 0	0 13 4	0 5 0
4,000	0 10 0	0 10 0	0 4 6	4 10 0	0 13 4	0 5 0
5,000	0 10 0	0 10 0	0 4 6	4 15 0	0 13 4	0 7 6
6,000	0 10 0	0 10 0	0 4 6	5 0 0	0 13 4	0 7 6
7,000	0 10 0	0 10 0	0 4 6	5 5 0	0 13 4	0 7 6
8,000	0 10 0	0 10 0	0 4 6	5 10 0	0 13 4	0 7 6
9,000	0 10 0	0 10 0	0 4 6	5 15 0	0 13 4	0 7 6
10,000	0 10 0	0 10 0	0 4 6	6 0 0	0 13 4	0 7 6
12,000	0 10 0	0 10 0	0 4 6	6 5 0	0 13 4	0 7 6
14,000	0 10 0	0 10 0	0 4 6	6 10 0	0 13 4	0 7 6
16,000	0 10 0	0 10 0	0 4 6	6 17 6	0 13 4	0 7 6
18,000	0 10 0	0 10 0	0 4 6	7 5 0	0 13 4	0 7 6
20,000	0 10 0	0 10 0	0 4 6	7 12 6	0 13 4	0 7 6
25,000	0 10 0	0 10 0	0 4 6	8 2 6	0 13 4	0 7 6
30,000	0 10 0	0 10 0	0 4 6	8 15 0	0 13 4	0 7 6
35,000	0 10 0	0 10 0	0 4 6	9 7 6	0 13 4	0 7 6
40,000	0 10 0	0 10 0	0 4 6	10 6 8	0 13 4	0 7 6
45,000	0 10 0	0 10 0	0 4 6	11 5 0	0 13 4	0 7 6

Effects sworn under	Oath of Executors and attendance on the party being sworn.	Affidavit for the Inland Revenue Office and attendance on the party being sworn.	Engrossing and collating the Will, three folios of ninety words or under.	Probate under seal.	Extracting.	Clerk's fee.
£.	£. s. d.	£. s. d.	£. s. d.	£. s. d.	£. s. d.	£. s. d.
50,000	0 10 0	0 10 0	0 4 6	12 3 9	0 13 4	0 7 6
60,000	0 10 0	0 10 0	0 4 6	13 2 6	0 13 4	0 7 6
70,000	0 10 0	0 10 0	0 4 6	15 0 0	0 13 4	0 7 6
80,000	0 10 0	0 10 0	0 4 6	16 17 6	0 13 4	1 1 0
90,000	0 10 0	0 10 0	0 4 6	18 15 0	0 13 4	1 1 0
100,000	0 10 0	0 10 0	0 4 6	20 12 6	0 13 4	1 1 0
120,000	0 10 0	0 10 0	0 4 6	21 11 3	0 13 4	1 1 0
140,000	0 10 0	0 10 0	0 4 6	23 8 9	0 13 4	1 1 0
160,000	0 10 0	0 10 0	0 4 6	25 6 3	0 13 4	1 1 0
180,000	0 10 0	0 10 0	0 4 6	27 3 9	0 13 4	1 1 0
200,000	0 10 0	0 10 0	0 4 6	29 1 3	0 13 4	1 1 0
250,000	0 10 0	0 10 0	0 4 6	30 18 9	0 13 4	1 1 0
300,000	0 10 0	0 10 0	0 4 6	35 12 6	0 13 4	1 1 0
350,000	0 10 0	0 10 0	0 4 6	40 6 3	0 13 4	1 1 0
400,000	0 10 0	0 10 0	0 4 6	41 17 6	0 13 4	1 1 0
500,000	0 10 0	0 10 0	0 4 6	43 8 9	0 13 4	1 1 0
600,000	0 10 0	0 10 0	0 4 6	46 6 3	0 13 4	1 1 0
700,000	0 10 0	0 10 0	0 4 6	49 13 9	0 13 4	1 1 0
800,000	0 10 0	0 10 0	0 4 6	52 16 3	0 13 4	1 1 0
900,000	0 10 0	0 10 0	0 4 6	55 18 9	0 13 4	1 1 0
1,000,000	0 10 0	0 10 0	0 4 6	59 1 3	0 13 4	1 1 0
Above that sum }	0 10 0	0 10 0	0 4 6	62 3 9	0 13 4	1 1 0

Fees of Letters of Administration with Will annexed.

In addition to the above Fees for attendance on execution of the Bond if the effects are—

	£.	s.	d.
£5 and under £20	0	0	10
£20 and under £100	0	1	8
£100 and upwards	0	3	4

FEES OF LETTERS OF ADMINISTRATION.

Effects sworn under	Oath of Administrator and attendance on his being sworn, and on execution of the Bond.	Affidavit for Inland Revenue and attendance on Administrator being sworn.	Letters of Administration under seal.	Extracting.	Clerk.
£.	£. s. d.	£. s. d.	£. s. d.	£. s. d.	£. s. d.
5	0 2 6	0 2 6	0 1 0	0 1 0	—
20	0 3 4	0 2 6	0 1 0	0 3 4	0 1 0
50	0 5 0	0 5 0	0 1 6	0 4 8	0 2 0
100	0 6 8	0 6 8	0 3 0	0 6 8	0 2 0
200	0 10 0	0 6 8	0 4 6	0 6 8	0 2 0
300	0 13 4	0 10 0	0 12 0	0 6 8	0 2 0
450	0 13 4	0 10 0	0 16 6	0 6 8	0 2 0
600	0 13 4	0 10 0	1 2 6	0 6 8	0 2 0
800	0 13 4	0 10 0	1 13 0	0 6 8	0 2 0
1,000	0 13 4	0 10 0	2 5 0	0 6 8	0 5 0
1,500	0 13 4	0 10 0	3 7 6	0 6 8	0 5 0
2,000	0 13 4	0 10 0	4 10 0	0 13 4	0 5 0
3,000	0 13 4	0 10 0	4 13 9	0 13 4	0 7 6
4,000	0 13 4	0 10 0	4 17 6	0 13 4	0 7 6
5,000	0 13 4	0 10 0	5 5 0	0 13 4	0 7 6
6,000	0 13 4	0 10 0	5 12 6	0 13 4	0 7 6
7,000	0 13 4	0 10 0	6 0 0	0 13 4	0 7 6
8,000	0 13 4	0 10 0	6 7 6	0 13 4	0 7 6
9,000	0 13 4	0 10 0	6 15 0	0 13 4	0 7 6
10,000	0 13 4	0 10 0	7 2 6	0 13 4	0 7 6
12,000	0 13 4	0 10 0	7 10 0	0 13 4	0 7 6
14,000	0 13 4	0 10 0	7 17 6	0 13 4	0 7 6
16,000	0 13 4	0 10 0	8 8 9	0 13 4	0 7 6
18,000	0 13 4	0 10 0	9 0 0	0 13 4	0 7 6
20,000	0 13 4	0 10 0	9 11 3	0 13 4	0 7 6
25,000	0 13 4	0 10 0	9 16 3	0 13 4	0 7 6
30,000	0 13 4	0 10 0	11 5 0	0 13 4	0 7 6
35,000	0 13 4	0 10 0	12 3 9	0 13 4	0 7 6
40,000	0 13 4	0 10 0	13 11 3	0 13 4	0 7 6
45,000	0 13 4	0 10 0	15 0 0	0 13 4	0 7 6
50,000	0 13 4	0 10 0	16 7 6	0 13 4	0 7 6
60,000	0 13 4	0 10 0	17 16 3	0 13 4	0 7 6
70,000	0 13 4	0 10 0	20 12 6	0 13 4	0 7 6
80,000	0 13 4	0 10 0	23 8 9	0 13 4	1 1 0
90,000	0 13 4	0 10 0	26 5 0	0 13 4	1 1 0
100,000	0 13 4	0 10 0	29 1 3	0 13 4	1 1 0
120,000	0 13 4	0 10 0	30 9 6	0 13 4	1 1 0
140,000	0 13 4	0 10 0	33 5 9	0 13 4	1 1 0
160,000	0 13 4	0 10 0	36 2 0	0 13 4	1 1 0
180,000	0 13 4	0 10 0	38 18 3	0 13 4	1 1 0
200,000	0 13 4	0 10 0	41 14 6	0 13 4	1 1 0
250,000	0 13 4	0 10 0	44 10 9	0 13 4	1 1 0
300,000	0 13 4	0 10 0	46 17 6	0 13 4	1 1 0
350,000	0 13 4	0 10 0	49 4 6	0 13 4	1 1 0
400,000	0 13 4	0 10 0	51 11 3	0 13 4	1 1 0
500,000	0 13 4	0 10 0	53 18 3	0 13 4	1 1 0
600,000	0 13 4	0 10 0	58 12 0	0 13 4	1 1 0
700,000	0 13 4	0 10 0	63 5 9	0 13 4	1 1 0
800,000	0 13 4	0 10 0	67 19 6	0 13 4	1 1 0
900,000	0 13 4	0 10 0	72 13 3	0 13 4	1 1 0
1,000,000	0 13 4	0 10 0	77 7 0	0 13 4	1 1 0
Above that sum }	0 13 4	0 10 0	82 0 9	0 13 4	1 1 0

FEES OF DOUBLE OR CESSATE PROBATES.

If the effects are sworn under	Attendance in the Registry and looking up the Will and bespeaking the engrossment.	Oath of the executor and attendance on his being sworn.	Affidavit for Inland Revenue Office, and attendance on the executor being sworn.	Drawing and copying Statement in support of application for the duty-paid stamp.	Attending the Commissioners of Stamps and procuring the duty-paid stamp.	Double Probate under seal.	Extracting.	Clerk.
£.	£. s. d.	£. s. d.	£. s. d.	£. s. d.	£. s. d.	£. s. d.	£. s. d.	£. s. d.
5	0 3 4	0 2 6	0 2 6	—	—	0 1 0	0 1 0	—
20	0 3 4	0 2 6	0 2 6	—	—	0 1 0	0 3 4	0 1 0
100	0 6 8	0 5 0	0 5 0	0 6 8	0 13 4	0 1 0	0 6 8	0 2 0
200	0 6 8	0 6 8	0 6 8	0 6 8	0 13 4	0 3 0	0 6 8	0 2 0
300	0 6 8	0 10 0	0 10 0	0 6 8	0 13 4	0 7 6	0 6 8	0 2 0
450	0 6 8	0 10 0	0 10 0	0 6 8	0 13 4	0 12 0	0 6 8	0 2 0
600	0 6 8	0 10 0	0 10 0	0 10 0	0 13 4	0 12 6	0 6 8	0 2 0
800	0 6 8	0 10 0	0 10 0	0 10 0	0 13 4	0 12 6	0 6 8	0 2 0
1,000	0 6 8	0 10 0	0 10 0	0 10 0	0 13 4	0 12 6	0 6 8	0 2 0
1,500	0 6 8	0 10 0	0 10 0	0 10 0	0 13 4	0 12 6	0 6 8	0 5 0
2,000	0 6 8	0 10 0	0 10 0	0 10 0	0 13 4	0 12 6	0 6 8	0 5 0
3,000	0 6 8	0 10 0	0 10 0	0 10 0	0 13 4	0 12 6	0 13 4	0 5 0
4,000	0 6 8	0 10 0	0 10 0	0 10 0	0 13 4	0 12 6	0 13 4	0 5 0
5,000	0 6 8	0 10 0	0 10 0	0 10 0	0 13 4	0 12 6	0 13 4	0 7 6
Above 5,000	The fees to be taken are the same as above, except the Clerk's fee, which, if the effects are of the value of 70,000 <i>l.</i> or upwards is 1 <i>l.</i> 1 <i>s.</i>							

Exemplification of Probate or Letters of Administration with or without Will annexed.

	£. s. d.
Attending in the Registry, looking up original Will, and bespeaking Exemplification	0 6 8
Exemplification under seal and stamp	1 1 0
Extracting	0 6 8
Clerks	0 2 6

Duplicate and Triplicate Probates or Letters of Administration with or without Will annexed.

	£. s. d.
Attending in the Registry, looking up the Will, and bespeaking Duplicate Probate and Engrossment	0 6 8
Drawing and copying Statement in support of application to the Inland Revenue Office for the duty-paid stamp	0 10 0
Attending at the Inland Revenue Office and procuring the duty-paid stamp	0 13 4
Extracting	0 6 8
Clerks	0 2 6

**LETTERS OF ADMINISTRATION WITH OR WITHOUT WILL ANNEXED
DE BONIS NON OR CESSATE.**

If the effects are sworn under	Attending in the Registry, looking up and perusing the Will, and taking an account of the former Grant.	Oath of the Administrator and attendance on his being sworn, and on execution of the Bond.	Affidavit for Inland Revenue Office and attendance on administrator being sworn.	Drawing and copying Statement in support of application to the Inland Revenue Office for the duty-paid stamp.	Attending at the Inland Revenue Office and procuring the duty-paid stamp.	De bonis administration with Will under seal and duty-paid stamp.	Extracting.	Clerks.
£.	£. s. d.	£. s. d.	£. s. d.	£. s. d.	£. s. d.	£. s. d.	£. s. d.	£. s. d.
5	0 6 8	0 5 0	0 2 6	—	—	0 1 0	0 1 0	—
20	0 6 8	0 5 0	0 2 6	—	—	0 1 0	0 3 4	0 1 0
50	0 6 8	0 6 8	0 5 0	—	—	0 1 6	0 4 8	0 2 0
100	0 6 8	0 10 0	0 6 8	0 5 0	0 6 8	0 3 0	0 6 8	0 2 0
200	0 6 8	0 13 4	0 6 8	0 6 8	0 13 4	0 4 6	0 6 8	0 2 0
300	0 6 8	0 16 8	0 10 0	0 6 8	0 13 4	0 12 0	0 6 8	0 2 0
450	0 6 8	0 16 8	0 10 0	0 6 8	0 13 4	0 12 6	0 6 8	0 2 0
Above 450	The fees to be taken are the same as above, except the Extracting fee, which, if the effects are 1,500 <i>l.</i> and upwards, is 13 <i>s.</i> 4 <i>d.</i> , and the Clerk's fee, which, if the effects are 600 <i>l.</i> and upwards, is 5 <i>s.</i>							

Probates, Special or Limited.

	£.	s.	d.
Consulting fee	0	6	8
Affidavit for Inland Revenue Office and attendance on the Executor being sworn:—The same fee as on ordinary probates.			
Drawing Special Oath of Executor, per folio of seventy-two words	0	1	0
Fair copy of the Oath for the Registrar, per folio of seventy-two words	0	0	4
Attending the Registrar thereon	0	13	4
Engrossing same, per folio of seventy-two words	0	0	4
Attendance on the Executor being sworn	0	6	8
Engrossing and collating the Will, three folios of ninety words or under	} The same fees as on ordinary Probates.		
Special or limited Probate, under seal			
Extracting			
Clerk			

Letters of Administration, Special or Limited.

	£.	s.	d.
Consulting fee	0	6	8
Perusing and abstracting Deeds or other Instruments, when necessary, at per folio of ninety words	0	0	4
Proxy of Nomination	0	13	4
Affidavit for Inland Revenue Office and attendance on the Administrator being sworn:—The same fees as on ordinary Grants of Letters of Administration.			
Drawing Special Oath of the Administrator, per folio of seventy-two words	0	1	0
Fair copy of the Oath for the Registrar to peruse, per folio of seventy-two words	0	0	6
Attending the Registrar thereon	0	13	4
Engrossing same, per folio of seventy-two words	0	0	4
Attendance when the Administrator was sworn, and on execution of the Bond	} The same fees as on ordinary Grants of Letters of Administration.		
Letters of Administration, under seal and stamp			
Extracting			
Clerks			

Office Copies of, or Extracts from, Records, Wills, and other Documents.

	£.	s.	d.
For attendance in the Registry for searching for a Record, Will, or other Document, or for a Grant of Probate, or Letters of Administration, with or without a Will annexed, for the first five years, or any period less than five years, including the ordering of a copy...	0	5	0
For every five years after the first five years	0	3	4
For the perusal of a Record, Will, or other Document, when necessary, for the purpose of ordering extracts or for any other purpose, including the ordering of extracts, per folio of ninety words	0	0	4
For collating an Office Copy or Extract of a Record, Will, or other Document, with the original, including Extracting fee, per folio of ninety words	0	0	2
For collating an Office Copy of the Act on granting Probate or Administration with the original entry thereof, including Extracting fee	0	1	0

Caveats.

	£.	s.	d.
For attendance in the Registry and entering Caveat	0	6	8
For attendance in the Registry and giving instructions for warning Caveators to enter an appearance	0	6	8

Affidavits other than the Affidavits and Oaths included in the Fees of Probate and Letters of Administration and Declarations of Personal Estate and Effects.

	£.	s.	d.
For taking instructions for every Affidavit or Declaration of Personal Estate and Effects	0	6	8
For drawing and fair copy of the same, per folio of seventy-two words	0	1	0
For every copy thereof, per folio of seventy-two words	0	0	4

Instruments of Renunciation and Consent, Letters of Attorney, and other Documents prepared by Proctors, Solicitors or Attornies.

	£.	s.	d.
For drawing and fair copy of every Instrument of Renunciation, Consent, Letter of Attorney, or other Document prepared as above, per folio of seventy-two words	0	1	0
For every fair copy, per folio of seventy-two words	0	0	4

CONTENTIOUS BUSINESS.

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Court for Divorce and Matrimonial Causes.

RULES AND ORDERS.

1. Proceedings before the Court for Divorce and Matrimonial Causes shall be commenced by filing a petition.—A Form of such Petition is given, No. 3.

2. Every such petition shall be accompanied by an affidavit made by the petitioner, verifying the facts stated in the petition of which he or she has personal cognizance, and such affidavit shall be filed with the petition.

3. In cases where the petitioner is seeking a decree of nullity of marriage, or a decree of judicial separation, or a dissolution of marriage, or a decree in a suit of jactitation of marriage, the petitioner's affidavit, filed with his or her petition, shall further state that no collusion or connivance exists between the petitioner and the other party to the marriage or alleged marriage.

4. Every Petitioner who files a petition and affidavit shall forthwith issue a citation, to be served on the Respondent in the cause, according to the Form No. 1.

5. A similar citation shall be served upon any party whom it is intended to make a Co-respondent in the cause.

6. To each Respondent in the cause shall be delivered, together with the citation, a copy of the petition certified under the seal of the Court.

7. Every citation shall be written or printed on parchment, and the party taking out the same, or his or her proctor, solicitor, or attorney, shall take it, together with a præcipe, to the Registry, and there deposit the præcipe and

get the citation signed and sealed.—The Form of Præcipe is given, No. 2.

8. The party applying for a citation to be sealed shall, on depositing the præcipe in the Registry, give an address within three miles of the General Post Office, at which it shall be sufficient to leave all notices, instruments, and other proceedings not by these Rules and Orders expressly requiring personal service.

9. Before a party can proceed after the service of a citation, unless by the express leave of the Court, an appearance must have been previously entered by or on the behalf of the party cited, or an affidavit of personal service of the citation must have been filed in the Registry.

10. In cases where personal service cannot be effected, application may be made to the Judge Ordinary, upon motion in open court, to substitute some other mode of service, or to dispense with service altogether.

11. Personal service of a citation shall be effected by leaving a copy of the citation with the party cited, and producing the original, if required by him or her so to do.

12. Every entry of an appearance shall be accompanied by an address within three miles of the General Post Office, at which it shall be sufficient to leave all notices, instruments, and other proceedings.

13. After personal service of citation has been effected, the citation, with the certificate of service indorsed thereon, shall be forthwith returned into and filed in the Registry.

14. Within twenty-one days from the service of the citation the Respondent shall file his or her answer in the Registry, otherwise the Petitioner shall be at liberty to proceed to proof of the petition.—A Form of Answer is given, No. 4.

15. Every answer which contains matter other than a simple denial of the facts stated in the petition, shall be accompanied by an affidavit made by the Respondent, verifying such other or additional matter, and such affidavit shall be filed with the answer.

16. In cases involving a decree of nullity of marriage, or a decree of judicial separation, or a dissolution of marriage, or a decree in a suit of jactitation of marriage, the Respondent shall, in the affidavit filed with the answer, further state that there is not any collusion or connivance between the Deponent and the other party to the marriage.

17. The Respondent shall file his or her answer in the Registry, and on the same day deliver to the Petitioner, or his or her proctor, solicitor, or attorney, a copy thereof.

18. Within fifteen days from the filing of the answer the Petitioner may file a reply thereto, and the same period shall be allowed for bringing in and filing any further statement by way of answer to such replication.

19. If either party desire to amend his or her petition, answer, or subsequent statement, it may be done by permission of the Judge Ordinary, and in such form and under such terms as the Judge Ordinary may approve.

20. When the proceedings have raised the questions of fact necessary to be determined, either party may, within fifteen days from the filing of the last proceeding, apply to the Judge Ordinary to direct the truth of any question of fact arising in the proceedings to be tried by a jury.

21. If neither party claim that the cause shall be heard before a jury, the Judge Ordinary shall determine whether the same shall be tried by a jury or before the Court itself, and whether by oral evidence or upon affidavit.

22. Whenever a case is to be tried before a jury, the Judge Ordinary shall direct the questions at issue to be stated in the form of a record, to be settled by one of the Registrars.—A Form of Record is given, No. 11.

23. After the record has been so settled, either party shall be at liberty to apply to the Judge Ordinary to alter or amend the same,

and his decision shall be final, and binding on the parties.

24. The Petitioner shall file the record and set down the cause as ready for trial, and on the day upon which it is set down shall give notice of his or her having done so to each party for whom an appearance has been entered; and if the Petitioner delay filing the record and setting down the cause as ready for trial, for the space of one month from the day on which the record was finally settled, the Respondent may file the record and set the cause down as ready for trial, and give a similar notice to the Petitioner and the aforesaid other parties. A copy of every such notice shall be filed in the Registry, and the cause, unless the Judge Ordinary shall otherwise direct, shall come on in its turn.

25. When an affidavit establishing the factum of a marriage between the parties has been filed, and the husband has appeared in the cause, the wife may proceed to file a petition for alimony, in substance according to the Form No. 12; and a copy of such petition shall be served on the husband, or on his proctor, solicitor, or attorney, on the same day.

26. The husband shall, within eight days after a petition for alimony has been filed, file his answer thereto upon oath, and on the same day deliver a copy thereof to the wife, or to her proctor, solicitor, or attorney.

27. The wife, subject to any order as to costs, may, if not satisfied with the husband's answer, examine witnesses in support of her petition for alimony.

28. After the answer of the husband has been filed, the wife may, at its next sitting, move the Court to decree her alimony *pendente lite*; provided that the wife shall, two days at least before she so moves the Court, give notice to her husband, or to his proctor, solicitor, or attorney, of her intention so to do.

29. A wife who has obtained a decree of judicial separation in her favour, and has previously filed her petition for alimony, may, unless in cases where an appeal to the full Court is interposed, move the Court to decree her permanent alimony; provided that she shall, eight days at least before making any such motion, give notice to the husband, or to his proctor, solicitor, or attorney, of her intention so to do.

30. Where a decree of judicial separation has been pronounced, it shall not be necessary for either party to enter into a bond conditioned against marrying again.

31. Every subpoena shall be written or printed on parchment, and may include the names of any number of witnesses. The party issuing the same, or his or her proctor, solicitor, or attorney, shall take it, together with a *præcipe*, to the Registry, and there get it signed and sealed, and there deposit the *præcipe*.—Forms of Subpoena are given, Nos. 6 and 8; and Forms of *Præcipe*, Nos. 7 and 9.

32. The Petitioner or Respondent may call upon the other party, by notice in writing, to admit any document, saving any just exceptions; and in case of refusal or neglect to admit the same, the costs of proving the document shall be paid by the party so neglecting or refusing, whatever the result of the cause may be, unless the Judge Ordinary shall certify that the refusal to admit was reasonable; and when such notice to admit has not been given, no costs of proving any document shall be given, except in cases where the omission to give the notice is in the opinion of the Registrar a saving of expense.

33. The hearing of the cause shall be conducted in court, and the counsel shall address the Court, subject to the same rules and regulations as now obtain in the Courts of Common Law.

34. The Registrar shall, in cases tried by a jury, enter on the record the finding of the jury and the decree of the Court, and shall sign the same. In all cases the Registrar shall enter the decree of the Court in the Court Book.

35. In cases to be tried upon affidavit the Petitioner and Respondent shall file their affidavits within eight days from the filing of the last proceeding.

36. Counter-affidavits to any facts stated in any such affidavits may be filed by either party within fifteen days from the filing of the affidavit which they are intended to answer.

37. Affidavits in reply to counter-affidavits may be filed by permission of the Judge Ordinary, granted on motion or summons, but not otherwise.

38. Applications to produce a Deponent in the cause, for the purpose of cross-examination, shall be made on summons to the Judge Ordinary sitting in Chambers.

39. Applications on the part of a wife deserted by her husband for an order to protect her earnings and property, acquired since the commencement of such desertion, shall be made on summons to the Judge Ordinary in Chambers, and supported by affidavit.—A Form of Application is given, No. 13.

40. Applications for the discharge of any order made to protect the earnings and property of the wife are to be founded on affidavit.

41. Petitioners to the Court for the reversal of a decree of judicial separation must set out the grounds upon which the Petitioner relies, as in Form No. 14.

42. Any person desirous of prosecuting a suit *in formâ pauperis* shall lay a case before counsel, and obtain an opinion from such counsel that he or she has reasonable grounds for applying to the Court for relief.

43. No person shall be admitted to prosecute a suit *in formâ pauperis* without the order of the Judge Ordinary; and to obtain such order the case laid before counsel for his opinion, and his opinion thereon, with an affidavit of the party or of his or her attorney that the same case contains a full and true statement of all the material facts, to the best of his or her knowledge and belief, and an affidavit by the party applying that he or she is not worth 25*l.*, after payment of his or her just debts, save and except his or her wearing apparel, shall be produced at the time such application is made.

44. Where a pauper omits to proceed to trial pursuant to notice, he or she may be called upon by summons to shew cause why he or she should not pay costs, though he or she has not been dispaupered, and why all further proceedings should not be stayed until such costs be paid.

45. Every application for a new trial in respect of causes tried before a jury is to be lodged in the registry within a month from the day on which the cause was tried.

46. If the Petitioner or Respondent, unless by leave of the Judge Ordinary previously obtained, fail to deliver the answer, reply, or other proceeding within the time specified in these Rules, the other party shall not be compelled to receive the same, unless by direction of the Judge Ordinary. The expense of every such application to the Judge Ordinary shall fall on the party causing the delay, unless the Judge Ordinary shall otherwise direct.

47. Where a special time is limited for filing affidavits, no affidavit filed after that time shall be used unless by leave of the Judge Ordinary.

48. Wherever it becomes necessary to give a notice to the opposite party in the cause, such notice shall be in writing, signed by the party, or by his or her proctor, solicitor, or attorney.

49. The addition and true place of abode of

every person making an affidavit is to be inserted therein.

50. In every affidavit made by two or more persons the names of the several persons making it are to be written in the jurat.

51. No affidavit shall be read or made use of in any matter depending in court in the jurat of which there is any interlineation or erasure.

52. Where an affidavit is made by any person who is blind, or who, from his or her signature or otherwise, appears to be illiterate, the person before whom such affidavit is made is to state in the jurat that the affidavit was read in the presence of the party making the same, and that such party seemed to, and according to the belief of such person did, understand the same, and also that the said party made his or her mark or wrote his or her signature in the presence of the person before whom the affidavit was made.

53. No affidavit is to be deemed sufficient which has been sworn before the party on whose behalf the same is offered, or before his or her proctor, solicitor, or attorney, or before a clerk of his proctor, solicitor, or attorney.

54. A proctor, solicitor, or attorney, and their clerks respectively, if acting for any other proctor, solicitor, or attorney, shall be subject to the Rules in respect to taking affidavits which are applicable to those in whose stead they are acting.

55. The Registry of the Court for Divorce and Matrimonial Causes, and the clerks employed therein, shall be subject to and under the controul of the Registrars of the Principal Registry of the Court of Probate, in the same way and to the same extent as the Principal Registry of the Court of Probate and the clerks therein is and are.

56. The Record Keepers, the Clerk of Papers, the Sealer, the Ushers, and other officers belonging to the Court of Probate, shall discharge the same duties in the Court for Divorce and Matrimonial Causes, and in the Registry thereof, as they discharge in the Court of Probate and the Principal Registry thereof.

57. The Judge Ordinary shall in every case in which a time is fixed by these Rules for the performance of any act have power to extend the same to such time and with such qualifications and restrictions and on such terms as to him may seem fit.

FORMS,

WHICH ARE TO BE FOLLOWED AS NEARLY AS THE CIRCUMSTANCES
OF EACH CASE WILL ALLOW.

No. 1.—Citation.

In Her Majesty's Court for Divorce and Matrimonial Causes.

VICTORIA, by the Grace of God of the United Kingdom of Great Britain and Ireland
Queen, Defender of the Faith.

To A.B., of in the County of

WHEREAS C.B. of , claiming to have been lawfully married to you the said A.B., has filed her petition against you in Our said Court, praying for wherein she alleges that you have committed adultery [or have been guilty of cruelty towards her the said C.B., or as the case may be]: NOW THIS IS TO COMMAND YOU, that within eight days of the service of this on you, inclusive of the day of such service, you do appear in Our said Court then and there to make answer to the said petition, a copy whereof, sealed with the seal of Our said Court, is herewith served upon you. AND TAKE NOTICE, that in default of your so doing, the Judge Ordinary of Our said Court [or the Judges of Our said Court] will proceed to hear the said charge [or charges] proved in due course of law, and to pronounce sentence therein, your absence notwithstanding.

(Signed) E.P., Registrar.

L.S.

Indorsement to be made after Service.

This citation was duly served by G.H. on the within-named A.B., of at on
the day of 18 .

(Signed) G.H.

No. 2.—Præcipe for Citation.

In Her Majesty's Court for Divorce and Matrimonial Causes.

Citation for A.B., of against C.B., of , for a judicial separation
by reason of adultery [or as the case may be].

(Signed) P.A., proctor, solicitor, or attorney for
the said C.B. [or C.B. in person.]

No. 6.—*Form of Subpœna ad testificandum.*

VICTORIA, by the Grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, to [names of all witnesses included in the subpœna], Greeting. We command you and every of you to be and appear in your proper persons before [insert the name of the Judge], Judge Ordinary of Our Court for Divorce and Matrimonial Causes, at _____, on _____ the _____ day of _____ 18____, by _____ of the clock in the forenoon of the same day, and so from day to day until the cause or proceeding is tried, to testify the truth, according to your knowledge, in a certain cause now in Our Court before Our said Judge depending [or now before Our said Court depending], between A.B., Petitioner, and C.B., Respondent [or in a certain cause or proceeding now in Our Court before Our said Judge depending (or now before Our said Court depending), in default of the appearance of _____], on the part of the [Petitioner or Respondent, or as the case may be], and at the aforesaid day between the parties aforesaid to be tried [or in default as aforesaid, between the parties aforesaid to be tried]. And this you nor any of you shall in nowise omit, under the penalty of every of you of 100*l.* Witness [insert the name of the Judge], at the Court for Divorce and Matrimonial Causes, the _____ day of _____ 18____, in the _____ year of Our reign.

(Signed) E.F., Registrar.

No. 7.—*Prœcipe for Subpœna ad testificandum.*

In Her Majesty's Court for Divorce and Matrimonial Causes.

Subpœna of [insert witnesses' names], to testify between A.B., Petitioner, and C.B., Respondent, on the part of the Petitioner [or Respondent].

(Signed) { A.B. } or { P.A., Petitioner's [or Respondent's] proctor,
 { C.D. } solicitor, or attorney.

No. 8.—*Subpœna duces tecum.*

VICTORIA, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, to [names of all parties included in the subpœna], Greeting. We command you and every of you to be and appear in your proper persons before [insert the name of the Judge], Judge Ordinary of Our Court for Divorce and Matrimonial Causes [or before Our said Court, as the case may be], at _____, on _____ the _____ day of _____, by _____ of the clock in the forenoon of the same day, and so from day to day until the cause or proceeding is heard, and also that you bring with you, and produce at the time and place aforesaid [here describe shortly the deeds, letters, papers, &c. required to be produced], then and there to testify and shew all and singular those things which you or either of you know, or the said deed or instrument doth import, of and concerning a certain cause or proceeding now in Our said Court before Our said Judge Ordinary [or now before Our said Court, as the case may be] depending, between A.B., Petitioner, and C.B., Respondent [or in a certain cause or proceeding now in Our said Court before Our said Judge Ordinary (or now before Our said Court) depending, in default of the appearance of _____], on the part of the Petitioner [or Respondent], and on the aforesaid day between the parties aforesaid to be tried. And this you nor any of you shall in nowise omit, under the penalty of every of you of 100*l.* Witness [insert the name of the Judge], at Our Court for Divorce and Matrimonial Causes, the _____ day of _____ 18____, in the _____ year of Our reign.

(Signed) E.F., Registrar.

No. 9.—*Prœcipe for Subpœna duces tecum.*

In Her Majesty's Court for Divorce and Matrimonial Causes.

Subpœna for _____ to testify and produce, &c. between A.B., Petitioner, and C.B., Respondent, on the part of the Petitioner [or Respondent].

(Signed) { A.B. } or { P.A., Petitioner's [or Respondent's] proctor,
 { C.D. } solicitor, or attorney.

No. 10.—*Notice to admit Documents.**A.B. v. C.B.*

In Her Majesty's Court for Divorce and Matrimonial Causes.

Take notice, that the Petitioner Respondent in this cause proposes to adduce in evidence the several documents hereunder specified, and that the same may be inspected by the Respondent at Petitioner on between the hours of and , and the Respondent is hereby required, within forty-eight hours from the last-mentioned hour, to admit that such of the said documents as are specified to be originals were respectively written, signed, or executed as they purport respectively to have been, that such as are specified to be copies are true copies, and that such documents as are stated to have been served, sent, or delivered were so served, sent, or delivered respectively, saving all just exceptions to the admissibility of all such documents as evidence in the cause.

To { *C.B.* } or to *E.F.*, proctor, solicitor or attorney for {
 { *A.B.* }
 (Signed) { *A.B.* } or *G.H.*, proctor, solicitor or attorney for {
 { *C.B.* }

[*Here describe the Documents.*]No. 11.—*Form of Record.*

In Her Majesty's Court for Divorce and Matrimonial Causes.

The day of 18 .

A.B. v. C.B.

A.B. did in his petition presented in this cause, allege that *C.B.* did, to wit, on the day of 18 , commit adultery with *R.S.*

[*Here insert the allegations of the petition.*]

C.B. did, in answer thereto, deny [*insert the denial and any other necessary matters contained in the answer*]. Whereupon the said *A.B.* denied that [*here insert the substance of the replication, if any, and so on for the further statements if any*].

Therefore let a jury come.

No. 12.—*Petition for Alimony.*

To the Judge Ordinary of Her Majesty's Court for Divorce and Matrimonial Causes.

C.B. v. A.B.

The day of 18 .

The petition of *C.B.*, the lawful wife of *A.B.*, sheweth,—

1. That the said *A.B.* has for many years carried on the business of at , and from such business derives the net annual income of £ ;
2. That the said *A.B.* holds shares of the Railway Company, amounting in value to £ , and yielding a clear annual dividend to him of £ ;
3. That the said *A.B.* is possessed of stock-in-trade in his said business of to the value of £

[*And so on for any other faculties which the husband may possess.*]

Your Petitioner therefore humbly prays,—

That your Lordship will be pleased to decree her such sum or sums of money by way of Alimony pendente lite [or permanent alimony] as to your Lordship shall seem meet.

And your Petitioner will ever pray, &c.

No. 13.—*Form of Application under Sect. 21.*

To the Judge Ordinary of the Court for Divorce and Matrimonial Causes.

The application of *C.B.* of _____, the lawful wife of *A.B.*, sheweth,—
 That on the _____ day of _____ she was lawfully married to *A.B.*, at _____ :
 That she lived and cohabited with the said *A.B.* for _____ years at _____ : and also
 at _____, and hath had _____ children, issue of her said marriage, of whom
 _____ are now living with the applicant, and wholly dependent upon her earnings :
 That on or about _____ the said *A.B.*, without any reasonable cause, deserted this applicant,
 and hath ever since remained separate and apart from her :
 That since the desertion of her said husband this applicant hath maintained herself by her own industry
 [or on her own property, as the case may be], and hath thereby and otherwise acquired certain property,
 consisting of [here state generally the nature of the property].
 Wherefore she prays an Order for the protection of her earnings and property acquired since the
 said _____ day of _____, from the said *A.B.*, and from all creditors and persons claiming
 under him.

No. 14.—*Petition for Reversal of Decree.*

To the Judge Ordinary of Her Majesty's Court for Divorce and Matrimonial Causes.

The _____ day of _____ 18 _____.

The petition of *A.B.*, of _____, sheweth,—

1. That your Petitioner was on the _____ day of _____ lawfully married to _____ :
 2. That on the _____ day of _____ your Lordship, at the petition of _____, pronounced
 a decree affecting this Petitioner, to the effect following; to wit :

[Here set out the decree.]

3. That such decree was obtained in the absence of your Petitioner, who was then residing at _____.

[State facts tending to shew that the Petitioner did not know of the proceedings; and further, that
 had he known he might have offered a sufficient defence.]

or
 That there was reasonable ground for your Petitioner leaving his said wife, for that his said wife

[Here state any legal grounds justifying the Petitioner's separation from his wife.]

Your Petitioner therefore humbly prays,
 That Your Lordship will be pleased to reverse the said decree.
 And Your Petitioner will ever pray, &c.

TABLE OF FEES.

	£.	s.	d.		£.	s.	d.
On every citation	0	5	0	If the hearing or trial continues more than one day, for each day:			
On entering appearance	0	2	6	From the plaintiff	0	10	0
Filing a petition	0	5	0	From the defendant or defendants	0	10	0
Filing an answer	0	5	0	Producing the Judge's notes	0	5	0
Filing a reply	0	5	0	Bill of exceptions signed by the Judge	0	5	0
Filing any further replication to a petition	0	5	0	Entering on the record the finding of the Jury or the decision of the Judge	0	5	0
Filing application for an order for the protection of a wife's earnings and property	0	5	0	On every subpoena	0	2	6
Filing application for discharge of such order	0	5	0	On a certificate under the hand of a Judge	0	2	6
Filing interrogatories	0	5	0	On every commission issuing under seal of the Court	1	0	0
Filing answer of each deponent to interrogatories	0	5	0	Writ of attachment	0	7	6
On every motion by counsel, inclusive of filing the case for motion	0	5	0	Writ of sequestration	1	0	0
Entering order of the Court on motion	0	5	0	On lodging instrument of appeal	0	10	0
Summons to attend in chambers	0	2	6	Search in Court Books, if within the last two years	0	1	0
For entering order of Court on summons	0	2	6	If at an earlier period than within two years	0	2	0
Filing notice	0	1	0	In case the Court Books to be searched or the documents required are not in the Registry, in addition to the above	0	2	6
On depositing the record	1	0	0	Filing and entry of remission of appeal	0	10	0
For the settling of the record by one of the registrars	1	0	0	Filing exhibits, not exceeding ten, for each exhibit	0	1	0
Setting a cause down for hearing or trial	0	5	0	Exceeding ten, but not exceeding twenty	0	10	0
Entering sentence or final decree in a cause	0	10	0	Exceeding twenty, but not exceeding fifty	0	15	0
Entering special verdict, if five folios of seventy-two words or under	0	2	6	If exceeding fifty	1	0	0
If exceeding five folios, per folio of seventy-two words	0	0	6	Office copies of minutes, orders, or decrees, Judge's notes or other documents filed in a cause:			
Entering a decree or order in pursuance of a written judgment from the Judge of an Ecclesiastical Court	0	10	0	If five folios of seventy-two words or under	0	2	6
Entering any decree or order for alimony	0	5	0	If exceeding five folios of seventy-two words, per folio	0	0	6
Entering order directing how damages shall be applied	0	5	0	In case the same are under seal of the Court, in addition for the seal	0	5	0
Entering order providing for custody, maintenance, or education of children, if two folios of seventy-two words or under	0	5	0	Filing every affidavit or other document brought into Court or deposited in the Registry for filing which no fee is before specified	0	2	6
Entering order for the settlement of the wife's property, if two folios of seventy-two words or under	0	5	0	Taxing every bill of costs:			
If either of the above orders exceed five folios, for each additional folio	0	2	0	If three folios of seventy-two words or under	0	2	6
Entering any minute, order, or decree in the Court Book other than the decrees or orders before specified	0	2	6	If exceeding three folios of seventy-two words			
On withdrawal of a cause after same is set down for hearing, to be paid by the party at whose instance it is withdrawn	0	5	0	When taxed as between party and party, per folio	0	0	6
On the hearing or trial of a cause:				When taxed as between practitioner and client, per folio	0	1	0
From the plaintiff	1	0	0	For administering oaths to each deponent	0	1	0
From the defendant or defendants	0	15	0	Examiner appointed to take evidence under a commission for examination of witnesses, for each day's attendance, besides travelling expenses...	3	3	0

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FURTHER RULES AND ORDERS

MADE UNDER

The Provisions of 20 & 21 Vict. c. 77. and 21 & 22 Vict. c. 95.

Dated the 9th of October 1858.

(SIGNED) CHELMSFORD, C.
W. ERLE.
C. CRESSWELL.

IN NON-CONTENTIOUS BUSINESS.

Affidavits.

1. In every case where an affidavit is required from a subscribing witness to a will or codicil, such subscribing witness shall in such affidavit depose as to the mode in which the said will or codicil was executed and attested.

2. The draft oaths to lead grants of special or limited Probate or Administration, with or without the will annexed, are to be transmitted by the District Registrar to the Registrars of the Principal Registry, in order to their being settled, and no such special or limited grant is to issue until the draft oath to lead the same has been settled by a Registrar of the Principal Registry.

3. No affidavit will be admitted in any matter depending in the Court of Probate of which any material part is written on an erasure.

Administration Bonds.

4. Administration Bonds are to be attested by an officer of the Principal Registry, by a
NEW SERIES, XXVII—PROBATE.

District Registrar, or by a Commissioner or other person now or hereafter to be authorized to administer oaths under 20 & 21 Vict. c. 77. and 21 & 22 Vict. c. 95, but in no case are they to be attested by the proctor, solicitor, attorney, or agent of the party who executes them. The signature of the administrator or administratrix to such Bonds, if not taken in the Principal Registry, must be attested by the same person who administers the oath to such administrator or administratrix.

5. In all cases of limited or special administration two sureties are to be required to the administration bond, and the bond is to be given in double the amount of the property to be placed in the possession of or dealt with by the administrator by means of the grant. The alleged value of such property is to be verified by affidavit if required.

Citations.

6. The Registrars of the Principal Registry may, when it appears to them desirable, dispense with the insertion of citations and other instruments in full in the *London Gazette* and other public journals, in accordance with any Rules and Orders made under the provisions

of 20 & 21 Vict. c. 77. and 21 & 22 Vict. c. 95, and may direct that an abstract only of such citations and other instruments shall be published in the said *Gazette* and in the said other public journals. Such abstracts are to be published in a form to be settled by the Registrars, and so often and at such intervals as the Judge or the Registrars may direct.

7. In cases of persons dying intestate without any known relation, in addition to the notice to be given to Her Majesty's Procurator General or to the Solicitor for the Duchy of Lancaster in London, under Rule 62. of the Rules, Orders, and Instructions to the Registrars of the Principal Registry, or Rule 81. of the Rules, Orders, and Instructions for the District Registrars, advertisements for the next-of-kin of the intestate are to be inserted in such of the leading morning and evening London newspapers, and such local newspapers, and so often, and at such intervals, as the Judge or the Registrars of the Principal Registry may direct.

8. Rule 58. of the Rules, Orders, and Instructions for the Registrars of the Principal Registry shall apply to all citations.

Office Copies.

9. Office copies of wills and other documents furnished in the Principal or District Registries will not be collated with the original will or other document from which the same are copied unless specially required. Every copy so required to be examined shall be certified under the hand of one of the Principal Registrars or of a District Registrar to be an Examined Copy.

Caveats.

10. When a caveat has been entered and subsequently warned, and such warning re-

sults in the commencement of contentious proceedings, the expenses of the entry of such caveat and the warning thereof shall, upon taxation, be considered as costs in the cause.

11. When a caveat has been entered in the Principal Registry, and notice thereof has been given to a District Registrar, he shall not proceed with the grant of Probate or Administration to which it relates until he receives notice from the Principal Registry that the caveat has been withdrawn, or that the proceedings consequent thereon have terminated, and a final decree has been made therein.

12. The warning to a caveat is to state the name and interest of the party on whose behalf the same is issued, and if such person claims under a will or codicil, is also to state the date of such will or codicil. A form is annexed hereto which is to be followed so far as the circumstances of each case will allow.

13. Upon the issuing of a citation under seal of the Court a caveat shall be entered in the Court books against any grant being made in respect of the estate and effects of the deceased to which such citation relates, and notice thereof shall be sent to the Registrar of any District in which the deceased appears to have resided at the time of his death, and such caveat shall remain in force until the proceedings following on such citation are terminated.

Revocation of Grants.

14. No grant of Probate or Letters of Administration is to be revoked by a District Registrar even with consent of parties interested. All applications for such revocation of grants are to be made to the Principal Registry.

IN CONTENTIOUS BUSINESS.

15. If contentious proceedings arise from the service of a citation, the expense of the citation and service thereof shall, upon taxation, be considered as costs in the cause.

16. The entry of every appearance to a citation or to a warning to a caveat shall hereafter be made in the Principal Registry.

17. The words "or of a Registrar of the Principal Registry" are to be added at the end of Rule 74. of the Rules, Orders, and Instructions heretofore issued for the District Registrars.

18. No cause is to be called on for hearing or trial until after the expiration of ten days from the day when the same has been set down as ready for hearing or trial, and notice thereof has been given, save with consent of all parties to the suit.

19. In Testamentary causes the Plaintiff and Defendant, within eight days of the entry of an appearance on the part of the Defendant, are respectively to file their affidavits as to scripts.

20. No party to the cause, nor his or her proctor, solicitor, or attorney, shall be at liberty, except by leave of the Judge, or of one of the Registrars of the Principal Registry, to inspect the affidavits as to scripts, or the scripts or exhibits annexed thereto, filed by any other party to the cause, until his own affidavit as to scripts shall have been filed.

21. The plaintiff shall not be compelled to deliver his declaration to the Defendant, or to file a copy thereof, until the expiration of eight days after the Defendant has filed his affidavit as to scripts.

22. In all causes relating to grants of probate or letters of administration, it shall be competent to the Defendant, on the day upon which

an appearance is entered by him or on his behalf, or on the day upon which he receives from the Plaintiff the declaration in the cause or within three days thereafter, to notify to the Plaintiff in writing the object for which he has so entered his appearance, and in such notice to set forth that he admits the validity of the will; or the intestacy of the deceased, and the relationship claimed by the Plaintiff to the deceased; and demand to be heard on petition in respect of some other matter to be therein stated. The Plaintiff shall, upon receiving such written notice, unless otherwise ordered by the Judge, within eight days, file his act on petition. In case he shall fail to do so, the Defendant shall be at liberty to file his act on petition, and the cause shall be heard by affidavit, unless the Judge shall direct otherwise.

23. In order to prevent the time limited for bringing in declarations, pleas, and other pleadings and proceedings from expiring before application can be made to the Judge for an extension thereof, any one of the Registrars of the Principal Registry may, upon reasonable cause being shewn, extend the time for bringing in such declaration, plea, or other pleading or proceeding, provided that such time shall in no case be extended beyond the day upon which the Judge shall next sit in open Court or in Chambers.

24. A receiver of real estate pending suit is to give bond in the form annexed to these Rules and Orders, or in a form as near thereto as the circumstances of the case will admit of, with two sureties, and in a penalty of such an amount as may be directed by the Judge.

Taxing Bills of Costs.

25. When an appointment has been made by a Registrar of the Principal Registry for

taxing any bill of costs, and one party only attends at the time appointed, the Registrar may nevertheless proceed to tax the bill after the expiration of a quarter of an hour, upon being satisfied by affidavit that the other party had due notice of the time appointed.

26. If more than one sixth is deducted from any bill of costs taxed as between party and party, or as between practitioner and client, no costs incurred in the taxation thereof shall be allowed as part of such bill.

RULES AS TO SUMMONSES.

1. A summons may be taken out by any person in any matter, whether contentious or non-contentious.

2. A printed form must be obtained and filled up with the object of the summons, and a half-crown stamp affixed. It must then be taken to the Clerk of the Papers, who will fill the blank left in the printed form for the time when the summons is to be made returnable, and get the summons signed by a Registrar.

3. The Clerk of the Papers is then to enter the name of the cause or matter and of the agent taking out the summons in a book to be called the Summons Book, and return the summons (with the stamp obliterated), signed, to the applicant, who is to serve a copy on the opposite party. This copy (except in cases where the consent of the party to be served has been obtained and indorsed on the summons) must be served on the opposite party one clear day at least before the summons is returnable, and before 7 p.m. On Saturdays the copy of the summons is to be served before 2 p.m.

4. On the day and at the hour named in the summons the party issuing the same is to present himself with the original at the Judge's Chambers.

5. Both parties will be heard by the Judge, who will make such order as he may think fit,

and a note of such order will be made by the Registrar in the Summons Book.

6. If the party summoned do not appear after the lapse of half an hour from the time named in the summons, the other party shall be at liberty to go before the Judge, who will thereupon make such order as he may think fit.

7. An attendance on behalf of the party summoned for the space of half an hour, if the other party do not during such time appear, will be deemed sufficient, and bar the party taking out the summons from the right to go before the Judge on that occasion.

8. If a formal order is desired, the same may be had on the application of either party, and for that purpose the original summons, or the copy served on the opposite party, must be filed in the Registry. An order will thereupon be drawn up, and delivered to the person filing such summons or copy. The Clerk of the Papers before giving out the order is to see that a half-crown stamp has been affixed to it and is to obliterate such stamp.

9. If a summons is brought to the Clerk of the Papers, with a consent, signed by the party summoned, or his proctor, solicitor, or attorney, indorsed thereon, an order will be drawn up without the necessity of going before the Judge: Provided that the order sought is in the opinion of the Registrar one which the Judge, under the circumstances, would make.

FORM OF WARNING TO A CAVEAT.

In Her Majesty's Court of Probate.

The Principal Registry

or

The District Registry at

To *A.B.* of
having interest].[or to *C.D.* of

Proctor, Solicitor, or Attorney of parties

You are hereby warned within six days after the service of this warning upon you, inclusive of the day of such service (but exclusive of Sunday) to enter an appearance, or cause an appearance to be entered for you in the Principal Registry of the said Court of Probate, to the caveat in the personal estate and effects of *E.F.* late of deceased, who died at on or about the day of 18, and to set forth your [or your client's] interest : And take notice that in default of your so doing the said Court will proceed to do all such acts, matters, and things as shall be needful and necessary to be done in and about the premises.

(Signed) *X.Y.*, Registrar,

or

District Registrar.

Issued at the instance of *R.S.* of the
[here set forth what interest *R.S.* has,
and if under a Will or Codicil set forth
the date thereof].

 FORM OF BOND TO BE EXECUTED BY A RECEIVER OF REAL ESTATE
PENDING SUIT.

Know all men by these presents, that we *A.B.* of &c., *C.D.* of &c., and *E.F.* of &c., are jointly and severally bound unto the Right Honourable Sir Cresswell Cresswell, Knight, the Judge of Her Majesty's Court of Probate, in the sum of pounds, of good and lawful money of Great Britain, to be paid to the said Right Honourable Sir Cresswell Cresswell, or to the Judge of the said Court for the time being, for which payment well and truly to be made we bind ourselves and every of us for the whole, our heirs, executors, and administrators, firmly by these presents. Sealed with our seals. Dated the day of in the year of our Lord one thousand eight hundred and fifty

Whereas *G.H.* late of &c., died on the day of 18, having, as asserted, made and duly executed { his } last will and testament, with codicil thereto, bearing date respectively the [here insert dates of the testamentary papers]. And whereas there is now pending in judgment in Her Majesty's Court of Probate a certain cause or suit instituted by *I.J.* as one of the executors named in the said will, against *K.L.* the natural and lawful and only next-of-kin of the said deceased, touching and concerning the validity of the said will and codicil, in which said cause or suit *M.N.*, as the heir-at-law of the said *G.H.*, has been cited to see proceedings, and has entered an appearance, and become a party to the said cause or suit. And whereas the Right Honourable Sir Cresswell Cresswell, the Judge aforesaid, did, on the day of 185, after hearing counsel for and on behalf of all parties to the said cause or suit, appoint the above-bounden *A.B.* as and to be receiver of the real estate of the said *G.H.* pending the said cause or suit.

Now the condition of this obligation is such, that if the above-bounden *A.B.*, the receiver of the real estate of the said *G.H.* pending the aforesaid cause or suit, do, when lawfully called on, in that behalf, make a true and perfect inventory of all the rents, issues, and profits of the said real estate which have or shall come to his hands, possession, or knowledge, or into the hands, possession, or knowledge of any other person for him, and the same so made do exhibit, or cause to be exhibited, into the Principal Registry of Her Majesty's Court of Probate, whenever required by law so to do, and the same rents, issues, and profits do well and truly pay and appropriate according to law; that is to say, in payment and satisfaction of all charges and expenses which are or may be or become legally charged upon and payable out of the said rents, issues, and profits and in the letting and managing the said real estate, and in performing other the duties committed to him by the Judge aforesaid; and further, do make or cause to be made a true and just account of his administration of the said rents, issues, and profits, whenever required by law so to do, and all the rest and residue of the said rents, issues, and profits do deliver and pay unto such person or persons as shall be entitled thereto, subject to and under the direction of the said Court, then this obligation to be void and of none effect, or else to remain in full force and virtue.

Signed, sealed, and delivered by the within-named _____ in
the presence of *P.Q.* a Clerk in the principal Registry, or a
Commissioner or Surrogate authorized to administer Oaths
in the Court of Probate.

REPORTS
OF
CASES ARGUED AND DETERMINED
IN THE
Court of Probate,
AND THE COURT FOR
Divorce and Matrimonial Causes.

BY
GEORGE HENRY COOPER, Esq. BARRISTER-AT-LAW.

AND IN THE
House of Lords,
ON APPEALS FROM THOSE COURTS,
BY
WILLIAM WAKEFORD ATTREE, Esq. BARRISTER-AT-LAW.

HILARY TERM TO MICHAELMAS TERM, 1858.

HER MAJESTY'S COURT OF PROBATE was opened on the 12th of January A.D. 1858, there being a very numerous attendance of the Bar of Doctors' Commons as well as of that of Westminster Hall.

Sir CRESSWELL CRESSWELL entered the court, accompanied by two of the Registrars, one of whom, Dr. Bayford, read the Royal Letters Patent, appointing him Judge of the Court of Probate.

THE QUEEN'S ADVOCATE then addressed the learned Judge as follows :—My Lord,—In the name and on behalf of the Bar, whose organ I am, and whose numerous attendance testifies its concurrence in the observations I am about to offer, I beg to tender you our most sincere and hearty congratulations upon your assumption of the office of Judge of the Court of Probate and of the Court for Divorce and Matrimonial Causes. Believe me, my Lord, we esteem ourselves most fortunate in finding ourselves under the guidance of a Judge of such long experience and of such distinguished ability as your Lordship, and of one who is still in the full vigour of his mental and physical powers. For that particular branch of the profession to which I have the honour to belong, I can sincerely say, that, although we look back to the past with some emotions of natural regret and of honest pride, we look forward to the future with hope and confidence. Removed, as we have been, somewhat unexpectedly (not, as we are well aware, by your Lordship's desire), from our ancient habitation, we still find ourselves at home under the shadow of that ancient hall which has so long been dedicated to English law and justice; and I trust we may say with the fugitives of old, "*Non erimus regno indecora.*" We are deeply conscious that in a new court, with a new procedure, we have much to learn; but we trust we have also something to impart. We shall gladly welcome our friends who belong to the other branches of the profession, and we have no doubt that we shall be received by them with courteous hospitality, when, in the exercise of the extended rights which have been conferred upon us, we practise in their courts. I trust we shall all work cordially and harmoniously together for the purpose of carrying to a successful issue the great experiment in jurisprudence which has wisely been entrusted to your Lordship's experienced hands, and of lightening, as far as we can, the serious weight of labour which has been cast on you. I need hardly say, that in Doctors' Commons the most entire confidence has ever prevailed in the intercourse between the Bench and the Bar; and I trust that a similar feeling may soon take root and may long flourish here between your Lordship and that profession in whose name I most heartily and cordially bid you welcome.

Sir CRESSWELL CRESSWELL.—I return you and those gentlemen on whose behalf you have addressed me my most cordial thanks for the kindness with which you have received me. I assure you unfeignedly that I stand much in need of some such encouragement as you have given me, for I cannot take my seat in this court without feeling many anxious fears lest I should prove unequal to the discharge of the duties which I have taken upon myself. I am now fully assured of the kind feeling of the Bar. I also place the utmost confidence in their learning and honour; and I am sure that their learning will supply me with the information which is necessary to enable me to discharge my duties, and that their honour will prevent them from attempting to use their learning as a means of misleading me. You have alluded to the long experience I have had in Westminster Hall, and to the interest manifested by the large attendance of the Bar on this occasion. If I have had the good fortune to acquire their goodwill and esteem in the exercise of my judicial office, I can only ascribe it to their doing me the justice to believe that I have ever been animated by an earnest desire to hold the scales equally between all men, to shew no preference or personal feeling, but to deal even-handed justice to every one. I hope I may, without presumption, promise that, during the rest of my judicial career, I shall pursue the same course, and happy shall I be if, at the conclusion of the few years during which I shall hold my present office, I shall be able to carry with me the same good feeling which has been expressed towards me to-day.

CASES ARGUED AND DETERMINED

IN THE

Court of Probate,

AND THE COURT FOR

Divorce and Matrimonial Causes.

COMMENCING WITH

HILARY TERM, 21 VICTORIÆ.

PROBATE. }
1858. }
Jan. 20. }

DRAKE AND ANOTHER v.
MORGAN.

Practice—Staying Proceedings in Suit transferred from the late Prerogative Court—Motions in Court—Counsel.

A motion by the heir-at-law, the defendant in a suit, in the late Prerogative Court, of proving in solemn form a will, to stay publication of evidence taken in that court and an ejectment commenced by him, and to quash the suit, with the view to a fresh suit in this court for trial by a jury of the question of the intestacy of the testator, both as to real and personal estate, refused; the Court of Probate having no power either to stay the ejectment or to decline hearing the cause.

All motions before the Court must be made by counsel.

This was a cause, transferred from the late Prerogative Court of Canterbury, of proving in solemn form of law the will of J. A. Partridge, who died in 1857, leaving a will purporting to dispose of real and personal estate. The will was propounded by Drake and Hitchcock, the executors, and opposed by Morgan, one of the next-of-kin of the testator, on the ground that

it had been improperly obtained. Several witnesses had been examined on both sides in the Prerogative Court, and the defendant stood assigned to give in his personal answers to the responsive allegations which had been given in on behalf of the executors. The defendant, being also heir-at-law, had commenced an action of ejectment in the Queen's Bench, which stood for trial at the Sittings after Hilary term. At this stage of the cause the Order in Council establishing the new Court of Probate was issued, and the solicitor for the defendant then proposed that the executors should consent that the proceedings already taken in the Prerogative Court should be abandoned, and that the cause should be commenced *de novo* in the Court of Probate; so that the validity of the will might be tried before a jury, and the action of ejectment rendered unnecessary, as the defendant, being also heir-at-law, would have been bound by the proceedings. The executors refused to consent.

Dr. Deane now moved on behalf of the defendant,—First, that his answers to the responsive allegations should not be required. Secondly, that publication of the evidence taken in the Prerogative Court should not be allowed to pass.

Thirdly, that all further proceedings in the cause and in the action of ejectment should be stayed. Fourthly, that a suit should be instituted in this court, in which the witnesses should be examined *vid voce* before a jury, and the intestacy of the testator, both as to the real and personal estate, tried.

The Queen's Advocate (Dr. Spinks with him) opposed the motion.

SIR C. CRESSWELL.—I have no power to grant any part of this motion. By section 84. of the 20 & 21 Vict. c. 77. all pending suits are transferred to this Court; but the statute does not give me an arbitrary power to go on with them or quash them. I have no power to say I will not hear this case; it has been transferred, and I am bound to go on and decide it. There is a discretion as to the form of the proceedings after the transfer has taken place. Notice has been given, that where witnesses have been examined before transfer, the course of proceedings observed in the late Prerogative Court will be adopted here. That notice is applicable to the present case. The case having proceeded so far, it would be most inconvenient to mix up two kinds of proceedings. As to staying the action of ejectment, I have no power to issue an injunction to the Court of Queen's Bench to stay that action. The party who has commenced it is *dominus litis*, and may go on with it if he pleases. As to not calling for the answers of the defendant, I see no reason why the usual course should not be pursued. As to the publication of the evidence, it is said that might increase the expense of trying the ejectment, but that is not a ground upon which this Court can act. The motion must be refused *in toto*, with costs.

Motion refused, with costs.

Pritchard, the proctor for the plaintiffs (according to the practice of the Prerogative Court), then prayed that publication of the evidence might pass.

SIR C. CRESSWELL.—To save unnecessary expense, I shall be ready to hear at chambers any motions which can be made by proctors; but now that the Court is sitting in Westminster Hall, it will be as

well that it should conform to the practice of the other Courts, and that all motions which must be made in court should be made by counsel.

MATRIMONIAL. } *Ex parte* ———.
1858—Jan. 23. }

Divorce—Practice—Adulterer Co-respondent to the Petition for Dissolution of Marriage—Special Grounds—20 & 21 Vict. c. 85. s. 28.

The recovery of damages in an action of crim. con. by a husband does not constitute a special ground within the meaning of s. 28. of the 20 & 21 Vict. c. 85, on which he will be excused from making the alleged adulterer a co-respondent to a petition for the dissolution of his marriage.

Pulling, on behalf of a husband, whose name he did not mention, applied for leave to present a petition for the dissolution of his marriage on account of the adultery of his wife, without making the alleged adulterer a co-respondent.—The husband had recovered damages in an action of crim. con., and this fact would, he submitted, constitute a special ground within the meaning of the 28th section of the 20 & 21 Vict. c. 85, on which he should be excused from making the alleged adulterer a co-respondent.

CRESSWELL, J.O.—I think that no special grounds within the meaning of the 28th section are shewn.

Application refused.

PROBATE. } *In the goods of W. T. NORRIS*
1858. } *(deceased).*
Jan. 28. }

Administration—Practice—Presumption of Death—Advertisement.

N, intending to come to England, sailed on the 1st of July 1856 from New Zealand in a ship bound for Sydney. The ship never arrived at Sydney, nor was anything ever heard of her or the crew after she set sail. Some heavy gales having occurred at

the time she would have been on her voyage and in her direct course, it was supposed she had foundered with all hands. Advertisements had not been inserted in the newspapers for information concerning N:—Held, that, under the above circumstances, as N.'s history was traced up to a certain point, and he was then lost sight of, advertisements were unnecessary, and that his death was to be presumed.

W. T. Norris settled in New Zealand in 1855. In December 1855 he became entitled to 20,000*l.* His father wrote to him from England informing him of this, and received in answer a letter from New Zealand, dated the 13th of May 1856, stating that he should return to England as soon as he could, and inclosing a power of attorney, authorizing the father to receive 3,000*l.*, and directing him to send it to him in New Zealand. In November 1856 a letter of credit for 3,000*l.* and a letter of advice were sent to him, both which had since been sent back to England by his agent. On the 1st of July 1856 he sailed from New Zealand for Sydney in the *Wyvern* on his way to England, and in due course would have arrived at Sydney about the 1st of August 1856. Neither ship nor crew having been heard of since she sailed from New Zealand, it was supposed she had been lost in a heavy gale that occurred in July 1856, which other vessels on the same voyage had encountered. Inquiries had been made in Australia about him, and notices inserted in the Australian and New Zealand papers. The *Wyvern* belonged to Sydney, and was the property of a merchant at Melbourne, but it could not be ascertained that he had any agent here, or that the ship was insured at Lloyd's, where no information of her had been received in December 1857.

The father of W. T. Norris, the London correspondent of his banker in New Zealand, and a solicitor, who had made inquiries at Lloyd's, deposed to the above facts.

Dr. Phillimore moved that a grant of letters of administration of the effects of W. T. Norris, as having died intestate on or since the 1st of July 1856, should be decreed to his father. According to the practice of the Prerogative Court, before

making such an application, it had been usual to require that advertisements for the person supposed to be dead should be inserted in the newspapers, but it was considered that the circumstances of this case rendered that course unnecessary.

SIR C. CRESSWELL.—Advertisements are very well when nothing has been heard for a long time of the person supposed to be dead. But here, as you trace the history of the deceased up to a certain time, and then lose sight of him in the manner stated, I think they may be dispensed with. There can be no reasonable doubt that he died at that time, and therefore administration may go.

Motion granted.

PROBATE. } *In the goods of ANDREW MAIN*
1858. } *(deceased).*
Jan. 28. }

Administration—Practice—Presumption of Death.

On the 27th of January 1857, M, master of the ship B, sailed in her from L. for V, the average duration of the voyage being ten weeks. The ship never arrived at V, and nothing having been heard or seen of her or any of her crew since she sailed from L, the underwriters had paid as for a total loss of the ship:—Held, that the death of M. in or since January 1857, might be presumed.

A. Main, master and part-owner of the ship *Brévet* of Liverpool, sailed thence for Valparaiso on the 27th of January 1857. The ship never reached Valparaiso; nor had she been spoken or heard of; nor had any of the crew been seen or heard of since she sailed. The underwriters had paid as upon a total loss, it being supposed that she had been lost with all hands.

These facts were deposed to by one of the part-owners of the ship, and by the ship's husband.

Dr. Phillimore moved that a grant of administration of the effects of A. Main, as having died in or since January 1857, should be decreed to W, one of his next-of-kin. He stated that the average duration of the

voyage from Liverpool to Valparaiso was about ten weeks.

SIR C. CRESSWELL.—Payment by the underwriters of the amount insured is very strong evidence in support of the motion.

Motion granted.

PROBATE. } In the goods of WILLIAM FRITH
1858. } (deceased).
Jan. 28. }

Will—Attestation—Guiding the Hand.

The hand of L, one of the attesting witnesses to a will, who was unable to write, was, at his request, held and guided by the other witness, and so L's name was subscribed:—Held, that the will was duly attested and subscribed by L. under section 9. of the Wills Act.

W. Frith died in October 1857, leaving a will, bearing date the 22nd of that month. In consequence of some informality in the execution of the will, an affidavit of due execution was required in the registry. From this affidavit it appeared that the hand of Lambert, one of the attesting witnesses, who was unable to write, had, at his request, been held and guided by the other attesting witness, and that thus Lambert's name had been subscribed.

This being the first time that probate of a will so attested had been applied for since the Wills Act came into operation, the Registrar had declined to grant it without the direction of the Court.

Dr. Robertson moved the Court to decree probate, on the authority of *Harrison v. Elvin* (1). In that case it was held, where one of the attesting witnesses guided the hand of the second who could not read or write, and in this way the name of the second witness was written, that the attestation was sufficient under section 9. of 7 Will. 4. & 1 Vict. c. 26.

SIR C. CRESSWELL.—I am perfectly satisfied with that authority.

Motion granted.

(1) 3 Q.B. Rep. 117; s. c. 11 Law J. Rep. (n.s.) Q.B. 197.

PROBATE. } In the goods of G. FRECKLETON
1858. } (deceased).
Jan. 28. }

Probate—Practice—20 & 21 Vict. c. 77. s. 87.

A testator died leaving personal estate, part being situate in the province of Canterbury, the residue in the diocese of Chester. A grant of probate was obtained from the Prerogative Court of Canterbury only, before the commencement of 20 & 21 Vict. c. 77:—Held, that by section 87. of that act such grant was rendered effectual with respect to the property in the diocese of Chester, without any order of the Court; such probate duty being payable as would have been chargeable on the diocesan probate.

G. Freckleton died at Cheltenham in November 1857, and in December his will was proved in the Prerogative Court of Canterbury by his executrix. The property was sworn under 7,000*l.*, on which sum 120*l.*, the full duty, was paid. It afterwards appeared that part of the personalty, consisting of shares in the Liverpool Exchange of the value of 540*l.*, was situate in the diocese of Chester, the residue, 5,775*l.*, being situate in the province of Canterbury. As to the 540*l.* the probate was ineffectual.

Dr. Deane moved the Court to confirm the probate. This may be done under the 85th, 86th and 87th sections of the 20 & 21 Vict. c. 77. No question affecting the revenue can arise; inasmuch as, if separate probates had been granted, the duty on the property situate in the province of Canterbury would have been 100*l.*, and that on the property in the diocese of Chester would have been 11*l.*, and it was usual to make a return of the duty when too much had been paid.

SIR C. CRESSWELL.—You do not want my assistance. The 86th section does not affect the question, but applies to grants of probate and administration void or voidable on the ground of error as to *bona notabilia*. The 87th section enacts that "legal grants of probate and administration made before the commencement of this act shall have the same force and effect as if they had been granted under this act." Here there

was a legal grant of probate, though it did not cover all the property, which by that section is made as extensive as if it had been granted by the Court of Probate. It is therefore unnecessary to make any special order confirming the probate. The act does it for you. As to the stamp duty: the executrix, but for the act, must have taken out probate in the diocese of Chester, and is by the 87th section expressly made liable for the duty which would have been chargeable on such probate.

No Order made.

PROBATE. }
1858. } *In the goods of S. H. LUDLOW*
Jan. 28. } *(deceased).*

Practice—Privilege of Counsel—20 & 21 Vict. c. 77. s. 40.

Semble—That a barrister, who has not been admitted an advocate in any ecclesiastical court, cannot practise as counsel in the Court of Probate in non-contentious matters.

On this case being called on—

H. T. Cole (of the common law bar) rose to move for a grant of letters of administration.

[*SIR C. CRESSWELL.*—Though I have known you elsewhere, Mr. Cole, I do not think I am authorized to know you here.]

Cole wished to make a few observations on that preliminary question. He submitted that, though he had never been admitted an advocate in an ecclesiastical court, he was entitled to be heard in the Court of Probate.

[*SIR C. CRESSWELL.*—It would be as well, before we proceed to discuss a question of such importance, that the matter should stand over for argument, as some gentleman might think proper to appear on behalf of the College of Civilians. By the 40th section of the 20 & 21 Vict. c. 77, a plain distinction is drawn between contentious and non-contentious matters, and unless you can make out that this is a "contentious matter," I think you are not entitled to be heard.]

Cole said he founded his right to be heard upon the common law of England.

[*SIR C. CRESSWELL.*—It would be as well that some day should be fixed for arguing the question in solemn form, notice being previously given to the College of Civilians.]

Cole said that he did not think his clients would wish to have the point argued, as this was but a small matter.

SIR C. CRESSWELL.—For the present I must decline to hear you. The matter may stand over.

Motion postponed.

PROBATE. }
1858. } *PERRY v. DYKE (executor).*
Jan. 28. }

Administration—Practice—Will—Incapacity.

By the will of J, who was at the time he made it of unsound mind, his personality was bequeathed to a charitable purpose in such terms as would give the Queen the disposition of it under her sign-manual. The Queen's proctor, having been cited to propound the will or shew cause why administration should not be granted to the next-of-kin as in case of an intestacy, did not appear. A copy of the original will, which had been lost, having been brought into the registry,—Held, that administration might go.

E. R. Jaques died on the 13th of January 1857, leaving a will, made in 1827, by which he directed that at his death all his money should be applied to the use of some charitable institution. The opinion of counsel had been taken as to the validity of the bequest, who had advised that the bequest was not void, but that the Crown might direct under its sign manual the mode of its application—*Morrice v. the Bishop of Durham* (1). *Perry*, one of the next-of-kin, thinking that the deceased was of unsound mind when he made the will, had, in July 1857, cited *Dyke*, the Queen's Proctor, as representing

(1) 9 Ves. 405.

the Crown, to propound the will or shew cause why administration should not be granted to him as in an intestacy. The Queen's Proctor had stated that he did not intend to appear to the citation.

The medical attendant of the deceased deposed that he, the deceased, from 1823 until his death, was imbecile and incapable of making a will, and that shortly after he made his will he had been placed in a lunatic asylum.

In another affidavit it was stated that the original will was lost soon after the death of the deceased, and the circumstances under which it was lost were stated.

Dr. Tristram moved for a grant of administration of the effects of the deceased, as having died intestate, to Perry, one of his next-of-kin, upon the usual security. — *In the Goods of Bourget, deceased* (2), is an authority for granting the motion. There Sir H. Jenner granted administration to the next-of-kin of a person who died insane and left a will marked with insanity; but directed the will to be filed in the registry, so that any person interested might propound it. A copy of the will, the original having been lost, will be left in the registry. The Queen's Proctor, the only person interested in supporting the will, has been cited.

SIR C. CRESSWELL.—On the authority of that case, I grant the motion.

Motion granted.

PROBATE. }
1858. } *In the goods of F. BEDWELL*
Feb. 15. } *(deceased).*

Administration — Practice — Affidavit sworn under Requisition of the Prerogative Court.

A requisition having issued to persons in New South Wales, under the seal of the Prerogative Court of Canterbury, to swear an administrator,—Held, that the Court of Probate might decree administration on an affidavit sworn under such requisition.

In July 1857 a requisition was issued, under the seal of the Prerogative Court of Canterbury, directed to the Governor of Sydney, his lieutenant-governor, or other competent Judge, to swear F. Garling, administrator, with the will annexed, of the goods of F. Bedwell, deceased. On the 9th of November 1857 Garling was sworn before a Judge of the Supreme Court of New South Wales. The requisition and affidavit of Garling had not been returned to this country in time to apply for letters of administration in the late Prerogative Court.

On application being made for a grant of letters of administration, under the seal of this Court, the Registrar declined to grant them, having some doubts whether the Court of Probate could act on an affidavit sworn under a requisition which had issued under the seal of the late Prerogative Court.

Dr. Deane (Jan. 28) moved the Court to decree letters of administration, with the will annexed, of the goods of F. Bedwell, deceased. The difficulty is in treating the affidavit of the extinct Court as an affidavit of this Court.

[SIR C. CRESSWELL.—How would the late Prerogative Court have acted in the case of an affidavit sworn before some person entitled to administer affidavits, but not specially authorized to do so by that Court?]

It would not have acted on an affidavit unless sworn before the Court, or under a requisition of the Court, or before a Commissioner.

[SIR C. CRESSWELL.—I am anxious that there should be no formal difficulties in the way of suitors, but I entertain some doubt whether I have the power to act on this affidavit. I must take time to consider the point, as it is an important one, for there are many similar cases.]

Cur. adv. vult.

SIR C. CRESSWELL now said that, on consideration, he had come to the conclusion that the affidavit was sufficient.

Motion granted.

PROBATE. }
 1858. } *In the goods of HENRIETTA JOHN-*
 Jan. 28. } *SON, WIDOW (deceased).*

Will—Double Probate—Executor substituted on Death of original Executor.

A. died, leaving a will, appointing B, C, D, and E. her executors, and directing that, in case B. should die, F. should be an executor in his place. All the executors proved the will. B. died, and F. applied that a double probate should be granted to him:—Held, on the authority of The goods of Lighton (1), that he was entitled to the grant, without the consent of the surviving executors, the will shewing a clear intention that he should, on B.'s death, succeed him as an executor.

Henrietta Johnson, a widow, died on the 24th of January 1856, leaving a will and one codicil duly executed, appointing John Blake, William Tyler, Joseph Roche, and William Blake, her executors. The will contained this clause:—"In case of the death of the said John Blake, then I nominate and appoint John Joseph Blake, of the city of Norwich, to be an executor in the place of the said John Blake."

On the 18th of March 1856, the four executors duly proved the will and codicil in the Prerogative Court of Canterbury. John Blake and William Gates have since died; John Blake leaving a will, of which he appointed his son, the said John Joseph Blake, sole executor, who duly proved it in September 1857. John Joseph Blake, in his affidavit, stated that the deceased derived the bulk of her property under the will of C. Mills, of which will the said John Blake was, at the time of his death, the sole surviving executor and trustee, and that the trusts of that will had now devolved upon John Joseph Blake, as the representative of John Blake; that he, from having been for many years in partnership with his father, had acquired a full knowledge of the affairs of the deceased and of C. Mills, and that on this account it was the intention of the testatrix that John Blake should act in the management of her affairs during

his life, and should be succeeded in such management, on his death, by John Joseph Blake.

The clause appointing the executors originally ran thus:—"And in case of the death of the said John Blake in my lifetime, then I nominate and appoint," &c., but the words "in my lifetime" were erased before the will was executed.

Dr. Addams moved the Court to decree a double probate of the will and codicil to be granted to the said John Joseph Blake, as the executor substituted in the said will of the testatrix in the place of the said John Blake, deceased. *In the goods of the Rev. Sir J. Lighton, Bart.* is an authority in favour of this motion. In that case a testator appointed two executors, and provided that, on the death of either, two others should be substituted; one of the executors only proved the will, and on his death probate was granted to one of the substituted executors, with the consent of the survivor of the original executors. The only difference between that case and the present is, that there the survivor of the original executors consented, but the right of the substituted executor, being derived from the will, could not be affected by such consent.

Dr. Twiss, for the surviving original executors.—There is a distinction between this case and the case cited. Here there is an outstanding grant and executors who are willing to act. In the case cited there was no one entitled to act under the original probate. It would be contrary to the policy of the Court of Probate to make a double grant.

SIR C. CRESSWELL.—In granting this motion, I proceed entirely on the case cited, and the construction of the will; I should be very unwilling to act upon any presumed policy of this Court. The case cited is a very strong one, as there were, in fact, two decisions: first, a decision of the Irish Court, and that was acted upon by the Judge of the Prerogative Court in this country. Here there is ample ground for coming to the conclusion that the testatrix intended that the gentleman who now asks for probate should succeed his father as her executor. His father was the trustee and executor of the person

(1) 1 Hag. Ec. 235.

under whose will she derived the bulk of her property, which came to her in a complicated state, and J. J. Blake, as his father's partner, had become conversant with the whole business. There is nothing to shew that the testatrix intended that the substitution should take place only in the event of J. Blake dying in her lifetime. I shall, therefore, grant probate as prayed.

Motion granted.

PROBATE. }
 1858. } LATHAM AND ANOTHER v.
 Jan. 28. } WOOLBERT.

Will—Incapacity—Undue Influence—Pleading—Relevancy of Allegation.

To an allegation propounding a will, dated the 7th of July 1857, by which a feme covert had exercised, in favour of her husband, a general power of appointment, a responsive allegation was given in which in the earlier articles pleaded the personal history of the deceased, her dislike to her husband in consequence of his ill-treatment, her wish to leave her property to her father, and that by the coercion of her husband she had been induced to execute previous wills in his favour. The 21st article alleged the testamentary incapacity of the deceased at the date of the will, and stated facts from which that inference might be drawn. The admission of this allegation being opposed,—Held, that as the 21st article pleaded facts bearing directly on the question of incompetency at the time the will was made, the former part of the allegation, which by itself would be inadmissible as irrelevant, was no longer immaterial, but that the facts stated in it might properly be taken into consideration in combination with those stated in the 21st article.

The question in this case was as to the admissibility of an allegation brought in by Woolbert.

The cause (transferred from the Prerogative Court of Canterbury to the Court of Probate) was one of granting letters of administration with the will, dated the 7th of July 1857, annexed, of Ann Caroline Latham, wife of Charles Thomas Latham,

deceased, instituted by Latham and Dee, the executors therein named, against Thomas Dedrich Woolbert, one of the executors named in another will of the deceased, dated the 10th of June 1857.

The executors Latham and Dee propounded the will of July 1857 in an allegation, which stated that the will was prepared according to her instructions, and was duly executed by her, she being at the time capable of giving instructions and of executing her will.

To this a responsive allegation was given in, on behalf of Woolbert, the admission of which was opposed.

It pleaded—That the deceased was the natural daughter of T. D. Woolbert, under whose protection her mother resided until 1822, when they went to reside with W. W. Clulow; that after the death of her mother the deceased continued to live with Clulow until his death; that Woolbert was in the habit of seeing her occasionally until 1848, when they always met on affectionate terms; that he lost sight of her in 1848, and did not see her again until June 1857; that Clulow died in 1855, leaving personal property to the amount of more than 8,000*l.*, upon trust, to pay the annual produce thereof to the deceased during her life for her own use and benefit, and after her death in trust for such persons as she should, whether covert or sole, by her will appoint. That the deceased in October 1855 married C. T. Latham, who in the following November induced her to make a will, by which she exercised her power of appointment under the will of Clulow, in his favour, subject to the payment of a small annuity to a servant, and appointed her husband and a friend of his, who was a stranger to her, her executors. That C. T. Latham after this treated deceased with unkindness, and kept her isolated from her friends; that she complained of this, and said she knew Latham had only married her for her money, and that she wished to live apart from him; that since he had got a will in his favour he treated her as he liked, and that she was determined to alter her will. That in January 1857 Latham obtained another will from her of the same tenour and effect as that of November 1855. That Latham continued to ill-treat her;

that she constantly complained of this ; told her friends that she was desirous to live apart from her husband, declared that he should not have her property, and that if she could not find out some relation she would make a will leaving the bulk of her property to a charitable institution. That she, being anxious to discover her father, consulted her medical man, who, through his own solicitor, one Brook, caused an advertisement to be inserted in the *Times* of May 1857, addressed to T. D. Woolbert, asking him to communicate with Brook, whose name was inserted in the advertisement that her husband might not discover that it emanated from her. That by means of this, T. D. Woolbert's address was discovered, that deceased called upon him, expressed pleasure at having found him, inquired about his children, complained of her husband's conduct, and asked how she could manage to live apart from him ; said that she had been induced by her husband to make a will in his favour, but that by reason of his conduct she wished to make alterations in it, and to provide for T. D. Woolbert and his family. That the deceased directed F. T. Woolbert, the son of her father, to make inquiries respecting the property to which she was entitled under the will of Clulow ; that she called on him and stated that in consequence of the ill-treatment of her husband she was anxious to make alterations in her will, and gave him instructions to prepare a new will for her. That he prepared a draft of a new will, which was engrossed and afterwards, on the 10th of June 1857, duly executed by her. That she afterwards alluded with satisfaction to having made this will, and stated that she had thereby provided for her father and his family and her servant, and expressed a desire to keep the fact from the knowledge of her husband. That from a short time after her marriage until her death, deceased was in a bad state of health and unable to bear excitement or resist undue influence. That her husband having become aware that she had executed the last-mentioned will, became angry and violent, and sent a note to the partner of F. T. Woolbert, who had prepared the will, requesting him to allow the bearer of it to see the draft of it. This

note was signed with the name of the deceased ; but the signature was in the handwriting of C. T. Latham. That he afterwards called with the order, and on being asked by F. T. Woolbert, admitted, with hesitation, that he was the husband of the deceased ; that he saw the draft, and then said that other wills would be made. That shortly after he returned home from this interview, he was heard talking in a violent tone to the deceased, and on her servant going into the room to ask about the dinner, deceased, who was crying, said, she hardly knew what she was about, and felt almost mad. That shortly after, on going into her bedroom, the deceased said that her husband insisted on her making another will. That she then went out with her husband, and, on her return home, told her servant she had been about a fresh will, and on being asked what she had done, said she did not know ; that it was her own wish to leave her property to her father and his family. That on the following day, the 13th of June, she again went out with her husband, and on her return said that he had taken her to sign some papers. That on that day she, with the daughters of her husband, called on a friend Mrs. Roe, and requested to see her alone, when she, in great grief, informed her that her husband had discovered that she had made a will, and had obliged her to make another ; that she did not know its contents, and though it was read over, she did not understand it. That on the 18th of June the servant, M. Castle, was sent by C. T. Latham to the Crystal Palace, though she had not asked to go ; that on her return she found the deceased very ill and low-spirited ; that she had been bleeding at the nose, to which she was subject on being excited. She then said that two strange gentlemen had been there about her will ; that she did not know what there was in it. That the deceased gave no instructions in reference to the two last testamentary papers, being a will and codicil, and that if executed by her, they were so executed at a time when her bodily health had become reduced, and when she was wholly under the power of her husband, and the execution of them was procured through his undue influence at a time when she was unable to resist the

same. That the deceased, after she had discovered her father, constantly spoke of her satisfaction thereat, and of her intention to benefit him and his family by her will ; and was in the habit of visiting him. That her husband, after he knew she had discovered her father, did all he could to prevent her visiting him, and never allowed her to leave the house, unless accompanied by himself or some of his family.

The 21st article was as follows :—

“That the said deceased was, on the 5th of July last, extremely ill and under the influence of delirium, brought on, in great measure, by the said C. T. Latham having, contrary to the express directions of her medical attendant, supplied her with spirits and water; that on the following day, the 6th, the said deceased was worse than on the previous day; that she, on that day, suffered greatly from sickness and vomited blood and bile, had a discharge from the uterus, and also a discharge of blood from the bowels; that she had also a nervous twitching of the hands, and was again under the influence of delirium, and in the evening of the said day was under the impression that there were devils in her room, when the said C. T. Latham had a candle brought into the room to endeavour to convince her to the contrary; that on the two following days, the 7th and 8th, the said deceased continued much in the same state as on the two previous days; that on the evening of the said 7th her medical attendant (who on his calling in the morning had been prevented seeing her by the said C. T. Latham sending word, contrary to the fact, that the deceased was asleep and could not be seen) was, in consequence of her having got worse, sent for, and on his seeing her found her quite unconscious and unable to answer questions put to her by him, the medical attendant, who, from her then state, expressed a wish that a physician should be called in, to which, however, the said C. T. Latham objected, on the ground that there was no necessity for it. And the party proponent further alleges and propounds, in contradiction to the allegation given in and admitted on the part of C. T. Latham and J. S. Dee, the other parties in this cause, that the deceased, on the said 5th, 6th, 7th and 8th days of July was incompetent to transact

any matter of business requiring thought, judgment and reflection.”

The allegation then stated, that on the 24th of August T. D. Woolbert, having heard of deceased's illness, and that a physician had been called in, went to the house of her husband, who at first told him she was not seriously ill, and refused to allow him to see her; that he insisted on seeing her, when he found her very ill; that she expressed great pleasure at seeing him; that deceased died on the 29th of August.

Jan. 20.—*Dr. Addams* and *Dr. Twiss* opposed the admission of the allegation.—It should be rejected *in toto*, for though all the averments in it were proved, the will of the 7th of July might still be valid. It is not sufficient, in order to invalidate a will, to shew that it was procured by undue influence, especially if that influence be marital; but the mental incapacity of the person making it must also be shewn. If so, all the earlier articles of the allegation must be rejected, as the circumstances stated in them are irrelevant to the question in issue. They, at most, set up a case of undue influence, without shewing mental incapacity. The 21st article must also be rejected, as it does not shew that the deceased was in a state of mental incapacity, but only that she was in a bad state of health. They cited—

Montefiore v. Montefiore, 2 Add. 354.

Marsh v. Tyrrell, 2 Hagg. Ec. 84.

Kinleside v. Harrison, 2 Phill. 449.

Williams v. Goude, 1 Hagg. Ec. 581.

Biddles v. Biddles, 3 Curtis, 467.

The Queen's Advocate and *Dr. Robinson*, contra.—The allegation is admissible. It is not necessary, in order to invalidate a will, procured from a person by undue influence, to shew that such person was labouring under mental incapacity at the time it was made: it is sufficient if it be shewn that, in consequence of the state of his bodily health, there was an inability to resist such undue influence—*Baker v. Batt* (1). The 21st article shews that the de-

(1) 1 Curtis, 125; s. c. on appeal, 2 Moore, P.C. 317.

ceased, at the time she made the will, was in such a weakened state of health, that she was unable to resist the undue influence of her husband; and consequently the earlier articles, which state circumstances tending to shew that there was undue influence, though taken by themselves they might be inadmissible, are not irrelevant, and cannot be rejected. They also cited *Mynn v. Robinson* (2).

Cur. adv. vult.

SIR C. CRESSWELL now said—In this case I have been called upon to decide whether an allegation brought in by T. D. Woolbert is admissible or not. On the 16th of November Latham and Dee brought in an allegation, propounding a will as the last will and testament of Ann Caroline Latham, deceased, wife of Charles Thomas Latham, which was alleged in the ordinary form to have been prepared according to her instructions, and to have been duly executed by her on the 7th of July 1857, she being at the time capable of giving instructions and of executing her will, or doing any other act requiring thought, judgment and reflection. In answer to this, the allegation, consisting of twenty-four articles, was brought in by Woolbert, on the 9th of December, and its admission opposed. The question was argued last week, when it appeared that the opposition was not to the form of any of the articles, but was general to the whole allegation, as not giving any answer to the case made in support of the will. The earlier articles of the allegation contain the personal history of the deceased Ann Caroline Latham, shewing that she was the natural daughter of T. D. Woolbert; that, in 1822, she and her mother went to live with a person named Clulow; that, in 1848, she and her father occasionally met, and always on affectionate terms; but that from 1848 they lost sight of each other; that, in 1855 Mr. Clulow died, having made a will, whereby he bequeathed property to a considerable amount to the deceased; that, in October, 1855, she intermarried with Charles Thomas Latham, and that he procured her to make a will, and that he afterwards treated her with great

unkindness, which induced her, in 1857, to endeavour to discover her father, which she succeeded in doing by means of an advertisement in the *Times* newspaper. Several articles then followed, alleging that she made a will, leaving to her father an annuity of 100*l.*, legacies to some other persons, and making her brother Frederick T. Woolbert residuary legatee; that she afterwards made another will and codicil under the coercion of her husband in the month of June. Now, all this has no direct bearing on the question whether the will propounded, of the 7th of July, was the will of Ann Caroline Latham, executed by her when in the possession of capacity to do so. It might be perfectly true that her husband prevailed upon her to make a will, and afterwards treated her with unkindness; that she afterwards discovered her father, and made a will, leaving legacies to him and others; that by the undue influence of her husband she was induced to make another will and codicil in June; and yet it would not follow that she had not testamentary capacity to make another will in July, and that the will propounded by the husband was not a valid will; and if the allegation had gone no further, I should have considered that it was inadmissible. But the 21st article is directed to the will now in question: it is as follows:—[His Lordship here read the 21st article.]—That therefore alleges, not that the deceased was induced to execute it by coercion, or under the undue influence of her husband, but that she was at the time incompetent to transact any matter of business requiring thought, judgment, and reflection. It appears that, according to the rules of pleading which prevailed in the ecclesiastical court, a bare denial of capacity would not be allowed; it was necessary to allege some facts from which an inference to the effect of a positive denial might be drawn. It seems to me, however, that the facts stated in the twenty-first article bear directly on the question of competency or incompetency at the time when the will was executed; and had they been given in evidence on an issue to try that question before a jury, the Judge could not, with propriety, have withdrawn them from their consideration. Having then evidence bearing directly on the question, the former

part of the allegation is no longer immaterial, and the facts therein stated may, with propriety, be taken into consideration in combination with those contained in the twenty-first article. I say nothing as to the strength or weakness of the case made in opposition to the will; it seems to me that it is a case which ought to be admitted to proof, and considered by the Court. In *Croft v. Croft* (3), Dr. Lushington, on the subject of admitting or rejecting averments, says, "The better and more discreet line to be adopted is, if a serious doubt arise as to the ultimate effect of any averment in a plea, to allow it to stand and come before the Court in proof; for then the utmost extent of mischief is to occasion some additional expense, while wholly to exclude the averment might work absolute injustice." Acting upon that rule, which seems to be as applicable to a whole allegation as to a particular averment, I think I ought to admit this allegation to proof.

Allegation admitted.

PROBATE.	}	NICHOLS AND ANOTHER v. BINNS.
1858.		
Feb. 1.		

Citing Heir-at-Law—20 & 21 Vict. c. 77. ss. 61, 62, 63.—Rules for Contentious Business, r. 34.

In a suit transferred from the Prerogative Court of Canterbury, in which the defendant opposed a will propounded by the plaintiffs, an application was made by the plaintiffs, under section 61. of the Probate Act, for leave to cite the defendant and F, the co-heirs of the deceased. At the time the act came into operation the defendant had appeared, but had not given in any answer or allegation:—Held, first, that it was no ground for rejecting the application that F. was the infant son of the wife of one of the plaintiffs.

Secondly, that as the plaintiffs were in a condition to call for the primary answer of the defendants when the Probate Act came into operation, they were entitled to cite the heir under s. 61.

(3) 3 Hag. Ec. 311.

This was a cause (transferred from the Prerogative Court of Canterbury to the Court of Probate) of proving in solemn form of law the last will of W. W. Parkinson, who died a lunatic.

Nichols and Freeman propounded a will, dated the 15th of November 1851, in which they were appointed executors. This will was opposed by Mary Ann Binns, a niece of W. W. Parkinson, and one of the surviving executors of a will dated the 4th of February 1837.

An appearance having been given in for Mary Ann Binns and affidavits of scripts brought in, her proctor, on the 19th of January, before Sir C. Cresswell, declared that he opposed the will of the 15th of November 1851, and ten days were allowed to Nichols and Freeman to bring in their declaration. Afterwards, the counsel for the plaintiffs became aware that the deceased died seized of real estate, which would be disposed of by the will of 1851, and advised that the plaintiffs should delay bringing in their declaration until leave should be obtained to cite the heir-at-law of the deceased, under s. 61. of 20 & 21 Vict. c. 77. Accordingly, a summons was served on the proctor of the defendant to shew cause why a citation to see proceedings should not issue against C. J. Freeman, the only son of Elizabeth Freeman, the wife of one of the plaintiffs, and Mary Ann Binns, the defendants, co-heirs of the real estate of the deceased.

Dr. Addams now moved for an order authorizing the plaintiffs to cite Mary Ann Binns and C. J. Freeman, the co-heirs of the deceased, under sec. 61. of 20 & 21 Vict. c. 77. and rule 34. of the Contentious Business Rules.

Denman, for the defendant.—The act does not require that the heir-at-law should be cited in all cases, but gives the Court a discretionary power to make or refuse the order—ss. 61, 62, 63. This is a case in which the Court should refuse to make the order. C. J. Freeman, who is the co-heir with Mrs. Binns, is the infant son of the wife of one of the plaintiffs, and would, therefore, be under the influence of the plaintiffs. Our case would be prejudiced, as, in consequence of the citation, the plaintiffs would, through C. G. Free-

man, become entitled to the possession of documents and acquire information bearing upon the case set up by the defendants.

SIR C. CRESSWELL.—I see no difficulty in your way, or any reason for departing from the intention of the legislature, which was to avoid as far as possible the necessity of having the same question twice tried. The defendant can set up an independent case.

Denman.—There is also a point of practice raised by this case, viz., whether this can be said to be a proceeding "taken" under the 20 & 21 Vict. c. 77. within the meaning of section 61. "Taken" must mean "commenced," and here an appearance had been entered before the Probate Act came into operation. This was a cause pending at the commencement of the act, and transferred to this Court by section 84.

SIR C. CRESSWELL.—I think that as the cause is at an early stage, no allegation or answer having been given in, but only an appearance and assertion, and as the plaintiffs are in a condition to call for the primary answer to their case, they are still entitled to call upon the heir-at-law to appear. The case seems to be clearly within the intention of the act. By the last clause of rule 34. it seems that the Court has power to exclude from citation any person not proper to be cited; but here it would be improper that one of two co-heirs should be cited to the exclusion of the other.

Motion granted.

PROBATE. }
1858. } *In the goods of T. GULLAN*
Feb. 15. } *(deceased).*

Will—Presumed Revocation.

G, in 1855, wrote his will on six or seven unattached sheets of paper. At the foot of each sheet he signed his name in the presence of two witnesses, who also subscribed their names in his presence. After G.'s death two only of these sheets, viz., the third and fourth, could be found, but they contained a

disposition of part of G.'s property. On motion for a grant of administration, with these two papers annexed, as being the will of G,—Held, first, that it must be presumed that G. destroyed the lost sheets intentionally; secondly, that as the last sheet contained the only signatures which were in compliance with the Wills Act, the whole will must be presumed to have been revoked.

Thomas Gullan died in December 1857, aged eighty-three, leaving his widow surviving, but no other relation. His personal estate amounted to 9,000*l.* He had also real estate, and under the will of a brother had power to charge certain property in favour of his widow, with an annuity of 100*l.* per annum. In 1855 he prepared a will himself. It was written on six or seven unattached sheets, and was executed by his signing his name at the foot of each sheet in the presence of two witnesses, who also subscribed their names in his presence. After his death only two of these sheets, the third and fourth, could be found. In their beginnings and endings they were insensible, but in the body of them the deceased had exercised the power of appointment in favour of his widow, and had also disposed of part of his property. His widow deposed that he had not destroyed any papers connected with business until shortly before his death, when his mind had undergone a great change, and he then destroyed a great many.

Dr. Deane moved the Court to decree that letters of administration, with the two papers annexed, as being the will of the deceased, should be granted to the deceased's widow. The question is, whether the destruction of the last sheet was a revocation of the whole will, or whether the two sheets are entitled to probate. There is no case exactly in point. In *Ewen v. Franklin* (1) the deceased had signed his name at the foot of each sheet of the will, and the attesting witnesses had subscribed all the sheets, but the last. Sir J. Dodson was of opinion that that was not a due execution of the will. That case, however, being one of imperfect exe-

(1) *Deane, 7.*

cution, and not a case of revocation, does not decide the question.

[SIR C. CRESSWELL.—It must be presumed that the testator wilfully destroyed the last sheet. If so, he destroyed the only part that gave validity to the will.]

Unless under Lord St. Leonards' Act (15 & 16 Vict. c. 24.) the signatures at the foot of each sheet have the effect of making each sheet a valid testamentary paper.

SIR C. CRESSWELL.—The case would have been very different if it had not appeared that more than two sheets were executed. You cannot convert signatures which are not in compliance with the statute into valid signatures. The signatures at the end of the last sheet were the only ones made in compliance with the statute. That sheet having been destroyed, the whole will was revoked, and I must refuse the motion.

Motion refused.

MATRIMONIAL.

1858.

Feb. 24.

CURTIS v. CURTIS.

Judicial Separation—Custody of Children pendente Lite—Interim Order under section 35. of 20 & 21 Vict. c. 85.

In a suit for a judicial separation by reason of the husband's cruelty, the wife applied under section 35. of 20 & 21 Vict. c. 85, for an interim order restraining the husband from removing from her custody the children of the marriage. They were respectively nine, eight and five years old, the two elder being under the care of a governess at her house, the youngest with the wife. The husband made a cross-application for an order that the two elder children should be delivered to him. The application of the wife was grounded on the facts stated in her petition for a separation, which were not admitted by the husband. The Court, in order to avoid prejudging the merits of the suit, refused both applications, and directed that until further orders the two elder children should remain with their governess, and the youngest child with the

wife, she undertaking not to remove it without notice to the husband, who was to have all reasonable access to the children.

This was an application, under sect. 35. of the 20 & 21 Vict. c. 85, for an interim order as to the custody of the children of the marriage, in a suit for obtaining a judicial separation, promoted by Mrs. Curtis against her husband, on the ground of cruelty.

The following facts were stated in the affidavit of Mrs. Curtis:—

The marriage took place in June 1846. There was issue of it five children, three of whom, of the respective ages of nine, eight, and five years, were still living. For some years after the marriage the parties lived in London. In several instances, about the year 1850, Mr. Curtis behaved with cruelty towards the children and herself. In 1850 he became lunatic, and was obliged to be placed under restraint. In 1851 he wanted her to go to Australia with him, to which she was opposed, when he threatened that if she did not do so, he would take away the children from her and place them with his mother. Influenced by these threats, she then consented to go with him to New York, where they arrived in February 1852. While there Mr. Curtis became a dangerous lunatic, and was confined in an asylum in New York, where he remained from July till October 1852. Her father then went over to New York, and brought her and her children back to England; and from that time till July 1857 she resided with her father in England and Ireland, during which period Mr. Curtis never came back to her, nor did he contribute to the maintenance of herself or children. In July 1857 he suddenly made his appearance at her father's house in Ireland, when, to avoid him, she fled with her children, and took another name. He then put advertisements in newspapers, and had handbills printed stating that she had absconded. In February 1858, having found out that she was living at Hornsey, he came to the house where she was lodging, broke open the door of her bedroom, and tried to drag away one of the children, and was only prevented from doing so by the interference of the police. He then went to the house

of a Miss Parker, a governess, with whom the other children had been placed for their education, at the expense of the father of Mrs. Curtis, and tried to induce her to give them up to him.

Forsyth, Q.C., moved the Court to make an order that while the suit should be pending, and until some final decree in it should be made, Mr. Curtis should be restrained from removing the children from the custody of their mother.

[*CRESSWELL, J.O.*—Have you an affidavit stating that Mr. Curtis has appeared in the suit?]

No.

[*CRESSWELL, J.O.*—That fact must be supplied by affidavit.]

Mr. Curtis, the respondent, appeared in person. He read an affidavit denying that he had treated his children with cruelty. He admitted that he had been placed under restraint, but alleged that this was in consequence of a brain fever, and that his illness was merely temporary. He admitted that Mrs. Curtis was entitled to the custody of the youngest child, but contended that he ought to be allowed to have access to it. As to the elder children, he urged that he had *primâ facie* a legal right to their custody, and that no ground was shewn for depriving him of this right.

He then made a cross-motion, praying the Court to order the petitioner or other persons having the custody of the two elder children to bring them into court and deliver them to him as their lawful guardian.

CRESSWELL, J.O.—The only order that I can now make must be one that will in no way bear upon or prejudge the merits of the suit. If I were to make an order, granting the application of Mrs. Curtis or that of her husband, I might be doing an injustice to the other party. For the present, the two elder children seem to be under the care of a very proper person, and, as I understand that Mrs. Curtis's father is willing to bear the expense of maintaining them with Miss Parker, I shall direct that until further order they shall remain with her. With respect to the youngest child, who is only five years

old, she must remain with Mrs. Curtis, on her undertaking not to remove from her present abode without giving notice to her husband. Mr. Curtis is in either case to be allowed all reasonable access to the children.

Ordered, that the two elder children remain in the custody of their governess till further orders, and that the youngest child remain with its mother, she undertaking not to remove it from her present abode without notice to her husband, he to be allowed all reasonable access to the children.

PROBATE. } In the goods of JOHN JONES
1858. } (deceased).
Jan. 28. }

Administration — Practice — Limited Administration, the Next-of-Kin residing Abroad—20 & 21 Vict. c. 77. s. 73.

A. died intestate, leaving personal property in England which required immediate management. B, his sole next-of-kin, resided in Australia, and had no duly constituted agent here. Administration was granted to C, the father-in-law of B, for the benefit of B. until he should himself apply for administration, on condition that C. should give justifying security and exhibit an inventory.

John Jones, widower, died on the 24th of December 1857, in the county of Middlesex, intestate, leaving Joseph Jones, his only child, the sole person entitled to his personal estate, who for four years had been resident at Sydney, in Australia, and had no duly constituted attorney or agent in this country. The personal estate of the deceased consisted of furniture at his lodgings, some leasehold houses, and monies in savings banks, for the management and protection of which it was necessary that a legal personal representative of the deceased should be immediately appointed.

Joseph Jones, in 1854, married Eliza-

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beth Riches, daughter of George Riches, who now applied for a grant of letters of administration for the benefit of his son-in-law Joseph Jones, under section 73. of the 20 & 21 Vict. c. 77.

These facts were stated in the affidavits of G. Riches, W. Clark, and C. G. Hobbs. The affidavit of the latter contained examined copies of the following documents:—

1. The register of the marriage of G. Riches.—2. The baptismal certificate of his daughter Elizabeth.—3. The marriage certificate of John Jones with M. O.—4. The baptismal certificate of their son, Joseph Jones.—5. Burial certificate of Mary, wife of John Jones.—6. Marriage certificate of Joseph Jones and Elizabeth Riches.

Dr. Deane now moved the Court to decree letters of administration of the goods, &c. of John Jones, to be granted to George Riches for the use and benefit of Joseph Jones, residing in Australia, until he should apply for the same to be granted to himself, on the said G. Riches giving justifying security, and being assigned to exhibit an inventory of the said goods, &c. within one month from the date of the letters of administration.

SIR C. CRESSWELL.—I think administration may go on the terms proposed.

Motion granted.

PROBATE. }
1858. } *In the goods of SUSANNAH*
Feb. 15. } CLARKE, WIDOW (deceased).

Will — Execution by Mark — Wrong Name written against the Mark.

A will, purporting in the commencement and testimonium clause to be that of S. C; was executed by a mark, against which was written the name S. B, and was handed by S. C, as her will, to one of her executors, shortly before her death. B. had been the maiden name of S. C:—Held, that, as there was sufficient evidence that the mark was that of S. C, the execution of the will

by her was not vitiated by another name having been written against her mark.

Susannah Clarke, widow, died in 1857, leaving a will, dated the 19th of February 1844. The will was executed by a mark. In the commencement of it, and in the testimonium clause, the testatrix was properly described as "Susannah Clarke," but against the mark was written "Susannah Barrell, her mark," Barrell having been her maiden name.

Fisher, one of the executors, deposed that, shortly before her death she gave him the will, in a sealed envelope, telling him that she wished him to manage for her; that he kept it sealed up until after her death; that the will was entirely in the handwriting of one of the attesting witnesses, Sidney, the schoolmaster of the parish in which the testatrix resided; that both the attesting witnesses were dead, and that he believed "Barrell" to have been a clerical error of Sidney's.

Dr. Deane moved for a grant of probate of the will.—The facts stated in the affidavit of Fisher shew that the will was duly executed pursuant to the Wills Act.—

In the goods of Bryce, 2 Curt. 325.

In the goods of Clark, Ibid. 329.

SIR C. CRESSWELL.—I am quite satisfied on the evidence that the mark was really that of Susannah Clarke, and therefore that she duly executed the will. If so, it matters not what some one else may have written against the mark.

Motion granted.

PROBATE. }
1858. } DE CHATELAIN AND OTHERS v.
Feb. 27. } DE PONTIGNY.

Administration Pendente Lite—20 & 21 Vict. c. 77. s. 70.

Administration pendente lite, under the 70th section of the 20 & 21 Vict. c. 77. was granted to the defendant in a testamentary suit, the plaintiffs not opposing the application.

This was a testamentary suit.

Denman moved the Court, under section 70. of the 20 & 21 Vict. c. 77. that letters of administration *pendente lite* of the personal estate of the deceased should be granted to the defendant in the suit.

Dr. Phillimore, for the plaintiffs, said that they would offer no opposition, on the understanding that they should not be prejudiced in the subsequent proceedings in the suit.

SIR C. CRESSWELL.—As the plaintiffs do not oppose the application, administration may go as prayed. If they had objected, I should have thought that it would have been better that administration should have been granted to some third person.

Motion granted.

MATRIMONIAL.
1858.
Feb. 27. }

Ex parte HALL.

Husband and Wife—Protection of Property acquired by a Deserted Wife—Practice—Citation—20 & 21 Vict. c. 85. s. 21.

Service of a citation on the husband is not necessary in the case of an application by a deserted wife, under section 21. of the 20 & 21 Vict. c. 85, for an order for the protection of property acquired by her since the desertion. Such order may be made on the affidavits of the applicant.

This was an application under section 21. of the 20 & 21 Vict. c. 85. by Maria Hall, who had been deserted by her husband, for an order protecting property acquired by her since the desertion.

Dr. Deane moved the Court to dispense with service of a citation on the husband, on the ground that the wife did not know where he was.

CRESSWELL, J.O.—You do not require the assistance of the Court. The service of a citation on the husband is not neces-

sary. I can grant an order for protection of the wife's property upon her affidavits. Her husband may come to the Court at any time and apply for a discharge of the order.

Motion refused.

MATRIMONIAL.
1858.
Feb. 27. }

Ex parte MULLINEUX.

Husband and Wife—Order for the Protection of Property acquired by a Deserted Wife—20 & 21 Vict. c. 85. s. 21.

The order for the protection of property acquired by a wife, after she has been deserted by her husband, should, in terms, be for the protection of her property generally, and not of specific property, so as to leave open any question as to her title.

This was an application, under section 21. of the Divorce Act, on the part of Mary Mullineux, of Market Drayton, Salop, the wife of James Mullineux, for an order for the protection of her earnings and property acquired since the 2nd of February 1838, the day on which she was deserted by her husband, from him and from all creditors and persons claiming under him.

The parties were married, on the 27th of August 1836, at Market Drayton, and cohabited together there for about a year and six months, but had no issue. On the 2nd of February 1838 the husband, without any reasonable cause, deserted his wife (having on that day left home on the pretence that he was going to the north of England to obtain orders in his business), and had ever since remained absent from her, except as hereinafter mentioned. The wife had no intelligence of her husband from the date of the desertion until August 1848, when she received a letter from him, dated "Pittsburg, Pennsylvania, June 18th, 1848." In January 1854, not having seen or heard from him in the mean time, he came unexpectedly to his wife's house, where he stopped for a short time, and then went to the house of his father in the

neighbourhood of Market Drayton, where he remained for a fortnight, calling daily on his wife, but not cohabiting with her. He then went away, since which time his wife had only once heard from him, when she received a letter from him dated "Liverpool, February 10, 1854," in which he stated his intention of forthwith sailing for America.

Since the desertion, the wife had maintained herself by her own industry, and had thereby acquired some considerable property, which was specifically set forth in her application to the Court. The husband is now residing in America or in other foreign parts, and has no attorney or agent in this country.

These facts were stated in the application of Mrs. Mullineux, and were deposed to by her in the affidavit in support of the application.

Dr. Addams now moved the Court, under section 21. of the Divorce Act, for an order of protection as to the property specified in the application, against the husband, his creditors, and all persons claiming under him.

CRESSWELL, J.O.—Upon the facts stated by Mrs. Mullineux in her affidavit, she is entitled to an order for the protection of the property she has acquired since the desertion. I cannot, however, give an order to protect any specific property. The order must be in general terms, leaving open the question of title to the specific property.

Order of protection granted, but not as to any specific property.

PROBATE. }
1858. } *In the goods of W. BROWN*
March 2. } *(deceased).*

Will—Revocation—Parol Evidence of Contents of missing Will.

B, in 1846, made a will, which he revoked by another will made in 1855. On his death the former will was found, but not the latter:—Held, first, that it must be pre-

sumed the deceased destroyed the missing will animo revocandi.

Secondly, that parol evidence of the contents of the missing will was admissible.

Thirdly, that the earlier will was not revived by the destruction of the will which had revoked it.

*W. Brown, of Whitby, died on the 19th of February 1857, leaving a widow and six children. He died possessed of real estates of the value of 40,000*l.*, and of personalty of the value of more than 10,000*l.**

On the 6th of November 1846 he made and duly executed his will, disposing of his real and personal estate. On the 21st of July 1855 he made and duly executed another will, disposing of his real and personal estate, of a different tenour and with a different appointment of executors, thereby absolutely revoking the will of November 1846, which was, however, on his death found in his possession, though treated apparently as of no value, and not placed among his important papers.

The will of the 21st of July 1855 was directly after its execution taken away by the deceased, who said he should probably leave it at his bankers. This, however, he never did; and after diligent search the second will could not be found.

The former will was never re-executed by the deceased or revived by any codicil. Neither the instructions for, nor any draft of, the second will were in existence, the deceased having destroyed them when he executed the will. The contents of that will were well remembered and deposed to by R. Breckon, who had been for many years the confidential solicitor of the deceased, who had prepared and was an attesting witness to both wills.

In order to obtain a judicial decision on the question, whether the deceased had died intestate, or whether the will of November 1846 was an operative will, and disposed of the real estates, W. Brown, the eldest son and heir-at-law of the deceased, brought an action of ejectment in the Court of Queen's Bench, against

the deceased's widow, to recover a freehold messuage, which formed part of the deceased's real estate at the time of his death.

This action came on for trial, before Lord Campbell, C.J., at Guildhall, on the 15th of December 1857, when a verdict was found for the plaintiff, subject to the opinion of the Court of Queen's Bench on a special case.

The questions left to the Court were—First, was the will of July 1855 proveable by parol for any purpose? If so, was the will of 1846 revoked thereby? Secondly, if the will of November 1846 was so revoked, did W. Brown, the father (the said deceased), die intestate, or was the will of November 1846 an operative will on his death? The special case was argued, on the 26th of January 1858, before the full Court, which held (1)—First, that the will of 1855 was proveable by parol, and that the first will was revoked thereby; secondly, that W. Brown, the father, died intestate. Judgment in the ejectment was entered accordingly for the heir-at-law.

The above facts were deposed to in the affidavits of the widow of the deceased, R. Breckon, his solicitor, and R. Porritt, the deceased's cousin.

Dr. Addams (Feb. 27) moved the Court to decree letters of administration of the effects of the deceased, as having died intestate, to the widow of the deceased. He submitted that, on the authority of the above decision of the Court of Queen's Bench, the motion ought to be granted.

Cur. adv. vult.

SIR C. CRESSWELL now said—In this case the deceased made a will, in 1846, disposing of his real and personal estate, and some years afterwards he made another will revoking the first. On his death the first will was found amongst his papers, but the second could not be found. The ordinary presumption must therefore prevail; and it must be taken that the deceased destroyed the second will *animo revocandi*. An ejectment was brought in the Court of Queen's Bench, by the heir-at-law of the

deceased, when the question arose whether parol evidence was admissible to shew the contents of the missing will. That Court held that it was; and in their decision I concur. Being admissible for that purpose, it shews beyond doubt that a will was executed by the deceased revoking the will of 1846. That will then, having been once revoked, was not revived by the destruction of the revoking will by the deceased. It could only be revived by its re-execution, or by the execution of a codicil, shewing an intention to revive it—7 Will. 4. & 1 Vict. c. 26. s. 22. Administration must therefore be granted to the widow of the deceased, as having died intestate.

Motion granted.

PROBATE. }
1858. }
March 5. }

HADDON v. FLADGATE.

Will of Married Woman — Separate Estate.

In 1817 a husband and wife verbally agreed that they would divide their furniture and effects, and live separate, that the wife should maintain herself, and that the husband should allow her to enjoy her earnings for her separate use, and that neither should interfere with the other. In pursuance of this agreement, they divided their effects and separated; the wife engaged in business and died in 1856, leaving a will, bequeathing money which she had acquired in her business since the separation. In a suit instituted for a grant of administration against the executor named in the wife's will, an allegation was given in by the latter pleading the above facts. The admission of this allegation being opposed,—Held, that it was admissible, inasmuch as under the circumstances stated in it, the property acquired by the wife after the separation became her separate property, and as such, might be bequeathed by her.

This was a cause (transferred from the late Prerogative Court of Canterbury) of

(1) Not yet reported.

granting letters of administration of the personal estate and effects of Martha Haddon, deceased, to William Haddon, her husband, instituted by him against T. W. Fladgate, an executor named in a will of the deceased made in October 1856.

At first the only question raised was, whether or not W. Haddon was the husband of the deceased, Fladgate alleging that she had died a widow. Subsequently, however, it was admitted that he was the deceased's husband; and the only point which remained in dispute was, whether, under the circumstances stated in the allegation of Fladgate, the property, of which the deceased died possessed, had not become her separate property, and as such might, notwithstanding her coverture, be bequeathed by her will.

An allegation filed, on behalf of W. Haddon, pleaded that in 1811 he married the deceased, then Martha Handley; that they cohabited together as man and wife for about five years; that the deceased then left him, and from that time until her death in August 1857 lived separate and apart from him; that the deceased up to the time of her death knew that he was living; and that after her death steps were taken to ascertain his abode and inform him of his wife's death. In answer to this an allegation was given in by T. Fladgate propounding a will of the deceased, whereof he was appointed an executor, of which the following is the substance:—

Art. 1.—That it was not true, as stated in the allegation of W. Haddon, that the deceased left him, but that from the time of the marriage in November 1811 he uniformly treated the deceased with great unkindness, neglect and cruelty, contributing nothing towards her maintenance, but leaving her to pay his ante-nuptial debts out of her earnings as a dress-maker. That in 1813 he deserted her and enlisted in the militia; that he subsequently obtained his discharge and renewed his cohabitation with her, but still continued to treat her with cruelty.

Art. 2.—That in 1817 deceased proposed that they should live separate; that, accompanied by a mutual friend, they went before a magistrate at Leicester, thinking that they should thereby obtain

a legal separation; that, at the suggestion of the magistrate they mutually agreed to live separate from each other, to divide their furniture and effects equally, and thenceforth not to molest each other, nor interfere with any property or money which either might acquire subsequently thereto; that the deceased agreed thenceforth to maintain herself, and never to apply to her husband to support her, or to liquidate any debt which she might contract, and that he, in consideration thereof, agreed to permit deceased to have and enjoy her own earnings and property for her sole and separate use; and that, in pursuance of that agreement, they separated, equally dividing their furniture and effects, and W. Haddon allowed deceased to have and enjoy her share thereof to her separate use; that deceased thereupon went to reside apart from her husband, and thenceforth entirely supported herself by her business of a dress-maker, and never at any time applied to her husband for assistance.

Art. 3.—That in 1821 deceased sold her share of the said furniture and effects, and retained the proceeds to her separate use, and that from that time till 1854 she was engaged in business, either as assistant or partner.

Art. 4.—That from 1817 to 1854, when deceased retired from business, she maintained herself without assistance from her husband; that she never attempted to conceal her abode from him, but that he knew she was carrying on business as a *feme sole*, and had saved a considerable sum of money; that, nevertheless, in pursuance of his agreement, he never interfered with her or her earnings, but treated her earnings as money set apart to her separate use.

Art. 4.—That W. Haddon had declared on several occasions, and particularly in 1856, that he never "intended to claim the property she had acquired; she had got it herself, and he had agreed that it should be her own"; and that at such time W. Haddon, who had been some time married to R. B., desired that deceased's name should never be mentioned before his wife, meaning the said R. B.

Art. 6.—That by reason of the premises, the property acquired as aforesaid by

Martha Haddon became and was her separate property, and, as such, might be bequeathed by will, notwithstanding the alleged marital right of W. Haddon.

Art. 7.—That in October 1856 Martha Haddon made her will, appointing J. V. and T. W. Fladgate her executors.

Dr. Deane and *J. S. Godfrey* (Feb. 24) opposed the admission of the allegation.—The circumstances stated in the allegation are not sufficient to constitute the earnings of the deceased, after the separation, her separate property. Here there is a mere verbal agreement, followed by a separation, and acquisition of property by the wife. With the exception of cases where the wife has been allowed to deal with her pin-money and paraphernalia as her separate property, she cannot, without the intervention of a trustee, acquire property to her sole and separate use. They cited—

Maas v. Sheffield, 1 Robert. 364.

M'Lean v. Longlands, 5 Ves. 71.

Walter v. Hodge, 2 Swanst. 92.

Lamphir v. Creed, 8 Ves. 599.

Dr. Spinks and *W. R. Ellis*, contra.—First, under the circumstances stated in the allegation, the earnings of Mrs. Haddon, subsequently to the separation, became her separate property. There is no necessity for the intervention of a trustee; the mere verbal agreement of the husband that the wife should have her earnings, in equity amounts to a declaration of trust. This was established by very early authorities, and the principle is still acted on by Courts of equity, though they now require stricter evidence than formerly of the agreement. At all events, the Court ought to grant probate, as by doing so the question would still be left open for litigation in a court of equity; but if refused probate, the executor would be barred from raising it elsewhere. They cited—

Cecil v. Juxon, 1 Atk. 278.

Braham v. Burchell, 3 Add. Ec. Rep. 243.

Tappenden v. Walsh, 1 Phill. 352.

Barnes v. Vincent, 4 Notes of Cases, Suppl. 25.

Sawyer v. Bletsoe, 1 Vern. 684.

Fettyplace v. Gorges, 1 Ves. jun. 46.

Rich v. Cockell, 9 Ves. 369.

Mews v. Mews, 15 Beav. 529.

Lucas v. Lucas, 1 Atk. 270.

Slanning v. Style, 3 P. Wms. 344.

Dummer v. Pitcher, 2 Myl. & K. 262.

[SIR C. CRESSWELL.—After a separation for forty years, I should be very glad to find that there are authorities in favour of her being treated as a *feme sole* in regard to this property. But I must look into the cases cited.]

Cur. adv. vult.

SIR C. CRESSWELL now said—The question in this case was, whether the allegation given in by Fladgate, propounding a will made by Mrs. Haddon, the deceased, ought to be admitted to proof. The allegation was in effect as follows.—[His Lordship here stated the substance of it.]—It was contended, on the part of the husband, that the circumstances stated in the allegation were not sufficient to make the property that Mrs. Haddon had acquired in trade her separate property, inasmuch as it had not been settled to her separate use, and that consequently she had no power to dispose of it by will, there being no express assent of the husband. On the other hand, it was said that, according to authorities, not now to be disputed, the husband, under the circumstances stated in the allegation, became, and would in a court of equity be treated as, a trustee for the wife as to such property. The case principally relied on as an authority against the admissibility of the allegation was *Lamphir v. Creed*. On the other hand, *Cecil v. Juxon* was cited, as shewing that the former case did not dispose of the present question. In *Lamphir v. Creed* a married woman, not living with her husband, carried on trade and advanced money to the plaintiff for the purchase of a share in a lottery, on an agreement that half should be considered a loan to him, and that they should be jointly concerned in the adventure; and it was held that, as the money with which the lottery-ticket was purchased was that of the husband, the produce of the lottery prize

belonged to him also. In that case it was not stated that the husband had agreed that the wife should trade as a *feme sole*, and have property to her separate use, and his absence was not wilful, as he was in the service of the Crown as a soldier, and therefore, it was contended, that that was not a case at all resembling the present in its circumstances. Many authorities were cited in support of the right of the wife in this case. It is only necessary to mention one of them, *Rich v. Cockell*, where Lord Eldon treats it as settled law that the husband, under circumstances similar to those in this case, would become a trustee for his wife. I am of opinion, therefore, on the authority of the above cases, that the property acquired by Mrs. Had-don subsequently to the separation, became her separate property, and that she, as a right incident to such property, had a power to dispose of it by her will.

As to that part of the allegation which charges the husband with bigamy, it must be struck out, as having no bearing upon the point in dispute. Subject to this, the allegation must be admitted to proof.

Allegation admitted, excepting the part charging the husband with bigamy.

PROBATE.

1858.

Feb. 8;

March 5.

ROBINS AND ANOTHER v.
DOLPHIN.

Will—Domicil—Scotch Divorce from English Marriage.

A Scotch sentence of divorce purporting to dissolve an English marriage between parties domiciled in England at the date of the marriage and of the divorce is inoperative, either as a dissolution of marriage or as a divorce à mensâ et thoro.

An allegation responsive to one propounding a will made under a power in April 1854 by A, a married woman, pleaded that A. in 1823 married in England B, a

*domiciled Englishman; that in 1839 they separated; that in 1854 "A, having discovered that B. was domiciled in Scotland" and living in adultery, obtained a Scotch sentence of divorce à vinculo; that A. then married P, a domiciled Frenchman, and went to reside in France, where she remained until 1857, when she died, having previously, in 1856, made a will, revoking all previous wills, valid according to the law of France, but not attested as required by the Wills Act. This allegation being opposed, was, by the direction of the Court, reformed so as to state specifically the facts as to B.'s residence in Scotland at the date of the divorce, when it appeared that such residence was merely temporary:—Held, that the allegation, as reformed, must be rejected for the following reasons: first, that the case was not distinguishable from *The King v. Lolley* (1) and *Conway v. Beazley* (2), and therefore that the Scotch divorce did not dissolve the English marriage; secondly, that the Scotch divorce could not operate as a divorce à mensâ et thoro; thirdly, that A.'s domicil continued to be that of her husband, viz. England; fourthly, that the will of 1856 not being made in accordance with the law of A.'s domicil, did not revoke the will of 1854.*

The question in this case was as to the admissibility of an allegation brought in by Vernon Dolphin.

The cause was one of granting probate of a will and codicil, dated the 11th of April 1854, of Mary Ann Dolphin, wife of Vernon Dolphin deceased, promoted by Robins and Paxton, the executors named therein, against V. Dolphin.

An allegation, brought in by the executors, pleaded—That the testatrix, in pursuance of a power vested in her by an indenture made subsequently to her marriage, dated the 15th of November 1839, did, on the 11th of April 1854, duly execute the will and codicil propounded.

An allegation, responsive to this, was brought in by Vernon Dolphin, of which the following is the substance:—That on

(1) Russ. & Ry. 237.

(2) 3 Hag. Ecc. 639.

the 16th of July 1822, V. Dolphin married in England, according to the ceremonies of the Church of England, Mary Ann otherwise Marie Eustelle de Pontès, wife of Amédée Davésiés de Pontès, falsely called Mary Ann Dolphin, then Mary Ann Payne. That they cohabited together as man and wife in Gloucestershire and elsewhere in England until November 1839, when they separated, and that a child was born which died soon after its birth. That by a deed or declaration of trust, bearing date the 15th of November 1839, it was declared that T. W. and T. B. should stand possessed of the rents and profits of certain hereditaments and premises, mentioned in three certain indentures of release of even date, and thereby directed to be sold, upon trust, after making certain payments thereout, to pay the residue during the joint lives of V. Dolphin and his wife, to M. A. Dolphin, or such person as she should appoint, and in the event of her dying in the lifetime of V. Dolphin, to hold the same upon such trusts, &c. as M. A. Dolphin, notwithstanding coverture, by deed or instrument in writing, or by her last will or any codicil thereto, or by any writing in the nature of a will, signed and published by her in the presence of and attested by two or more credible witnesses, should, from time to time, appoint, and in default of appointment, in trust for V. Dolphin, his executors, &c.; and by the same deed it was declared that, subject to the trusts affecting the same, M. A. Dolphin should have a like power of appointment over other hereditaments and premises therein mentioned.

Article 7. was as follows:—

“That the deceased in the beginning of 1854 having discovered that V. Dolphin was then living in adultery, and was then resident and domiciled in Scotland, and that he had been so resident and domiciled in or near Edinburgh from the month of February 1854, she proceeded to Edinburgh, and on the 17th of June in that year instituted an action of divorce, before the Lords of the Court of Council and Session in Scotland, against her husband, the said V. Dolphin, on the ground of

adultery, and thereupon such proceedings were taken and proofs adduced, that the said Court, by their decree, dated the 19th of July 1854, found the said V. Dolphin guilty of adultery, and therefore divorced and separated him from the said M. A. Payne or Dolphin, her society, fellowship and company in all time to come, and declared that he had forfeited all the rights and privileges of a lawful husband, and that the said M. A. Payne or Dolphin was entitled to live single or marry any free man as if she had never been married to the said V. Dolphin, or as if he were naturally dead; and the proponent alleges that by such decree she was absolutely divorced from the bond of matrimony with the said V. Dolphin, and was free to marry any other man.”

The allegation then pleaded—That on the 8th of October 1854, Amédée Theodore Davésiés de Pontès and M. A. Payne were duly married in Edinburgh, according to the ceremonies of the Scotch Church. That, by the law of France, it is necessary when a marriage is intended to take place out of France, between a native of France and a foreigner, that proclamation of such marriage should be made in France; but that no ecclesiastical ceremony is required to make it valid. That A. D. de Pontès was a native of France, domiciled at La Rochelle, and was a General of Brigade in the French army, and Commander of the Department of the Lower Charente; and that, to legalize his marriage, he obtained the requisite consent of the Minister of War, and had the marriage proclaimed on two Sundays at the Mairie of La Rochelle, whereby, according to the law of France, they became lawful husband and wife. That deceased, having previously been baptized by a Roman Catholic priest in the names of Marie Eustelle, on the 4th of February 1855, formally abjured the Protestant religion, and became a Roman Catholic. That the deceased and De Pontès cohabited together as man and wife, having taken up their permanent residence in Paris until shortly before deceased's death, when De Pontès placed her in a convent at Paris, where she died, never having re-

turned to England or Scotland. That deceased, intending to revoke all former wills, did, in pursuance of the power given by the indenture of the 15th of November 1839, with her own hand draw up and write the will now in the archives of Ducloux, a notary in Paris, in the words following:—"I revoke all foregoing wills made by me up to this date. June 23, 1856, Paris"; and having so done, and in approbation thereof, she, on the said 23rd of June 1856, subscribed her then names of "Marie Eustelle Davésiés de Pontès" thereto at the foot or end thereof, and then sealed the same in an envelope, "which she indorsed "Last will, which I have made this day, the 23rd of June 1856. Marie Eustelle Davésiés de Pontès." That deceased, at the time of making the said will, was of capacity to make it. That the deceased, on the 23rd of June 1856, was lawfully domiciled in France. That, by the law of France, any holograph will, codicil, or testamentary instrument, made and executed in the above manner, is valid; and that the will above set forth was valid according to the laws of France. That at the end of June 1856, deceased handed the envelope to a friend, telling her that it contained her will, and asking her to take care of it; that it remained with her till after deceased's death, when she delivered it to a notary.

The 25th article set out a bill, filed in Chancery by De Pontès after the death of the deceased, in which De Pontès set up a deed, executed by Mrs. Dolphin, in pursuance of the power given her by the deed of November 1839, under which he took substantially the same interest in the property, which Mrs. Dolphin had power to appoint, as was given him by the deed and codicil propounded.—[The bill was set out, inasmuch as it contained a statement of many of the circumstances pleaded in the allegation.]

Dr. Addams and Dr. Spinks (Feb. 1, 8) opposed the admission of the allegation.—The question on which the case turns is, whether Mrs. Dolphin at the time she made her will of the 23rd of June 1856, revoking all former wills,

was domiciled in France. If she was, that will being valid according to the law of France revoked the will and codicil propounded, and Mr. Dolphin would be entitled to the personalty as in default of appointment. If she was not domiciled in France, but remained a domiciled Englishwoman, the will executed by her in France, not being in accordance with the law of her domicile, as it was not attested as required by the Wills Act, is inoperative, and the will and codicil of 1854 remain unrevoked. At the date of the marriage Mr. Dolphin was domiciled in England, and there is nothing to shew he had ever acquired a fresh domicile. If the deceased remained the wife of Mr. Dolphin, her domicile would be that of her husband, so that the question comes to this—Did the Scotch sentence of divorce dissolve the marriage? It was a mere nullity, the parties at the time of their marriage having been domiciled in England—*The King v. Lolley*. In that case the prisoner was indicted for bigamy and found guilty. The facts of that case were that Lolley having been married in England went to Scotland and obtained a divorce *à vinculo*, on the ground of adultery, and then married again. The case was argued before the twelve Judges, who decided that the conviction was right, as "no sentence or act of any foreign country could dissolve an English marriage *à vinculo matrimonii* for ground on which it was not liable to be dissolved *à vinculo* in England." The only difference between that case and the present is that, there the second marriage was solemnized in England, which is of no importance. That case was recognized and acted on by Dr. Lushington, in *Conway v. Beazley*. It follows that Mrs. Dolphin, at the time of her death, remained the lawful wife of Mr. Dolphin, and that she died a domiciled Englishwoman. The will, therefore, executed by her in France was inoperative. The 25th article is clearly irrelevant, and must be struck out, if the allegation is not rejected *in toto*.—They also cited—

M'Carthy v. De Caix, 2 Russ. & M. 614, and

Warrender v. Warrender, 2 Cl. & F. 528.

Dr. Deane and *Dr. Twiss*, in support of the allegation.—First, the case is distinguishable from *The King v. Lolley*, inasmuch as here Mrs. Dolphin never returned to this country after obtaining the Scotch divorce, and consequently it does not follow from that decision that the Scotch divorce was not a dissolution of the marriage. Secondly, the sentence of the Scotch Court, if it did not dissolve the marriage, was effectual as a divorce *à mens et thoro*, and would consequently enable Mrs. Dolphin to acquire a fresh domicile—*Williams v. Dormer* (4). If so, there can be no doubt that Mrs. Dolphin had, at the time of her death, acquired a French domicile.

[*SIR C. CRESSWELL*.—Is there any case where, in the case of an English marriage, in a suit for restitution of conjugal rights, a Scotch sentence of divorce *à vinculo* has been set up as a separation by a competent tribunal?]

Dr. Deane.—I know of no such case.

They also cited—

Lord Brougham's remarks in *Warrender v. Warrender*, 2 Cl. & F. 528.

Giels v. Giels, 1 M'Queen, 279.

Toovey v. Lindsay, 1 Dowl. P.C. 124.

Barnes v. Vincent, 5 Moore, P.C. 217.

Hughes v. Turner, 4 Hag. Ec. Rep. 522.

Cur. adv. vult.

SIR C. CRESSWELL. — In this case I was to consider the admissibility of an allegation, which was opposed by *Dr. Addams*, on the ground that the question which really arose had been decided by another Court. I understand from *Dr. Deane* that he can reform the 7th article, so as perhaps to put the question in a better form for his client. At present, it merely states by way of recital, that Mrs. Dolphin had discovered that her husband was domiciled at Edinburgh, and living in adultery, and then proceeds to state that she went to Edinburgh, and there pro-

cured a divorce. I can take no notice of an allegation in that form, as presenting any case of a real domicile in Scotland at the time of the divorce; and I shall therefore direct it to be reformed in that particular, so as to allow the Court to see what is set up as a Scotch domicile. I shall do that, in order that I may be put in a position to compare the circumstances of this case with those in *Conway v. Beasley*, and consider what was said by *Dr. Lushington* in that case upon the subject of foreign domicile, and the effect a *bond fide* domicile in Scotland at the time of the divorce might have in a foreign court. I shall then be able to see whether the question is or is not concluded by the decision of *Dr. Lushington*. With regard to the 25th article, which recites a great part of a bill in equity, it seems to me that I ought to reject it. The question to be decided by the Court is one arising out of facts which occurred before the death of the deceased, and I do not see how that question can be affected or elucidated by anything that may have been done since her death by General de Pontès.

I think therefore that that article is irrelevant, and ought to be rejected.

The 7th article as afterwards reformed is set out in the following judgment.

The case was not re-argued.

SIR C. CRESSWELL now (March 5) said this case was argued, before me, on the admissibility of an allegation, brought in by the proctor of Mr. Dolphin. The circumstances of the case are peculiar; and, so far as is material for the determination of the present question, are as follows:—In 1822 Mr. Dolphin, an Englishman, domiciled in England, married an English lady, in England, and they afterwards lived together at his house in Gloucestershire. In 1839 differences having arisen between them they agreed upon a separation, and afterwards lived apart. At that time a settlement was executed, by which certain property was secured to Mrs. Dolphin for her life, with power of appointment by deed or will. In April 1854 Mrs. Dolphin, then living

(4) 2 Robert. 505.

in England, executed a will, as required by the Wills Act, of which Messrs. Robins and Paxton were appointed executors. In the same year Mr. Dolphin went to Edinburgh, and in the same year Mrs. Dolphin also went there, and instituted against him an action of divorce, before the Lords of the Court of Council and Session, on the ground of adultery. On the 20th of July a decree was pronounced, dissolving the marriage, and declaring Mrs. Dolphin to be at liberty to marry again, as if her husband were dead. On the 8th of October 1854 she married, in Edinburgh, Amédée Theodore Davésiés de Pontès, a Frenchman, domiciled in France. They were afterwards re-married in France, and all necessary steps were taken to render such marriage a valid marriage according to the law of France. Mrs. Dolphin having accompanied De Pontès to France, continued to live with him there as his wife until a short time before her death, when she was placed by him in a convent in Paris, where she died. When there Mrs. Dolphin, by the name of De Pontès, wrote and signed a paper, intended to be a will, in these words:—"I revoke all foregoing wills made by me up to this date, June 23rd, 1856. Paris." And this was alleged to be by the law of France a valid will. Mrs. Dolphin died soon afterwards. A *caveat* was entered on behalf of Mr. Dolphin. The executors named in the will of 1854 having propounded it, the proctor of Mr. Dolphin brought in an allegation, pleading the several matters above mentioned. This was opposed, on the ground that the facts alleged afforded no answer to the claim of the executors to have the probate of the will of 1854, for that the Scotch Court had no power to dissolve a marriage solemnized in England, between English people domiciled in England, and that, consequently, Mrs. Dolphin, although resident in fact in France with De Pontès, remained domiciled in England, and the document executed by her in the convent in Paris, not being attested as required by the Wills Act, could not have any effect upon the will executed in 1854. The cases of *The King v. Lolley* and *Conway v. Beazley* were cited in support of this

view. The allegation in its then state was very vague as to the nature and duration of Mr. Dolphin's residence in Scotland before the suit for divorce was instituted, and I requested that it might be reformed so as to enable me to judge how far the case was similar in circumstances to that of *Conway v. Beazley*. That has been done, and the allegation as to that matter now stands thus:—

"That in the month of February 1854 the said V. Dolphin left England and went to Scotland; that on the 23rd of February 1854 he arrived at Edinburgh, and from such time until the 25th of the said month resided at the Waterloo Hotel, Edinburgh, when he left the said hotel, and from such time until the 3rd day of April following, resided at a cottage called South Cottage, which he had hired as a residence at Wardie, near Edinburgh; and that on the said 3rd day of April he returned to the Waterloo Hotel, where he resided until the 9th of the said month, when he left the said hotel and went to England for a few days, and returned to Scotland, and resided again at Edinburgh and Stirling until the 6th of June following, when he again returned to and took up his abode at the said hotel, and there remained till the 19th of the said month; that the said V. Dolphin had by such residence and intention, as well as in fact, become a domiciled Scotchman;" and then it goes on to allege the proceedings which were taken by Mrs. Dolphin, and the sentence of divorce.

Now, the allegation does not state that Mr. Dolphin had given up his house and establishment in England, or that he had left it without intention of returning, or that he had gone to Scotland with the intention of remaining there. It appears to me that the case in this respect is governed by *Lolley's case* and *Conway v. Beazley*, and that the marriage was not dissolved.

But it was contended, secondly, that, admitting that the Scotch Court had not power to dissolve the marriage, yet, that the sentence would have the effect of a divorce *à mensâ et thoro*, and that the domicile of the wife would no longer be presumed to be that of the husband, for

which *Williams v. Dormer* was cited as an authority. But the sentence of the Scotch Court was no otherwise a sentence of separation from bed and board and mutual cohabitation than by dissolving the marriage. As a dissolution of the marriage, it cannot be recognized in this court, and therefore I think it could not destroy the legal presumption that the domicile of the husband is the domicile of the wife.

It follows, then, that the revoking instrument, not having been executed by Mrs. Dolphin in conformity with the law of her domicile, is inoperative. The will remains unrevoked, and the allegation, if admitted, would afford no answer to the claim of the executors to have probate of that will. It must, therefore, be rejected.

Allegation rejected.

Dr. Deane.—I do not know whether this is the proper time to make the application, but this being an interlocutory decree, we are unable to appeal without your Lordship's permission, under section 39. of 20 & 21 Vict. c. 77, which we should be glad to obtain.

SIR C. CRESSWELL.—Certainly.

Dr. Deane.—That, I presume, would include an order to stay proceedings.

SIR C. CRESSWELL.—Yes.

PROBATE. }
1858. } *In the goods of J. J. MARTINDALE (deceased).*
Jan. 28. }

Will—Administration with Will annexed to the Nominees of a Person having Power under a Will to appoint Personalty, the Executor renouncing—20 & 21 Vict. c. 77. s. 73.

A. bequeathed the residue of his personal estate to W. his sole executor and trustee, in trust for such persons as B, a married woman, should appoint, and in default of appointment to B. absolutely. W. renounced. By deed B. appointed and assigned to M.

and J., who accepted the trust, all her interest under the will, and her right to letters of administration with the will annexed, in order that they might obtain such letters of administration. Letters of administration, with the will annexed, granted to M. and J.

J. J. Martindale died in 1857, leaving a will, dated the 6th of March 1855, by which he appointed J. Weekes his sole executor and universal legatee in trust. After directing that his debts should be paid, he bequeathed the residue of his property to the said J. Weekes, in trust for such person or persons as Martha Brown, wife of J. Brown, should by any writing or writings under her hand, or by her last will and testament, notwithstanding her coverture, appoint, and in default of appointment for the absolute, sole and separate use of the said Martha Brown, free from the controul, debts or engagements of her then present or any future husband.

J. Weekes, by proxy under his hand and seal, renounced all his right to the probate of the said will, as also to the letters of administration with the will annexed of the goods of the deceased.

Under the power given by the will, Martha Brown, by an indenture of appointment and assignment, assigned all her separate estate, and all her right and interest given to her by the will, and also her right and title to the letters of administration with the will annexed, to E. Mariner and H. W. Judge, upon trust for the purposes therein mentioned, in order that they might apply for letters of administration with the will annexed. They, by the indenture, accepted the trust.

Dr. Deane moved the Court to decree letters of administration, with the will annexed, of all the goods, &c., of J. J. Martindale, to be granted to E. Mariner and H. W. Judge, as the nominees of Martha Brown. There is no case in point, but I submit that the indenture was a sufficient exercise of the power to entitle the nominees to a grant of letters of administration. If, however, this be doubtful, the Court may, in its discretion, make the grant as prayed, under the 73rd section of 20 & 21 Vict. c. 77, the testator "not

having appointed an executor willing to take probate."

SIR C. CRESSWELL.—At present there is only a copy of the indenture of assignment in the registry. The original must be brought in and compared with the copy in the registry. If that is found correct, the grant may go as prayed.

Motion granted, subject to the copy of the assignment being found to be correct, on comparison with the original deed.

PROBATE.
1858.
Feb. 15. }

YOUNG v. OXLEY.

Administration Bond—Assigning Administration Bond given to a Bishop before the Probate Act for the Purpose of putting it in Suit—20 & 21 Vict. c. 77. s. 84.

In 1854 an administration bond, with two sureties, was given to the Bishop of Chester. In 1854 a suit in Chancery was commenced by a creditor of the intestate against his administratrix, and, the condition of the bond having been broken, it was ordered by the Master of the Rolls that an action should be brought on it against the sureties. The proceedings required by the Ecclesiastical Court to be taken before commencing such action were not completed at the time the Probate Act came into operation, when the testamentary jurisdiction of the Court of Chester ceased. On motion that the Court should order the bond to be attended with, for the purpose of being put in suit, the Court decreed that the Registrar should order the bond to be assigned for the purpose of being put in suit.

Quære—whether, since 20 & 21 Vict. c. 77, an action will lie on such bond.

W. Oxley having died in 1853, intestate, letters of administration of his personal estate were granted in January 1854 by the Consistory Court of Chester to Ann Oxley, his widow, who, with two sureties, G. Hughes and M. Brandwood, executed a bond to the Bishop of Chester in the

sum of 4,000*l.* for the due administration of the personal estate of the deceased. The deceased at the time of his death was indebted to J. Young in the sum of 109*l.* 2*s.* 2*d.* for goods sold and delivered. For this Young brought an action against Ann Oxley, as administratrix, in the Queen's Bench, and on the 21st of March 1854, obtained judgment for 118*l.* 4*s.* 2*d.*, the amount of the debt and costs. In April 1854, J. Young commenced a suit in Chancery against Ann Oxley as administratrix. By the order of the Master of the Rolls, an account was taken of what was due to Young and the other creditors of the deceased, and of the personal estate which had come to the hands of Ann Oxley. In February 1856, the chief clerk made a report, which was confirmed by the Master of the Rolls, by which it appeared that Ann Oxley had received personal estate to the value of 1,157*l.* 6*s.* 9*d.*, and was entitled to be allowed 131*l.* 3*s.* 7*d.*, leaving a balance due from her of 1,026*l.* 3*s.* 2*d.*, and that there was due to J. Young 126*l.* 15*s.* being the amount of the judgment debt and interest. In May 1856 it was ordered that the costs of J. Young and Ann Oxley should be taxed, and that one month after the taxing Master's certificate she should pay the balance of the 1,026*l.* 3*s.* 2*d.*, after deducting her taxed costs, into the Bank of England to the credit of the cause. No part of the balance having been paid in, the Master of the Rolls, in January 1857, directed that an action should be brought against the sureties to the administration bond. According to the practice of the Ecclesiastical Court, proceedings were taken against Ann Oxley to compel her to exhibit an inventory and furnish an account before making a decree against the sureties to the bond. Ann Oxley having exhibited an inventory and furnished an account, by which it appeared that she had assets sufficient for the payment of the debt due to J. Young, a monition was decreed against the sureties, and subsequently a monition by letters of request to the Isle of Man against G. Hughes, who resided there, to shew cause why the bond should not be attended with for the purpose of being sued upon in a court of common

law. The letters of request were not, however, issued, as they could not be made returnable until the 14th of January 1858, when the jurisdiction of the Ecclesiastical Court ceased.

Dr. Phillimore now moved this Court to order the bond to be attended with, for the purpose of being sued upon at common law. This bond not having been given to the Judge of the Court of Probate, the Court has no power, under section 83. of 20 & 21 Vict. c. 77, to order the Registrar to assign it for the purpose of being put in suit. Section 84, however, enables the Court to grant the motion. Here there was a testamentary suit pending at the time the Probate Act came into operation, which was transferred with all its incidents, including the bond, to this court, by section 84.

SIR C. CRESSWELL.—All that I have power to do is, to direct the Registrar to assign the bond when it shall have been brought into the registry. It may then be sued upon in a court of common law. It will be for such Court to decide whether or not the action will lie.

Decreed, that the Registrar should order the bond to be assigned for the purpose of being put in suit.

PROBATE. }
1858. } *In the goods of S. W. LEWIS*
Feb. 27. } *(deceased).*

Will—Presumption of Revocation.

On the 15th of December A, being very ill, made his will, and gave it to his mother to take care of. On the 21st of December, at his request, she gave it back to him. On the 22nd of December he died, when the will was found under the bolster of the bed on which he died, the attestation clause and signatures of the attesting witnesses having been torn off:—Held, that the will was revoked.

On the 15th of December 1857, the deceased being very ill, a will, appointing

his wife sole executrix, was at his request drawn up by R. L. a relative. It was then duly executed and attested, and at the deceased's desire given to his mother, who kept it until the 21st of December, when he asked his mother for it, who returned it to him in the same plight as when she received it. On the 22nd of December the deceased died. Immediately after his death, which took place on the 22nd of December, the will was found under the bolster of the bed on which he died, the attestation clause and signatures of himself and of the attesting witnesses having been torn off. Deceased, after executing the will, expressed his satisfaction that he had done so to R. L.

In order to obtain the opinion of the Court—

Dr. Waddilove now moved that probate of the will should be granted to the widow of the deceased, as sole executrix. He presumed, however, that the Court, under the circumstances deposed, would not grant probate.

SIR C. CRESSWELL.—I cannot grant probate. The will having been returned to the deceased at his request, and found after his death in the place where he would naturally put it, in a mutilated state, leads to the presumption that it was torn by him *animo revocandi*. The widow is, however, entitled to letters of administration of the goods of the deceased, as having died intestate.

Motion refused.

MATRIMONIAL. }
1858. }
Feb. 27. } *EVANS v. EVANS.*

Petition for Dissolution of Marriage, How it should be addressed—Practice—Pleading.

The Judge Ordinary has not jurisdiction to dismiss a petition for dissolution of marriage.

Semble, first, that such petition should be addressed to the full Court, and not to the Judge Ordinary.

Secondly, that when a petition is good on the face of it, it cannot be dismissed on a mere affidavit of facts, though such facts would furnish matter for a plea in bar; but that the facts must be embodied in a plea.

Mr. Evans had presented a petition for the dissolution of his marriage, on the ground of the adultery of Mrs. Evans. The petition was addressed "To the Judge Ordinary of Her Majesty's Court for Divorce and Matrimonial Causes."

In an affidavit, filed by Mrs. Evans, it was stated that in 1855 Mr. Evans had instituted against her, in the Court of Arches, a suit for a divorce *à mensâ et thoro*, by reason of adultery, the facts relied on being those upon which the present petition was founded; and that in June 1857 the Judge of that court had dismissed Mrs. Evans from the suit, adultery not having been proved.

The Queen's Advocate, for the respondent, moved for the dismissal of the petition, on the ground that the question was *res judicata*.

CRESSWELL, J.O.—I have no power to hear you by myself. This is a motion which can only be made before the full Court.

Motion refused.

The Queen's Advocate asked for his Lordship's opinion upon the form of the petition. Following Form No. 3, given in the Rules for this Court, it was addressed to "The Judge Ordinary, &c." It seemed very doubtful whether this was correct, as section 10. of 20 & 21 Vict. c. 85. required that a petition for dissolution should be heard before the full Court.

W. G. Harrison (of the common law Bar), who appeared for the petitioner, said that the difficulty had been felt, but that it had been thought better to follow the Form given.

CRESSWELL, J.O.—I think it will be better, in order to avoid all technical objections, to amend the petition by addressing it to the full Court, which alone has

power to hear it. The Forms are merely given *exempli gratia*, and are not intended to be literally adhered to. I would suggest, *Queen's Advocate*, that your motion is not correct. The facts on which you rely, viz. those stated in the affidavit of Mrs. Evans, do not appear upon the face of the petition; you cannot, therefore, move the Court to dismiss it, but should plead them. The plea would be in the nature of a plea of judgment recovered.

MATRIMONIAL.

1858.

March 9.

WRIGHT v. WRIGHT.

Practice — Amendment of Petition for Dissolution of Marriage.

Leave to amend a petition for dissolution of marriage, no notice of the motion having been given to the respondent, granted, on condition that the petition should be withdrawn, and served again when amended.

Mrs. Wright had presented a petition for the dissolution of the marriage by reason of her husband's adultery and desertion. The petition was addressed "To the Judge Ordinary of Her Majesty's Court for Divorce and Matrimonial Causes."

Dr. Deane moved for leave to amend the petition by addressing it "To the Judges of Her Majesty's Court for Divorce and Matrimonial Causes."

[CRESSWELL, J.O.—You should have given notice of this motion to the other side.]

Dr. Deane.—We had intended to withdraw the petition, and serve it again, when amended, on the respondent.

CRESSWELL, J.O.—You may do that.

Motion granted.

MATRIMONIAL.

1858.

Feb. 17.

ROBOTHAM v. ROBOTHAM.

Dissolution of Marriage — Practice — Service of Citation — Substitutional Service — 20 & 21 Vict. c. 85. s. 42. — Rule 10.

An application on behalf of a wife, who had presented a petition for dissolution of marriage, that a substitutional service of the citation on the father of her husband should be allowed, on the ground that she did not know her husband's address, but that his father was in communication with him, was rejected by the Judge Ordinary, as it appeared probable that the husband was in New York, and the impossibility of serving him personally was not made out.

Quære—Whether the Judge Ordinary has power to dispense with personal service of the citation in a proceeding for dissolution of marriage.

In this case a petition for a dissolution of marriage had been presented by Mrs. Robotham by reason of the adultery and bigamy of her husband.

Macqueen now moved the Court, under section 42. of the 20 & 21 Vict. c. 85. and rule 10 of the Rules of the Court for Divorce and Matrimonial Causes, to dispense with personal service upon the husband of the citation and copy of the petition, and to allow a substitutional service of the same by serving them on the husband's father.

The facts on which he relied, in support of the motion, were stated in the affidavits of the petitioner, her brother, and the clerk to her solicitor, of which the following is the substance.

The petitioner deposed, that her husband, on the 27th of March 1856, confessed that he had committed bigamy, and then left her without saying where he was going or where she could communicate with him: that she had never since seen him or heard from him, and did not know how to communicate with him, and had no means of obtaining such knowledge.

A brother of the petitioner deposed, that in the beginning of the year 1857 he received through the father of the respondent a letter from him, which he destroyed, but that he remembered it was dated from

the United States of America, and that it stated that the respondent was desirous that the petitioner should write to him through his father, who would forward it to him.

The clerk to the petitioner's solicitors deposed, that on the 19th of February 1858 he called on the respondent's father to ascertain the address of his son, for the purpose of serving him with the citation and a copy of the petition; that the father said, that his son had left England for New York in April 1856; that he frequently received from him American newspapers, and the last newspaper was received in January 1858; and that he knew where a letter would reach him in New York, but that he would not disclose his son's address even if he knew it.

Macqueen.—I submit that, under these circumstances, the Court should grant the motion, and that sufficient time should be allowed the respondent's father to communicate with his son and receive his reply; and that, if at the expiration of that period no appearance should be entered, a further application should be made to the Court for liberty to proceed, "the absence of the husband notwithstanding." There are no precedents in this Court, but the practice of the House of Lords in similar cases is in favour of this application being granted. In *Lingham's case* the House of Lords, under the advice of Lord Eldon, directed service of the order for the second reading of the bill for a divorce by reason of the wife's adultery, to be made by leaving a copy of the bill and order at the house of the mother of the wife, who had left this country.—(*House of Lords Journals*, Feb. 22, 1805.) Again, in *Battersby's case* (1), Mrs. Battersby applied for a divorce on the ground of her husband's bigamy. He had been convicted at the Central Criminal Court of bigamy, and sentenced to transportation, and was on his way to a penal settlement when it became necessary to serve him with notice of the second reading of the bill. The House of Lords, with the sanction of Cottenham, L.C., allowed a substitutional service of the copy of the bill, and of the order for the second reading, by leaving the same

(1) 1 Macq. 667.

with the attorney who had defended the husband on his trial. The bill was read a second time and passed.

THE JUDGE ORDINARY.—Assuming that I have the power sitting alone to dispense with personal service in cases where a dissolution of marriage is prayed, as to which I have some doubt, I think you should take further steps before I make the order you ask. To entitle you to such an order you ought to make out the impossibility of effecting personal service, which you have not done. There is sufficient evidence that the respondent is at New York, and some efforts might be made to discover his address. If I were at once to make an order that service on the father of the respondent should be good service, it might lead in the majority of cases to the dispensing with personal service. I should recommend you to send out to some person in New York, say the British Consul, the citation and a copy of the petition, with instructions to send back the citation when served with an affidavit of service. The affidavit might be sworn before any person having power to administer an oath. If that application should not be successful you can come to the Court again. I think there should be an alteration in the form of the citation given in the rules, which is inapplicable to a case where the respondent is abroad. You had better get a form of citation requiring the respondent to enter an appearance within six weeks from the date of service.

Motion rejected.

MATRIMONIAL. }

1858.

April 23.

WARD 9. WARD.

Dissolution of Marriage—Practice—Proceeding to Proof of Petition in Default of Answer—Rule 14.

Where the respondent to a petition for dissolution of marriage appears, but does not put in an answer within twenty-one days from the service of the citation, an application to proceed to proof of the petition will not be granted unless notice of it has been given to the respondent.

This was an application to the Judge Ordinary at chambers, for the purpose of ascertaining in what way the Court would hear the evidence in support of a petition.

The petition, which was presented by a wife for dissolution of marriage, with the requisite affidavit, had been duly filed, and the husband had been served personally with the citation, and had appeared; but, although more than twenty-one days had elapsed since the service of the citation, he had not put in any answer. Rule 14. provides, "That within twenty-one days from the service of the citation the respondent shall file his or her answer in the registry, otherwise the petitioner shall be at liberty to proceed to proof of the petition." This application was made for the purpose of proceeding with the evidence in accordance with that rule.

The JUDGE ORDINARY inquired whether any notice of this application had been given to the respondent.

O. B. C. Harrison, in support of the application, said that there was no rule of this Court by which such notice was required; that, consequently, no notice had been given; and that, looking at the terms of rule 14, it had been supposed that where a respondent did not answer within the twenty-one days, the petitioner was entitled to proceed with the evidence at once—the only question being the way in which the Court would receive it.

The JUDGE ORDINARY said that the respondent ought to have had notice of the application, and should have been summoned to shew cause against it; that a rule upon the subject was unnecessary, as the course of proceeding was sufficiently pointed out by the general practice of the Courts under similar circumstances.

The application was then allowed to stand over until the respondent had been summoned to shew cause against it.

MATRIMONIAL. }
 1858. } CHANDLER v. CHANDLER.
 May 10. }

*Dissolution of Marriage—Practice—
 Service of Citation—Substitutional Service*
 —20 & 21 Vict. c. 85. s. 42.—Rule 10.

An application was made on behalf of a wife, who had presented a petition for dissolution of marriage, to dispense with personal service of the citation, and allow substitutional service on the brother of the husband. The affidavits, in support of the application, shewed that the husband was living abroad under an assumed name, and that the wife could not ascertain where he was, but that her husband's brother was in communication with him, and had undertaken to forward the citation to him.

The Judge Ordinary rejected the application, on the ground that personal service might be effected through the husband's brother.

This was an application for an order to substitute service of the petition and citation upon the brother of the respondent, instead of on the respondent.

Mary Ann Chandler presented a petition for a dissolution of marriage, on the ground of the adultery and desertion of her husband, T. W. Chandler.

The petition and affidavit in support of it were filed on the 22nd of April 1858, and a citation issued on the following day.

The affidavit of the petitioner stated, that the marriage took place in 1849, and that the parties lived together at Cheltenham until the 1st of February 1855, when the respondent deserted the petitioner, and she had never seen him since. That the petitioner was informed and believed that the respondent, on leaving home, assumed a different name, and had since been living under it. That the petitioner was entirely ignorant of the respondent's name and address, and had repeatedly applied to his brother, B. Chandler, for the same, but he refused to give them, but had offered to send anything to the respondent which the petitioner might wish forwarded. That the petitioner did not know any person who was acquainted with the re-

spondent's address or assumed name, and had no means of obtaining such information, but believed that the said B. Chandler had full means of communicating with him, and that if substituted service of the citation and copy of the petition were ordered to be made on B. Chandler, he would communicate the same to the respondent.

The affidavit of the petitioner's solicitor stated, that on the 4th of May 1858 he sent a letter to B. Chandler, the substance of which was—"A petition for divorce against your brother has been filed, and there is a difficulty in serving him with the citation, as Mrs. Chandler neither knows his abode nor the name under which he passes, and we collect you do not wish to disclose them; but we understand you are in communication with your brother, who, we believe, is residing out of Europe. We think the Court would approve of having the citation served upon you; and we will thank you to say whether you will forward it to him, and how long it will take to obtain his answer." That he received in reply the following letter, dated May 6, 1858, from B. Chandler:—

"I am in communication with my brother, and if you send me the citation and a copy of the petition, I will take care and forward it, provided you undertake to pay my charges. Many letters between him and myself never reach their destination, but if mine to him and his to me are delivered in due course, I may get an answer from him in from two to three months."

Macqueen now moved the Court for an order to substitute service of the petition and citation on Benjamin Chandler, the brother of the respondent. The affidavits shewed—that the petitioner did not know, and had no means of knowing, where to find the respondent, and that his brother was in the habit of communicating with him. If the order were granted, there could be no doubt that the respondent would receive the citation and petition.

THE JUDGE ORDINARY.—Why have you not tried the experiment of sending the citation to the respondent's brother, and seeing if you can so get it served on the respondent? I have a great objection to

making the order, if it can possibly be avoided, for, if I do so, the substituted service will be effectual, although the citation should be put in the fire by the respondent's brother as soon as he got it. Make the experiment, and if, after doing all you can, you find that you cannot get the citation served on the respondent, the Court may dispense with service altogether.

Motion rejected.

PROBATE. }
1858. } *In the goods of THOMAS*
March 2. } *CADYWOLD (deceased).*

Will — Revocation by Marriage, and Birth of a Child before the Wills Act.

C, in 1828, made his will, in contemplation of marriage, whereby he appointed E. S, his intended wife, executrix, and made provision for her and the issue of the marriage. C. shortly afterwards married E. S, and had children by her. In 1857 K. died:—Held, that the will was revoked by the marriage and birth of a child.

Thomas Cadwold died on the 12th of August 1857, leaving a will, executed before the Wills Act, bearing date the 29th of March 1828, of which he appointed Elizabeth Soundy, his intended wife, with others, the executors. He devised his real estate to E. Soundy, his intended wife, for her life, and directed that after her death his executors should sell the same, and bequeathed the proceeds of such sale to and amongst all his children by his said intended wife, who should be living at his decease, or should be born in due time afterwards, and bequeathed the residue of his personal estate to his intended wife for her own use absolutely.

After making the said will the deceased married E. Soundy and had issue by her, of whom a son and three daughters were living at his death. The other executors having renounced, Elizabeth Cadwold, the widow of the deceased, applied for probate of the will, having been advised,

on the authority of *Kennebel v. Scraston* (1), that the will was not revoked by the subsequent marriage of the deceased and birth of children. The Registrar refused to grant probate.

Dr. Addams now moved that probate of the will should be granted to Elizabeth Cadwold, as one of the executors of the will therein named.—Though I move for probate, I apprehend the Court cannot grant it, as, upon the authorities, the will was revoked by the subsequent marriage of the deceased and birth of children. According to the old practice of the Ecclesiastical Courts marriage and the birth of a child were not necessarily a revocation of the will previously made, but raised only a presumption of revocation, which might be rebutted by evidence of the testator's intention that the will should not be revoked; and the fact that the testator had in his will made provision for his wife and children was considered in those courts as some evidence of such intention. In *Fox v. Marston* (2) an allegation pleading evidence to rebut the presumption of revocation was held admissible. The same question on the same will came under the consideration of the Exchequer Chamber, in *Marston v. Rosd. Fox* (3), who held that the revocation of a will by the subsequent marriage of the testator and birth of a child takes place "in consequence of a rule or principle of law, independently of any question of intention of the testator, and that, consequently, evidence of his intention that it should not be revoked is inadmissible." In *Israel v. Rodon* (4) the Privy Council, on an appeal from the Court of Ordinary in Jamaica, held that the will of a bachelor was absolutely revoked by his subsequent marriage and the birth of a child.

SIR C. CRESSWELL.—It seems rather startling that a will like this, executed in contemplation of marriage, and making provision for the testator's intended wife and the issue of the marriage, should be *ipso facto* revoked by the subsequent mar-

(1) 2 East, 530.

(2) 1 Curt. 494.

(3) 8 Ad. & E. 14.

(4) 2 Moore, P.C. C. 51.

riage and birth of a child; but, on the authorities cited there can be no doubt such is the case. I must, therefore, refuse probate of the will.

Motion rejected.

PROBATE. }
1858. } *In the goods of ELIZABETH*
March 13. } *HOW (deceased).*

Will—Married Woman—Presumption that Husband, not heard of for more than Seven Years, died before his Wife.

E. H. died in February 1857, leaving a will made in January 1857. The deceased's husband had left New York for Albany on the 9th of April 1850, since which time, though inquiries had been made for him there and elsewhere, nothing had been heard of him. On motion for probate of the will of E. H. as having died a widow,—Held, that the husband of E. H., not having been heard of for more than seven years, might, under the circumstances, be presumed to have died before his wife, as there was no legal presumption that his death took place at the end of the seven years, and that, consequently, the will of E. H. was valid.

Elizabeth How died on the 20th of February 1857, leaving a will, dated the 25th of January 1857, whereby she appointed G. B. her sole executor. Her husband left England for the United States in 1850, and arrived at New York in April of that year. He left New York on the 9th of April 1850 for Albany, since which time he had not been heard of. Inquiries were made by the testatrix in America, Australia, the Cape of Good Hope, and elsewhere, and in 1856 advertisements were inserted in the *Albany Evening Journal* and the *New York Herald*, but without obtaining any information about him.

Since the death of Mrs. How her executor had caused further inquiries to be made, and had advertised fourteen times in the *Argus* newspaper, published at Melbourne, and also in other newspapers.

Dr. Deane moved the Court to decree probate of the will of Elizabeth How, as having died a widow. He submitted that

under the circumstances the Court might presume that the deceased's husband died before her.

SIR C. CRESSWELL.—I think I may well grant probate of the will. It appears that seven years have now elapsed since he was last heard of, and, therefore, his death may be presumed. In *Doe v. Nepean* (1), it was held, that though a person, who had not been heard of for seven years, might be presumed to be dead, yet that there was no legal presumption that his death took place at the end of the seven years, and Lord Denman in delivering the judgment of the Court gives good reasons why this should be so. Here, there is great reason to suppose that the husband of the deceased died some time ago. If he had remained in Albany or any place, it is most probable that he would have got known, and through the inquiries that have been instituted would have been found out. I think, therefore, that I may fairly presume that he died before Elizabeth How, and, consequently, that she had a right to make this will.

Motion granted.

PROBATE. }
1858. } *In the goods of M. GENT,*
March 19. } *(deceased).*

Administration Bond—Amount of Penalty
—20 & 21 Vict. c. 77. ss. 81, 82.

*G. died a bachelor and intestate, leaving personal estate, sworn under 3,000*l.*, his debts amounting to about 44*l.* The Court, under section 82. of 20 & 21 Vict. c. 77, granted letters of administration to his mother, who was his sole next-of-kin, on her giving a bond with sureties for double the amount of the debts of the deceased.*

The Rev. Matthew Gent died in December 1857, a bachelor and intestate, leaving his mother, M. A. Gent, widow, the only person entitled to his personal estate.

The property of which he died possessed

(1) 5 B. & Ad. 86.

consisted of 2,000*l.* 3*l.* per cent. consols, standing in his name in the books of the Bank of England, and some other effects, the whole being under the value of 3,000*l.* Mrs. Gent was about to take out letters of administration to the deceased's effects, but had no relatives in England, and was not acquainted with any persons to whom she could apply to become sureties with her in the usual administration bond in the sum of 6,000*l.* The debts of the deceased, at the time of his death, amounted only to about 43*l.* 15*s.* 4*d.*

These facts were deposed to in the affidavit of Mrs. Gent.

Dr. Addams moved the Court, under the 81st and 82nd sections of the 20 & 21 Vict. c. 77, to decree administration to Mrs. Gent, on her giving bond, without sureties, in the sum of 6,000*l.*; or, on her giving bond, with sureties, in the sum of 100*l.*:—The Court has power either, under the 81st section, to dispense with sureties to the administration bond, or, under the 82nd, to direct that the penalty of the bond be reduced below the ordinary sum at which it is fixed, viz., double the amount under which the personal estate of the deceased is sworn.

SIR C. CRESSWELL.—I think the most convenient course to adopt will be, for Mrs. Gent to enter into a bond, with sureties, for double the amount of the debts of the deceased—say 100*l.*

Administration granted on bond being given for double the amount of the deceased's debts.

PROBATE. }
1858. } *In the goods of M. A. HOLL*
April 23. } *(deceased).*

Will deposited in Registry—Application to allow it to be sent Abroad.

A, by her will, devised to B. certain land in Australia. A suit was commenced by B. in the Supreme Court in Australia to recover possession of such land.

An application on behalf of B. that the original will, which was deposited in the

Principal Registry of the Court of Probate, should be delivered out of it for the purpose of being sent to Australia to be used as evidence in the suit, was refused.

Mary Ann Holl died on the 7th of March 1849, leaving a will and codicil, the latter dated the 4th of March 1849, which were duly proved in the late Prerogative Court of Canterbury by D. S., the surviving executor. The original will and codicil were deposited in the Principal Registry of the Court of Probate. The codicil contained the following clause:—"I also will and bequeath to J. K. Wilson, R. K. Wilson and F. H. Wilson, so much of the land in New South Wales belonging to me as they may be able and willing to occupy and cultivate; but, in the event of their not being willing to occupy it, I then give and bequeath it to J. and H. Hamilton and to their brother, whose name I forget, all three now residing in Sydney."

R. J. Want, an attorney and solicitor practising in the Supreme Court of New South Wales, at Sydney, who was on a visit to this country, stated in an affidavit, that he was the solicitor for the devisees named in the codicil, who were resident in New South Wales; that the property devised was, at the death of the testatrix, in the possession of J. Stockdale, who refused to give up possession to the devisees, alleging that he had some title to the property; that the devisees had commenced proceedings against him in the Supreme Court at Sydney to recover possession; that to support their title it was necessary to give evidence of the due execution of, and the contents and validity of, the will and codicil, and that he believed that, on the hearing of the cause, it would be objected that they ought to be produced, and that any other evidence of them would be inadmissible.

Dr. Addams moved the Court to direct that the original will and codicil of M. A. Holl, deceased, should be delivered out of the Registry, upon leaving a certified copy of them, in order that they might be produced at the hearing of the cause in Sydney; or that the same should be transmitted to the Judge, Registrar, or other official of the Supreme Court, with such

directions as the Court should think expedient to insure the safe return of them to the Registry.

SIR C. CRESSWELL.—I cannot grant the application. If I were to allow the original will and codicil to be delivered out of the Registry to the solicitor of the devisees, to be taken by him to Australia, and he were not to send them back, what can I do to him? I should have no power to compel him to return them. Even if I could grant it, I do not see that it is necessary that they should be produced at the trial in Australia. It appears that a commission has been issued for taking evidence in the cause in this country, and I have no doubt, if the execution of the will and codicil is proved under it, and an examined copy of them is sent out to Australia, that the Court will dispense with the production of the originals. In *Alison v. Furnival* (1) an action was brought on an instrument executed in France and deposited there with a notary. On proof that by the law of France a document deposited with a notary cannot be removed, the Court of Exchequer held, that the instrument was sufficiently proved by the production of a copy, and I have no doubt the Court in Australia would act on the same principle. You must not trust to an *official*, but should send an *examined*, copy of the original.

Motion rejected.

PROBATE. } In the goods of REBECCA SMITH,
1858. } WIDOW (deceased).
April 28. }

Will of Married Woman—Effect of Will made during Coverture by a Wife who survives her Husband.

R. S. died on the 19th of January 1858, two days after her husband's death, leaving a will, made during her coverture, which had not been re-published after her husband's death. R. S. had no power under any instrument to make a will during cover-

ture. At the time of the death of her husband and herself there was invested in the husband's name in the 3l. per cent. annuities, with monies of his, a sum of money which had always been treated by the husband and wife as her separate property, the same being the savings of the wife of presents made to her by her husband. By his will the husband declared that the said sum was the sole property of his wife:—Held, that the said monies were the separate estate of the wife, her husband being, as to them, a trustee for her, and, consequently, might be disposed of by a will made during her coverture; but that, as she survived her husband, probate should be granted, limited to such property as she had power to dispose of.

Rebecca Smith, widow of James Smith, died on the 19th of January 1858. Her husband died on the 17th of the same month. She left a will, dated the 4th of January 1858, whereby she appointed M. S. Smith, her daughter, her executrix.

The affidavit of the executrix stated, that the will was in the handwriting of the deceased's husband, with the exception of her signature and the signatures of the subscribing witnesses, and was written by him at the dictation of the deceased. That there was no settlement on the marriage of the deceased, nor had she power under any instrument to make a will during coverture. That she was entitled at and long before the date of the will to a considerable sum of money, at one time amounting to 1,600*l.* new 3*l.* per cent. annuities, in which her monies were, at the time of the deaths of herself and her husband, invested. That such money and stock were treated by both the deceased and her husband during the coverture as her sole and separate estate. That the same was, for convenience, invested in her husband's name in the 3*l.* per cent. annuities, together with monies of his own and also monies of the executrix. That when deceased required a portion of the said property, her husband sold out the same, or took the same to himself at the current price of the day, and gave the deceased the proceeds. That the deceased's hus-

(1) 1 Cr. M. & R. 277.

band, in 1856 and 1857, so sold out, or took to himself, portions of the said stock, and gave deceased the proceeds, who advanced the same to her grandsons for their own use. That in a memorandum-book in which deceased's husband entered, in his own handwriting, a particular of the stock in his name, is an entry by him in his own writing:—

"Mother has but 1,100*l.* New 3*l.* per Cent., she having sold to me 100*l.* The money was for George, to set him up in the washing-powder trade."

"August 18th, 1857, Mother agreed to let G. S. have another 100*l.* stock from her present amount of 1,100*l.* New 3*l.* per Cent., at *Times* price, which will reduce the amount to 1,000*l.* This has been done, and 91*l.* 5*s.* has been paid G. S. at mother's request."

That by "mother," he meant the deceased. That on receiving the half-yearly dividends of the stock, he divided the same between deceased, the executrix and himself, according to their several interests. That deceased disposed of the dividends so paid for her own purposes and as her separate estate. The deceased acquired this money by gifts from her husband, who was in the habit, on the anniversaries of their wedding-day and other days, of presenting her with a sum of money. That the deceased's husband died on the 17th of January 1858, having made a will, which contained the following words:— "And whereas there is now standing in my name in the new 3*l.* per cent. bank annuities, the sum of 1,100*l.*, stock, which in equity belongs to and is the sole property of my said wife, I hereby declare the same to be the sole property of my wife, and direct my executors to transfer or pay the same to her or her assigns to and for her own absolute use and benefit and disposal, and so far as may be necessary, or I can do so, I hereby give and bequeath the same to her."

April 26.—*Dr. Phillimore* moved the Court to decree probate of the will of Rebecca Smith, widow, deceased.—The deceased's husband, under the circumstances stated in the affidavit of the executrix, had made himself a trustee for the

wife as to the money in the funds, which she had, therefore, a right to dispose of by a will made during the coverture. He referred to *Roper's Husband and Wife*, 2nd edit., vol. 1, pp. 170, 171.

Cur. adv. vult.

SIR C. CRESSWELL. — The distinction between the cases which have arisen, as to the effect of the wife's will made during coverture when she survives, is rather fine. Where the sole power for the wife to make a will arises from the consent of the husband; it is said that he merely waives his right as her administrator, and can only give validity to the will in the event of his being the survivor, and that if he dies before her, the will is void against her next-of-kin — *Roper's Husband and Wife*, 2nd edit., vol. 1, pp. 170, 171. Again, where property is settled on husband and wife, and the wife has a power to appoint by will if she dies before her husband, but if she survives, the property is to go to her absolutely; and she appoints by a will made during coverture, but survives her husband: such will is inoperative—*Price v. Parker* (1), *Trimmell v. Fell* (2)—for the circumstances under which the power was to be operative never arose, and the will was never valid. There is, however, a third class of cases, viz., where the wife is possessed of separate estate, within which, I think, the present case comes; for the sum of money in the funds may be considered to have been the separate property of the deceased, her husband being as to it a trustee for her. She would, therefore, have a disposing power over it, according to *Fettiplace v. Gorges* (3) and several other cases, by which that has been followed. I think, therefore, that probate may be granted, but it must be limited to such property as she had power to dispose of.

Limited probate granted.

(1) 16 Sim. 198.

(2) 16 Beav. 537.

(3) 3 Bro. C.C. 8; s. c. 1 Ves. jun. 46.

PROBATE.
1858. }
March 13. } PATTEN v. POULTON.

Will — Presumption of Revocation of Missing Will rebutted.

The presumption that a will left in the keeping of the testator, if it cannot be found at his death, has been destroyed by him animo revocandi is a presumption of fact which prevails only in the absence of circumstances to rebut it. Among such circumstances are declarations by the testator of goodwill towards the persons benefited by it, adherence to the will as made, and the contents of the will itself.

C, in 1837, made a will in favour of her three children, who were illegitimate, retaining possession of it. She had no place for the deposit of papers of importance, and afterwards changed her residence twice, and died in 1846. Search was then made unsuccessfully for a will by her brother who, when doing so, destroyed some papers which he supposed unimportant. C. always shewed the greatest affection for her children, and at the time of making the will and shortly before her death expressed her satisfaction that her property was secured to them in the event of her death, and never expressed a desire to benefit by her will any other person.

*A draft of the will, propounded by the executor, being opposed by the next-of-kin,—the Court decreed probate of the draft, holding that under the circumstances the *prima facie* presumption that C. destroyed the will *animo revocandi* was rebutted, inasmuch as it was possible that the will might have been accidentally lost in C.'s lifetime or destroyed after her death, and highly improbable that she wilfully destroyed it.*

The following were the facts of this case as stated by Sir C. Cresswell in his judgment.

This was a cause of propounding the will of Julia Clarenza, deceased, promoted by James Patten, the executor therein named, against R. L. Poulton, her eldest brother, and others next-of-kin. Several witnesses were examined on Patten's allegation; the next-of-kin did not bring in

any allegation or administer any interrogatories. The following facts were proved:—Julia Clarenza, formerly Poulton, in 1806, married John Peché, and by him had three children, two sons and a daughter. She then discovered that before the marriage Peché was married to another woman, who was still living, and thereupon immediately separated from him, and never cohabited with him again. She afterwards married Count Clarenza, who died in 1822, and by him had no issue. John Peché died in 1853, having made a will in favour of his three children above mentioned, his property being sworn under 3,000*l.* Julia Clarenza was always devotedly attached to her children, who grew up under her care. The daughter married an Austrian; one son entered the Austrian army, and the other settled at the Cape, and she maintained a correspondence with them during the whole of her life, always manifesting the strongest affection for them and anxiety for their prosperity. After Count Clarenza's death she lived at Blackheath, in Kent, and when there often spoke to a lady with whom she was intimate of her anxiety about them and of her intention to settle her affairs so that they might enjoy the small property which she had to dispose of. In 1837 she was about to remove to Torquay, and then gave instructions in her own handwriting to Mr. Patten, a solicitor, for the preparation of a will. He prepared one according to those instructions, and, at her request, consented to act as executor. The will was executed on the 10th of October 1837, and at the same time the attestation clause and the names of the attesting witnesses were copied on to the draft, which Mr. Patten retained, the will being given to the deceased. She afterwards told a Mrs. Kipps, an intimate friend, resident at Blackheath, that she had settled her affairs, and in 1844, writing to the same lady, said, "My mind seems now at ease that the 600*l.* is now secure in the Bank for my children in case of sudden death." In October 1837 the deceased removed to Torquay, and remained there for some time, occupying part of the house in which her brother R. L. Poulton resided. She afterwards removed to Dawlish, and there occupied part of a

small cottage until her death, which happened in September 1846. Her brother thereupon went to Dawlish and searched for a will without success. When so doing he burnt some papers, which appeared to him unimportant, and it was not imputed that he had intentionally destroyed a will.

March 8.—*Dr. Addams*, for the executor.—The *prima facie* presumption that the deceased destroyed the will *animo revocandi* is rebutted by the evidence: whilst it is most improbable that she should have done so, as up to the time of her death, she is proved to have lived on the most affectionate terms with her children, who would take nothing if she died intestate. It is very probable that the will was either accidentally lost on one of the occasions on which the deceased changed her residence, or was accidentally destroyed by her brother with other papers after her death.—He cited *Davis v. Davis* (1).

Dr. Twiss, for the next-of-kin.—The burthen of proof is on the person propounding the will. The fact, that the affection of the deceased towards her children continued undiminished until her death, is not sufficient *per se* to rebut the presumption that she destroyed the will intentionally; and that is the only fact proved which tends to rebut the presumption.—He cited *Welsh v. Phillips* (2) and *Wargent v. Hollins* (3).

SIR C. CRESSWELL (after stating the facts as above set out) said—The delay that has occurred in propounding the will having been accounted for, I make no observation respecting it.

The case then stands thus:—The executor has proved the due execution of a will, and that the original cannot be found, and he has given satisfactory secondary evidence of the contents. But, on the other hand, it is said that, as the will was in the keeping of the deceased, and at her death could not be found, it must be presumed that she destroyed it *animo revocandi*. This has sometimes been called a presumption of law; but I think that Sir

J. Nicholl, in *Colvin v. Fraser* (4), and Parke, B., in *Welsh v. Phillips* (5), more correctly designate it a presumption of fact; and there can be no doubt that evidence of a will being left in the keeping of the party who made it, and that it cannot be found at his death, is sufficient, in the absence of circumstances tending to a contrary conclusion, to warrant an opinion that the maker of the will destroyed it. But it is a presumption that prevails only in the absence of circumstances to rebut it, and is therefore commonly called a *prima facie* presumption. It may be fortified, or it may be rebutted, by many circumstances. Those commonly relied on are declarations, either of goodwill towards the parties benefited by the will, and of an adherence to the will as made, or, on the contrary, of dissatisfaction and change of mind respecting them. In *Saunders v. Saunders* (6), Sir H. Jenner Fust said:—"The strongest proof of adherence to the will, and of the improbability of its destruction, arises from the contents of the will itself." In the present case, I find no extraneous circumstances to fortify and support the *prima facie* presumption. The lady changed her residence twice after the will was made, and she does not appear to have had any place for the deposit and safe custody of papers of importance. The probability of the will having been lost by accident is not therefore excluded. Again, her brother destroyed some papers, the particular nature of which is not ascertained. It is not suggested that he wilfully destroyed a will, nor is it probable that he could destroy the will in question, which would be of considerable bulk, without some examination; but the possibility of its being so destroyed is not excluded. On the other hand, there are many circumstances tending to negative the presumption: the constant, undeviating affection manifested by the deceased for her children; that the will was made under the influence of that feeling as expressed at the time and afterwards; that she never expressed a desire to benefit by her will any other person; and, above all, the fact that she perfectly

(1) 2 Add. 226.

(2) 1 Moore, P.C.C. 299.

(3) 4 Hagg. Ecc. 249.

(4) 2 Hagg. 325.

(5) 1 Moore, P.C.C. 302.

(6) 6 Notes of Cases, 522.

well knew that her children were illegitimate (although not by any fault of hers); and that, consequently, if she died intestate, they would receive no part of her property, but the whole would be divided amongst others. Here then, as in *Saunders v. Saunders*, it may be said, that the contents of the will itself shew the improbability of its destruction. These circumstances combined render it so improbable that the deceased would wilfully destroy a will made in favour of her children, that I cannot, from the mere circumstance of its not being found, presume that she did so. The will, then, having been duly executed, the contents of it having been duly proved by secondary evidence, and it not being established that the deceased cancelled that will, the Court must give effect to it by pronouncing for its force and validity, and decreeing probate of the draft.

Dr. Twiss, for the next-of-kin, asked that their costs should be paid out of the estate.

SIR C. CRESSWELL.—I have considered the question, and I think they ought to pay their own costs.

Probate of the draft will decreed, the next-of-kin to pay their own costs.

MATRIMONIAL. }
1858. } HOPE v. HOPE.
April 16. }

Restitution of Conjugal Rights—Husband and Wife both Guilty of Adultery—Compensatio Criminum.

The doctrine of the canon law that, where husband and wife have both been guilty of adultery, there is a compensatio criminum, and both are restored to the position of innocent parties, is not part of the law of England.

Therefore, a suit for restitution of conjugal rights cannot be sustained by a wife who has committed adultery, although the husband also has committed adultery.

This was a suit instituted by Mrs. Hope for restitution of conjugal rights.

The sole question was, whether Mrs. Hope could sustain that suit, she and Mr. Hope having both been pronounced guilty of adultery in a suit commenced by her, in the Consistory Court of London, for a divorce *à mensâ et thoro*, on the ground of her husband's cruelty and adultery?

The circumstances raising the question are fully detailed in the judgment.

Feb. 27 and March 2.—*Dr. Twiss* and *Dr. Spinks*, for Mrs. Hope.—Though there is no authority in the English Courts directly in point, Mrs. Hope is, on principle and analogy, entitled to sustain this suit. As a general rule the law acknowledges no intermediate state between a cohabitation and a formal separation, and, except in the case of separation by mutual consent, does not permit a husband or wife to withdraw from cohabitation without the sanction of a Matrimonial Court. In the absence of any direct authority, the case must be governed by the Canon Law, according to which, when the husband and wife had both been guilty of adultery, there was a *compensatio criminum*, the guilt of the one was neutralized by the guilt of the other, and they were restored to the position of innocent parties, and either would be entitled to a restitution of conjugal rights.—

Proctor v. Proctor, 2 Hag. Cons. 298.
Decretals of Gregory IX. lib. 5. tit. 16. decret. 6 and 7.
Sanchez, De Divortis, lib. 10. disp. 6.
Sanchez, De Matrimonio, lib. 10.
Oughton's Ordo Judiciorum, tit. 216.
Ayliffe's Parergon, tit. 'Divorce,' p. 226.

They also cited—

Dalrymple v. Dalrymple, 1 Hag. Cons. 67.
Forster v. Forster, Ibid. 154.
Orme v. Orme, 2 Add. Ec. Rep. 382.
Denniss v. Denniss, 3 Hag. Ec. 353, n.

Dr. Phillimore and *Dr. Deane*, for Mr. Hope.—Where both parties have been dismissed by the sentence of a Matrimonial Court as equally guilty of adultery, neither can appear again in that court to apply for fulfilment of duties applicable to innocent parties. Although the Matrimonial

Law is founded on the Canon Law, yet the English Courts have not adopted all the doctrines of the Canonists. The judgment of Lord Stowell in *Proctor v. Proctor* shews that the doctrine of *compensatio criminum* is not part of the law of England; and he seems to regret that it is not. It is a doctrine quite inconsistent with the present state of society. Under the Canon Law, among other correctives of the evils that would flow from that doctrine, was a system of absolution, by which a husband or wife guilty of adultery was restored to the position of an innocent person. The Canonists place the doctrine of *compensatio criminum* on the same footing as condonation and connivance,—doctrines which are founded on different principles—*Beeby v. Beeby* (1).

There are also two cases in the Court of Queen's Bench, *Govier v. Hancock* (2) and *The Queen v. Flinton* (3), where the Court states that, according to the law of the Ecclesiastical Courts, a wife who has committed adultery cannot obtain restitution of conjugal rights, though her husband has also committed adultery.

They cited also—

Moore v. Moore, 3 Moo. P.C.C. 84; Co. Litt. 32 a, note; and *Manby v. Scott*, 1 Siderfin, 104; s. c. 2 Smith's Leading Cases, 250, n.

Dr. Twiss replied.

The JUDGE ORDINARY now delivered the following judgment:—This suit was commenced in the Consistory Court of London, by Mrs. Hope, against her husband for restitution of conjugal rights. The libel pleaded the marriage, the birth of three children, and the refusal of the husband, at and after a certain time, to permit the wife to live and cohabit with him. The defendant, on the 6th of June 1857, brought in an allegation, pleading, amongst other things, fourthly, that the complainant voluntarily quitted his house; and fifthly, as follows:—"In further contradiction to what is untruly pleaded as aforesaid in the fourth article of the said libel, the party proponent alleges and pro-

pounds that the said Emilie Melanie Mathilde Hope, shortly after she had so voluntarily as aforesaid quitted the house of her said husband, to wit, on or about the month of September 1853, instituted in this court a suit for divorce against the said Adrian John Hope by reason of alleged cruelty and adultery; that after such the institution of the said suit, it came to the knowledge of the said A. J. Hope that the said Emilie Melanie Mathilde Hope had formed in the year 1846, and had subsequently carried on an adulterous connexion with Count Olympe Aguado, who, during such period, principally resided and does still principally reside at No. 18, Place Vendôme, in the city of Paris; that accordingly such the adultery of the said Emilie Melanie Mathilde Hope with the said Count Aguado was pleaded in the said suit in an allegation on behalf of the said A. J. Hope; that the said suit proceeded in due course, and was concluded on or about the 19th of July 1855, when the following decree was duly made therein:—"The Judge, having read the proofs and heard advocates and proctors on both sides thereon, by his interlocutory decree, having the force and effect of a definitive sentence, in writing pronounced, decreed and declared that Emilie Melanie Mathilde Hope, wife of A. J. Hope, had failed in proof of so much of the libel admitted in this cause as charged the said A. J. Hope with cruelty, but had sufficiently proved so much of the said libel as charged the said A. J. Hope with adultery, and that the said A. J. Hope had been guilty of adultery as therein pleaded; and he further pronounced that the said A. J. Hope had also sufficiently proved the allegation given in by Bathurst, and that the said Emilie Melanie Mathilde Hope had been guilty of adultery as therein pleaded, and therefore dismissed, as well the said A. J. Hope as also the said Emilie Melanie Mathilde Hope from this suit, and all further observance of justice therein." In verification of what is hereinbefore alleged, the party proponent craves leave to refer to the acts and records of this court, and this was and is true, and the party proponent alleges and propounds as before." That allegation stood for admis-

(1) 1 Hag. Ecc. 797.

(2) 6 Term Rep. 603.

(3) 1 B. & Ad. 227.

sion: then Mrs. Hope brought in an allegation of faculties for alimony, and Mr. Hope was assigned to answer, but he prayed to be heard on petition to shew why he ought not to be called upon to assign alimony. She answered. The matter was argued, and stood for judgment when the authority of the Consistory Court was abolished, and all suits then pending were transferred to this court; and I much regret that the parties and the public cannot now enjoy the advantage of having this question determined by the very learned person who, for so many years, presided in the Consistory Court with so much benefit to the suitors and honour to himself.

In this court the learned Advocates agreed to abstain from all discussion on technical points, and to argue the main question only, viz., whether, a wife having been guilty of adultery, the husband also being guilty, can claim restitution of conjugal rights? It was admitted on both sides that the records of the ecclesiastical courts of this country furnish no case exactly in point; so that, being left without any former precedent for my governance, I am compelled now to establish one, availing myself of such assistance as can be derived from the *dicta* bearing on the subject, which have from time to time fallen from learned Judges presiding in our courts, whether spiritual or temporal. The argument for Mrs. Hope was simply this: that cohabitation is a duty resulting from marriage, and that neither party can lawfully withdraw from cohabitation without the judgment of a Court, which, in this case, the husband not only had not obtained, but having asked the proper tribunal to release him from that duty, his prayer was rejected; and secondly, that the guilt of each being the same, their mutual delinquencies were thereby compensated, and both were restored to their original position as innocent parties. The first proposition is hardly to be sustained; for an innocent husband may withdraw from cohabitation with a guilty wife, without being subject to any legal proceeding for so doing; and if the wife were to sue for restitution of conjugal rights, her suit would fail on proof of her guilt. But the question remains, whether

the guilt of the wife is to be considered as abolished by that of the husband, so as to restore her to the condition of an innocent person with reference to her conjugal rights. The authority mainly relied on in support of that proposition was *Proctor v. Proctor*, not as a decision on the point now under consideration, but for certain expressions of Lord Stowell as to the extent to which the Canon Law is to be considered as binding in questions of marriage, and its rights and duties; for, undoubtedly, in the Canon Law, authority may be found for saying that, where both husband and wife are guilty of adultery, the husband cannot refuse to receive his adulterous wife. In 2 *Hagg. Consist. Rep.* p. 300, that eminent person thus speaks of the Canon Law: "Upon the first point, the binding authority of the Canon Law in causes matrimonial, depending in these courts, I look without success for any principle on which I can hold that they can release themselves by any power of their own from a submission to that authority. The release, if proper, must come from a higher authority than they possess. It is notorious that this country, at the Reformation, adopted almost the whole of the law of matrimony, together with all its doctrines of indissolubility of contracts *per verba de præsenti et per verba de futuro*, of separations *à mensâ et thoro*, and many others; the whole of our matrimonial law is in matter and form constructed upon it; some canons of our own may have varied it, and a higher authority, that of the legislature, has swept away some important parts of it. But the doctrine of indissolubility remains in full force. The very practice of the legislature, in granting by special acts particular divorces in particular cases, affirms the indissolubility as existing in the general law, and to be maintained in their dispensations of justice." This latter proposition, viz., that marriages are indissoluble, was the important one for the decision of the case then before the Court. The husband sued for divorce upon the ground of adultery; the wife recriminated. The adultery of the wife before suit was proved. The husband also was proved to have been guilty, but not until after the commencement of the suit; and the question to be

decided was, whether, under such circumstances, he could have a divorce. The learned Judge held, that the marriage was by our law, following the principles of the Canon Law, indissoluble; that the infidelity of the husband was, therefore, *par delictum* with that of the wife, and that, consequently, he could not have a legal separation. That was the only point determined in *Proctor v. Proctor*, and is obviously far short of an authority for the decision of that now before the Court. But Lord Stowell, in the course of his judgment, says of the Canon Law, as affecting the case of mutual guilt: "It provides against the mischiefs to which a husband might be exposed by such a wife living apart, by its known doctrine that all separations merely voluntary are totally illegal, not to be either tolerated or presumed. It acknowledges no intermediate state between a cohabitation and a formal separation. It, therefore, presumes, when it withholds its decree of separation, that the parties return to cohabitation, all matters return to their former course, but with increased vigour—the husband and wife live again on their former footing, and there is no anticipation of separate debts or of the probability of a spurious offspring. That such is the doctrine of the Canon Law is most certain; the authorities are numerous and precise to that effect." His Lordship then cited several passages to that effect, which are printed in a note to Dr. Haggard's report of the judgment. In some it is said that, "*paria crimina mutua compensatione delentur*." In others "*mutua compensatione ambo adulteria abolentur*," and that the husband may be compelled to take his wife back. If, indeed, whatever is found in the Canon Law on this subject is to be accepted as an authority binding the Courts of this country, the passages cited would shew that the wife in this case is entitled to a decree in her favour. But in the case of the *The Queen v. Millis* (1), Lord Chief Justice Tindal, in giving the answers of the Judges to the questions proposed by the House of Lords, thus describes the effect to be given to the Canon Law of Europe:—"That the Canon Law of Europe does not and never did, as a body of laws,

form part of the law of England, has been long settled and established law. Lord Hale defines the extent to which it is limited very accurately; the rule, he says, by which they proceed is the Canon Law, but not in its full latitude, but only so far as it stands uncorrected either by contrary acts of parliament, or the common law and custom of England; for there are divers canons made in ancient times and decretals of Popes that never were admitted here in England." The Lord Chief Justice then quotes the following passage from *Cawdrie's case* (2): "As in temporal causes the King, by the mouth of the Judges in his courts of justice, doth judge and determine the same by the temporal laws of England; so in causes ecclesiastical and spiritual, as namely, (amongst others enumerated), rights of matrimony, the same are to be determined by ecclesiastical Judges, according to the ecclesiastical law of this realm." He afterwards adds, "So, albeit the kings of England derived their ecclesiastical laws from others, yet so many as were proved, approved and allowed here by and with a general consent, are aptly and rightly called The King's Ecclesiastical Laws of England." The Canon Law of Europe, therefore, binds the Courts in England, not simply because it is the canon law, but because it has been approved and allowed here; to that extent, and to that extent only, is this Court bound to give effect to it. And, notwithstanding the general expressions on this subject ascribed to Lord Stowell in *Dalrymple v. Dalrymple* and *Proctor v. Proctor*, I infer from another passage in the latter case that he would have entertained at least grave doubts as to the propriety of giving effect to the Canon Law in its full latitude, had the question now raised been brought before him for his decision. For, in 2 *Hagg. Consist. Rep.* 302, he says, "Taking this (viz. that the adultery of the husband was a bar to his suit for divorce on account of the adultery of the wife) as I think I am compelled to do, as the rule of law binding upon the judgment of this Court, I cannot blind myself to the fact, that the modern course of life and manners does not furnish those corrections of the

(1) 10 Cl. & F. 534.

(2) 5 Rep. 1.

mischiefs that may follow which the Canon Law had anticipated in connexion with its rule. There is no return to cohabitation, nor any means to be resorted to for the purpose of compelling it." This passage leaves me in some doubt whether his Lordship meant to say that the law of this country does not furnish the means of compelling a return to cohabitation, or that the usage of society would prevent either party from taking advantage of those means. But, whatever be the real meaning of the passage, what is there to shew that the state of things described by him has arisen from the modern course of life and manners, and did not always exist in this country? For I have not discovered, and what is more important the industry of the learned counsel engaged in this case has failed to discover, any decision or *dictum* of any Judge authorizing the opinion that, under such circumstances as exist in the present case, a decree for restitution of conjugal rights could, at any time, have been obtained. There is, in *Oughton's Ordo Judiciorum*, a statement that such would be the case. Under his title, p. 216, "De causis quæ impediunt restitutionem obsequiorum conjugalium in causâ matrimoniali;" he says, "Probatio quod post contractum vel citra solemnizatum matrimonium ac recessum mulieris à viro (vel è contrâ), vir vel uxor commiserit adulterium, sufficit ad impediendam restitutionem in causâ matrimoniali. In hoc tamen casu, si actor replicaverit et probaverit compensationem vel scientiam, condonationem vel remissionem criminis, obtinebit actor restitutionem petitam." In *Mortimer v. Mortimer* (3), Lord Stowell mentioned Oughton as an authority of no mean consideration in matters of practice in that court; from which limited praise I infer that equal attention has not been paid to his statements of the law in other respects, unless he refers to some other authority. In the passage quoted, he puts "*compensatio criminum*," connivance and condonation, on the same footing. By connivance in this and other passages, I take it that the party is supposed so to connive as to give a willing consent to the act, although not accessory before the

(3) 2 Hagg. Cons. Rep. 316.

fact; in such a case, it is consistent with reason to say, that the party so consenting shall not be allowed to take advantage of the guilt contracted by doing the act consented to. So as to condonation, it is reasonable to say that an offence, which has been blotted out by forgiveness, shall not afterwards be made the subject-matter of accusation. But the same observation is not strictly applicable to a case of compensation by mutual guilt. Both break the sacred obligation into which they have entered; neither instigates or consents to, neither pardons the offence of the other; and although it may not be competent to either to obtain the assistance of a Court to punish the offence committed, it by no means follows, as a reasonable consequence, that each shall be bound to treat the other as an innocent party. There is a passage in Lord Stowell's judgment in *Beeby v. Beeby* (4), which seems at variance with Oughton's doctrine even as regards the effect of condonation. The husband there sued for a divorce on the ground of adultery; the wife pleaded in bar the adultery of the husband. It was argued, but not pleaded, that the evidence proved condonation of his guilt. Lord Stowell, at p. 797, deals with this point as if it had been pleaded. He says, "But what is the effect of condonation? In general, it is a good plea in bar; it is not fit that a man should sue for a debt which he has released; but here the plea in bar is *compensatio*; and condonation is not in bar of the action, but a counter plea. Here the wife does not pray relief, but prays to be dismissed. It does not follow that the same act, which will bar the remedy, will operate on the other side; and unless it is an universal rule that whatever is a plea in bar, and disables a party from bringing a suit, likewise destroys the defence, the present attempt cannot avail the husband. A man, it is true, who has forgiven adultery, cannot bring a suit; but when he complains of his wife, will her forgiveness of his previous misconduct make him a proper person to receive the sentence of the Court? Does her act bind the Court? If both are equally guilty, will her condonation make him *rectus in curiâ*, and enable

(4) 1 Hagg. 789.

him to procure a sentence?" The decision, however, did not proceed on that ground, for Lord Stowell considered that condonation was not proved. If the opinion which, from that passage, Lord Stowell may be presumed to have entertained, be sound, it would apply to this case also. Can a wife, guilty of adultery, say that she is *recta in curia*, because her husband also is guilty? Does his act bind the Court and enable her to procure a sentence? Here the whole matter appears on the plea, and the case must be considered as if the husband had pleaded the adultery of the wife, and his adultery had been alleged by way of counter plea. A question similar to that which I am now called upon to decide, was involved in the case of *Naylor v. Naylor*, of which a note was read by Dr. Lushington in giving judgment in *Asiley v. Asiley* (5). It was tried by Dr. Bettesworth, in the Consistory Court, in 1777. The wife sued for restitution, the husband pleaded her adultery in bar; the wife recriminated. Whether by counter plea, or whether the point was raised on the evidence only (as in *Beeby v. Beeby*) does not appear. The learned Judge decided that the guilt of the wife was fully proved, but that the charge against the husband was not proved. He had, therefore, an opportunity of deciding the question now raised; he said, indeed, "that according to the law of the Ecclesiastical Court, if the guilt of the husband were proved, it would prevent his obtaining the effect of his prayer, which, I presume, was for a divorce; but he does not go on to say that the wife would, therefore, have obtained a decree for restitution. To adopt the language of Lord Stowell, in *Beeby v. Beeby*, If both were equally guilty, that might not make her a proper person to receive the sentence of the Court; and Dr. Bettesworth does not say that it would. But the force of the argument, founded on Lord Stowell's observations in *Beeby v. Beeby*, is certainly diminished by the opinion expressed by Dr. Lushington, in *Anichini v. Anichini* (6). That was a suit by the wife for restitution. The husband pleaded her adultery in bar, and

prayed a sentence of separation. She recriminated; he rejoined condonation. Dr. Lushington, in giving judgment, stated that, although Lord Stowell had not in *Beeby v. Beeby* decided the point, he inferred that his opinion was, that a husband who had committed adultery could not, notwithstanding condonation, afterwards obtain a divorce *à mensâ et thoro* on account of the adultery of the wife, and from that he, Dr. Lushington, dissented; and in the case then before the Court, which disclosed gross adultery on the part of the wife, and a single act of adultery by the husband, long before fully condoned, he decreed a separation according to the prayer of the husband. The learned Judge does not say what would have been his decision had the evidence of condonation failed. But undoubtedly there is another passage in his judgment from which, if considered by itself, and without reference to the facts of the case then before the Court, it may be inferred that, in that event, he would not have felt justified in refusing to decree restitution. "I know no authority (he says) which states that, whatever be the guilt of both parties, if the Court does not pronounce for a separation, they are not, according to the law of this country, bound to live together, and I think such a principle would be dangerous to society and to public morals." But during the argument of this case, it was forcibly contended, by the counsel for the defendant, that, if an adulterous wife could claim the assistance of this Court to enforce restitution of conjugal rights by reason of the husband's equal guilt, a principle much more dangerous to society and to public morals would be established. For the husband's violation of the marriage vow remaining uncondoned (for a suit for restitution is said not to be a condonation) will be a perpetual bar to any proceeding against the wife for repetitions of her offence, however numerous and shameless, and committed under his own roof; and the wife will be equally without remedy for the misconduct of the husband. With that observation I agree, and cannot but think that, as far as public morals and the interests of society are concerned, it would be better to act upon the sugges-

(5) 1 Hagg. 714.

(6) 2 Curt. 215.

tion, not to say the opinion, thrown out by Lord Stowell in *Beeby v. Beeby*, that a party guilty of a breach of the marriage vow should not have the assistance of the Court to enforce any marital rights. In the case of *Kirby v. Kirby* (reported in a note to *Anichini v. Anichini*) the wife sued for restitution, the husband pleaded the adultery of the wife, and prayed a divorce; she offered an allegation denying her guilt and recriminating, and also prayed a divorce. The admission of the allegation was opposed. Sir W. Wynne admitted the allegation, and, after some preliminary observations, said:—"If both prove adultery, it is not necessary to say now what would be the consequence; perhaps the Court might say it would give no sentence." In that case neither party succeeded in proving adultery, but the wife would not revert to her original prayer, and both parties were dismissed. After some research bestowed on this question, the *dictum* of Sir W. Wynne—the principle suggested rather than enunciated by Lord Stowell in *Beeby v. Beeby*—his intimation in *Proctor v. Proctor*, that in such a case as the present no means could be resorted to for the purpose of compelling cohabitation—and the passage cited from Dr. Lushington's judgment in *Anichini v. Anichini*, are all the lights that I have been enabled to obtain from the reports of the Ecclesiastical Courts. But there are two decisions of the Court of Queen's Bench, which it is important to consider. The first of them, *Govier v. Hancock* (7), occurred in 1790. It was an action of assumpsit for the board and lodging of the defendant's wife. It appeared in evidence that the defendant, having committed adultery with a woman named Bazeley, whom he had brought home, treated his wife with great cruelty, and finally turned her out of doors. Then the wife committed adultery, after which she offered to return home, but her husband would not receive her; and this action was brought for her board and lodging subsequent to that time. It was held, that the action could not be maintained, and the Court said:—"In this case, if the wife had instituted a suit in the Ecclesiastical Court against the

husband for restitution of conjugal rights, they would not have assisted her"; and a similar opinion was expressed by the same Court, in 1830, in *The King v. Flinton* (8), which was an appeal against a conviction of a husband for refusing to maintain his wife. It appeared that the wife committed adultery, which was not then known to the husband; she and her husband afterwards quarrelled and separated, and then he committed adultery. The wife sued in the Ecclesiastical Court for a divorce on the ground of the husband's adultery, and claimed alimony; he recriminated, the guilt of both was proved and the suit was dismissed. The husband then refused to maintain his wife and was convicted under the 5 Geo. 4. c. 83. s. 3. Bayley, J., asked—"How can it be said that he is liable to maintain her, if he can neither be sued for maintenance found her nor for restitution of conjugal rights," and the whole Court concurred in quashing the conviction. This, then, is the result of my investigation of this question. I find in a decretal of Gregory the Ninth an assertion that an adulterous wife was entitled to be received by her husband if he also had been guilty of a similar offence, and this is mentioned as the law by several canonists—Lancellottus, Sanchez *De Matrimonio*, and Ayliffe in his *Parergon*. I do not find any instance in which the law so laid down has been adopted and acted upon as part of the ecclesiastical law of this land. I find a *dictum* of Sir W. Wynne that, under such circumstances, a suit for restitution would probably be dismissed, and there is ground for inferring that such was the opinion of Lord Stowell. The Court of Queen's Bench in two cases, occurring after an interval of thirty-five years, expressly declared that such was the law prevailing in the Ecclesiastical Court. In my humble judgment that rule is sound in principle and calculated to prove beneficial in its operation. I have, therefore, come to the conclusion, that the suit for restitution in this case cannot be sustained, and that the husband must be dismissed.

Husband dismissed.

(7) 6 Term Rep. 603.

NEW SERIES, XXVII.—PROBATE.

(8) 1 B. & Ad. 227.

H

MATRIMONIAL. }
 1858. }
 May-6. } ARMITAGE v. ARMITAGE
 AND MACDONALD.

*Dissolution of Marriage—Practice—
 Hearing Cause upon Affidavit.*

A. presented a petition for dissolution of marriage by reason of the adultery of his wife. The co-respondent put in an answer, but the wife did not appear. Before 20 & 21 Vict. c. 85, A. had recovered damages in a defended action for crim. con. against the co-respondent.

The Judge Ordinary, on the application of the petitioner, the co-respondent not objecting, directed that the cause should be heard upon affidavit; but that, in addition to affidavits of the facts, an examined copy of the record in the action should be brought into the Registry.

This was a suit for dissolution of marriage by reason of the wife's adultery. The wife had not appeared, but the co-respondent had, and had also put in an answer. The petitioner, in the year 1857, brought an action for crim. con. in the Court of Common Pleas against the co-respondent. The action was defended, and at the trial the petitioner obtained a verdict.

Pulling, on behalf of the petitioner, now moved the Court to direct that the cause should be heard upon affidavit, the co-respondent not objecting.

THE JUDGE ORDINARY.—I think this is a case in which I may dispense with oral evidence, and hear the cause upon affidavits, but an examined copy of the record in the action should be brought into the registry, in addition to affidavits as to the facts. It has been suggested that the Judge's notes taken at the trial might be used; but this Court is bound to follow the rules of evidence observed in the common law courts, and there they would not be admissible in evidence.

Motion granted.

MATRIMONIAL. }
 1858. }
 May 10. } HORNE v. HORNE.*

*Dissolution of Marriage—Bigamy, with
 Adultery—20 & 21 Vict. c. 85. s. 27.*

Semble, (Per Pollock, C.B.) that in a suit for dissolution of marriage, on the ground of bigamy with adultery, the adultery and bigamy must be committed with the same woman; and, consequently, some evidence beyond the mere solemnization of the bigamous marriage should be given, e.g. that the parties cohabited as man and wife. Proof of a bigamous marriage with A. and adultery with B. is not sufficient.

In this case the wife had presented a petition for dissolution of marriage, on two distinct grounds, first, bigamy with adultery; and, secondly, adultery coupled with desertion.

The petitioner now proved her petition, by oral evidence, before the Court.

Slade and Dr. Spinks, for the petitioner.

No one appeared for the respondent.

The evidence proved the marriage, adultery with a Miss Crispe, and a desertion for upwards of ten years. It was also proved, by production of an examined copy of the marriage register, and proof of the handwriting of the respondent, that on the 16th of October 1854, he had married Sarah Brown, but no evidence was given that he had lived with her as his wife, or other evidence that he had committed adultery with her.

LORD CAMPBELL, C.J.—The petitioner is entitled to a dissolution of the marriage, adultery with Miss Crispe, and desertion for two years, without any reasonable cause, having been proved.

POLLOCK, C.B.—I am of the same opinion. It has been satisfactorily proved that the respondent has been guilty of adultery with Miss Crispe, and desertion of his wife for two years, without reasonable excuse.

If the application had been founded merely on that part of section 27. of the

* Coram Lord Campbell, C.J., Pollock, C.B. and the Judge Ordinary.

20 & 21 Vict. c. 85. which makes "bigamy with adultery" a ground for dissolution of marriage, I should have thought the petitioner had not made out her case, for I think "bigamy with adultery," in that section, means adultery with the person with whom the bigamy is committed; and, consequently, that proof of adultery with that person should be given, *e. g.* some evidence that they lived together as man and wife. It would not be sufficient, in my opinion, to prove a bigamous marriage with one woman and adultery with another.

Dissolution decreed.

MATRIMONIAL. }
1858. } NORRIS v. NORRIS AND
March 13. } GYLES.

*Dissolution of Marriage — Practice —
Mode of Proving Petition.*

Generally the mode in which the petitioner for a dissolution of marriage will be directed to prove his petition when no answer has been filed, and twenty-one days have elapsed, as required by rule 14, is by oral evidence before the Court without a jury.

There may be cases in which it would not be desirable that the evidence should be taken orally in court.

In this case a petition had been presented by the husband for dissolution of marriage, on the ground of the adultery of the wife. The citation and petition had been served upon the respondent and co-respondent.

They had appeared, twenty-one days had elapsed since the service of the citation, but no answers had been put in.

Dr. Twiss, on behalf of the petitioner, now applied to the Judge Ordinary, under section 36. of the 20 & 21 Vict. c. 85, to direct the mode in which the cause should be tried.—The petitioner is now, under rule 14, at liberty to proceed to proof of his petition, twenty-one days having elapsed since the service of the citation, and no answer having been put in. Neither of the parties desires to have the case tried before a jury.

The JUDGE ORDINARY.—The petitioner may prove his petition by oral evidence before the Court without a jury. There may be cases in which it would not be desirable that the evidence should be given orally in court; but except in cases in which some strong reason can be shewn against having recourse to that mode of trial, I think it would be better that it should be generally adopted.

Order accordingly.

[*Note.*—In *Pearce v. Pearce* (April 28, 1858), where the wife petitioned for a dissolution of marriage, and the husband had not appeared, on application to the Judge Ordinary to direct the mode in which the petition should be proved, he said, "As a general rule, where there is no appearance, the petition should be proved by oral evidence before the Court without a jury."

In *Wells v. Wells* (April 20, 1858) a similar application was made, the counsel for the petitioner stating that the respondent had not appeared. The Judge Ordinary declined to make an order as to the mode of proving the petition until an affidavit of non-appearance should be filed.

So also when an appearance has been entered it is necessary that that fact should be verified by an affidavit.

In *In the goods of Harrison* (April 26, 1858), Sir C. Cresswell said, "It does not seem to be generally understood that whenever it is requisite to bring the fact of appearance or non-appearance before the Court, for the purpose of making an application, there should be an affidavit. This was not formerly necessary, because in the ecclesiastical court the appearance was before the Judge bodily, and therefore he would be able to take judicial notice of the appearance or non-appearance. Under the new system the appearance being entered in the registry and not before the Judge, he cannot, judicially, know anything about it, but, like other facts, it must be proved by an affidavit."

In *Badcock v. Badcock and another* (April 20, 1858), the Judge Ordinary declined to direct the mode of trial, the affidavit of non-appearance being three weeks old, and stated that it would be necessary that the affidavit should be made shortly before the application to the Court as was

required in analogous cases by the common law courts.]

MATRIMONIAL.
1858.
April 22.

TOURLE v. TOURLE AND
ANOTHER.

Dissolution of Marriage — Pleading — Practice—Affidavits verifying Petition and Answer—Rules 2 & 15.

A petition for dissolution of marriage on the ground of the wife's adultery charged various acts of adultery in 1856, 1857 and 1858. The respondent, in her answer, pleaded, first, a denial of the adultery; secondly, desertion on the 4th of September 1857; thirdly, condonation; fourthly, connivance. The affidavit of the petitioner, filed in pursuance of Rule 2, did not verify the statements in the petition as to the adultery. The respondent's affidavit, filed in pursuance of Rule 15, did not verify the third and fourth pleas, it being supposed that by doing so the adultery would be admitted.

On motion to disallow the last three pleas and for leave for the petitioner to file an affidavit verifying the adultery charged "to the best of his belief":—Held, by the Judge Ordinary, first, that the second plea was bad, as, though it was pleaded to the adultery charged in the petition, it was only an answer as to part.

Secondly, that the third and fourth pleas should be verified by affidavit, as the respondent, by doing so, would not admit the adultery, each plea being to be construed by itself.

Thirdly, that the petitioner might in his affidavit state that the adultery was committed "to the best of his belief."

This was a suit for dissolution of marriage by reason of the adultery of the wife.

The petition stated that the marriage took place in 1850, and that the respondent had committed adultery with the co-respondent in September, October, November and December 1856, in January and February 1857, and also in January and February 1858.

The co-respondent did not appear. The respondent appeared and put in an answer, which pleaded—First, a denial of the adultery; secondly, that the petitioner

deserted the respondent, without any reasonable cause, on the 4th of September 1857; thirdly, condonation; and fourthly, connivance.

The affidavit of the petitioner, filed with the petition, verified the facts stated in the petition with the exception of the adultery.

The respondent, with her answer, filed an affidavit, verifying only the second plea, as to the desertion.

The petitioner, in his replication to the answer, objected that the second plea was irrelevant and bad in law; and also objected to the third and fourth pleas, as not being verified by affidavit in conformity with the 15th rule of the Rules and Orders of this Court. The respondent denied this.

Kingdon now moved the Court to disallow the second, third and fourth pleas.—The second plea is bad. Though it professes to be an answer generally to the adultery charged in the petition, it is no answer to that committed before the date of the alleged desertion. The third and fourth pleas should also be disallowed. They contain matters other than a simple denial of the facts stated in the petition, and therefore, in conformity with Rule 15, should be verified by affidavit.

Dr. Phillimore (Dr. Spinks with him), for the respondent.—I admit the plea of desertion is only an answer to any adultery subsequent to the 4th of September 1857; but the third plea, of condonation, being applicable to all the adultery charged in the petition, may cover what is not answered by the second plea, so that there is a good answer to all the adultery charged. As to the third and fourth pleas, the 15th rule must be taken in conjunction with the rules of evidence, and although connivance may not admit adultery, yet condonation does, and it would be unreasonable to require the respondent to verify that plea by affidavit, as by doing so she would admit the adultery.

The JUDGE ORDINARY.—According to the system of pleading which it was intended to introduce in proceedings in this court, each plea must be taken by itself, and should *per se* be an answer to the matter to which it is pleaded; and if it contains only an answer to part of the charge, it should be pleaded to that part.

The proper form of the second plea would have been—"As to so much of the adultery charged in the petition to have taken place since the 4th of September 1857," &c. As to the third and fourth pleas, the respondent would not be placed in a worse position by making the affidavit than if she proved the pleas. In either case, as the adultery is denied, the petitioner would have to prove it. The respondent may make an affidavit that the petitioner has condoned the adultery, if any. I do not at all wish to encourage technical objections; but it is a very safe rule not to construe one plea by another. The second plea must be amended by limiting it to the adultery alleged to have been committed after the 4th of September 1857, and there must be an affidavit verifying the third and fourth pleas.

Second plea to be amended; third and fourth pleas to be verified.

Kingdon then asked that the petitioner should be allowed to file a supplemental affidavit, verifying the statements in the petition as to the adultery "to the best of his belief." It had been supposed, from the terms of Rule 2, that the affidavit should only verify matters within the *personal cognizance* of the petitioner; but it was now understood that an affidavit of the petitioner's *belief* would be sufficient.

The JUDGE ORDINARY granted the application.

MATRIMONIAL. }
1858. } BODDINGTON v. BODDING-
May 11. } TON AND NOSSITER.*

Dissolution of Marriage—Practice—Evidence of Husband's Conduct towards Wife before her Adultery—Co-respondent, when not liable to Costs.

On proof of a petition for dissolution of marriage, by reason of the adultery of the wife, some evidence should be given of the conduct of the husband towards her previously to the adultery.

* Coram Campbell, C.J., Pollock, C.B. and the Judge Ordinary.

Where there was no evidence that the co-respondent, when he committed adultery, knew that the respondent was married, the Court refused to order him to pay the costs.

In this case a petition was presented by Mr. Boddington for a dissolution of marriage, by reason of the adultery of his wife, committed with the co-respondent, Nossiter.

An appearance having been entered, but no answer given in, the petitioner now proceeded to prove his petition by oral evidence before the Court, without a jury.

Dr. Deane and Macqueen, for the petitioner.

No one appeared for the respondents.

The witnesses called proved the marriage and adultery, but no evidence was given to shew what had been the conduct of the husband towards the wife prior to the adultery, nor did it appear that the co-respondent had ever visited the petitioner, or that he knew Mrs. Boddington was a married woman.

CAMPBELL, C.J.—The proof of the adultery is satisfactory; but you should call some member of the petitioner's family to shew how he treated his wife, and what care he took of her.

A witness proved that the petitioner had invariably treated his wife with kindness.

CAMPBELL, C.J.—The petitioner is entitled to a dissolution of marriage. There is nothing to throw suspicion on his conduct, or to lead one to suppose that he connived at the adultery of his wife, or had ill-treated her. From the moment that he had reason to suspect his dishonour, he took steps to find out the paramour, and as soon as he had obtained proof of the adultery, commenced these proceedings.

Dissolution decreed.

Macqueen asked that the co-respondent should be ordered to pay the petitioner's costs.

Per Curiam.—No; this is not a case in which he should pay costs. There is no evidence that he knew Mrs. Boddington was a married woman.

MATRIMONIAL. }
 1858. } PYNE v. PYNE.*
 May 13. }

Dissolution of Marriage on Ground of Adultery and Desertion—Evidence—Wife incompetent to prove Desertion—14 & 15 Vict. c. 99. s. 4.

In a suit instituted by the wife for dissolution of marriage, on the ground of the husband's adultery and desertion, the wife is not a competent witness to prove the desertion.

This was a suit for dissolution of marriage, instituted by Mrs. Pyne against her husband, on the ground of adultery and desertion.

Dr. Phillimore (*H. Lloyd* with him), in opening the case of the petitioner, stated that he proposed to call Mrs. Pyne, for the purpose of proving the desertion, and submitted that though not competent to give evidence as to the adultery, yet that she might do so as to the desertion.

The JUDGE ORDINARY.—This being a proceeding instituted in consequence of adultery, Mrs. Pyne cannot be called as a witness at all. The 4th section of the 14 & 15 Vict. c. 99, the statute which made parties to proceedings competent witnesses, excludes from the operation of the act "any proceeding instituted in consequence of adultery."

The rest of the COURT concurred.

MATRIMONIAL. }
 1858. } TOMKIN v. TOMKIN.
 June 2. }

Dissolution of Marriage—Practice—Dispensing with Service of Citation and Petition on the Co-respondent.

The Judge Ordinary allowed a husband to proceed with his suit for dissolution of marriage without serving the citation and petition on the alleged adulterer, who was then at the Cape of Good Hope, he having allowed judgment to go by default in an

action for crim. con. at the suit of the husband.

In this case the husband had presented a petition for dissolution of marriage, by reason of the wife's adultery.

The husband had, in 1857, recovered 1,000*l.* damages in an undefended action, for crim. con. against the alleged adulterer, and in May 1857 obtained a sentence of divorce *à mensâ et thoro* in the Consistory Court of London. The alleged adulterer was an officer in Her Majesty's service, and was with his regiment at the Cape of Good Hope.

Dr. Addams moved the Court to dispense altogether with service of the citation and petition on the co-respondent, or to allow service of them on his attorney.

The JUDGE ORDINARY.—I think that the probable object of the legislature in requiring that the alleged adulterer should be made a co-respondent to the petition was, in part at least, that he might have an opportunity of vindicating his character. In the present case he has been sued, and has had an opportunity of defending himself from the charge, but has not done so. I think, therefore, under the circumstances, that I may dispense with service altogether.

Motion granted.

MATRIMONIAL. }
 1858. } KAYE v. KAYE.*
 June 14. }

Dissolution of Marriage—Practice—Costs of Wife petitioning when successful—20 & 21 Vict. c. 85. s. 51.

Where the Court decrees a dissolution of marriage at the suit of the wife, and no order is made as to costs, they follow the decree as a matter of course.

In this case a petition had been presented by the wife for dissolution of marriage, on the ground of adultery and desertion.

* Coram Campbell, C.J., Pollock, C.B. and the Judge Ordinary.

* Coram Cockburn, C.J., Wightman, J. and the Judge Ordinary.

The averments of the petition having now been proved, the Court decreed a dissolution of marriage.

Overend (*Dr. Spinks* with him), for the petitioner, asked the Court to order her costs to be paid by the respondent.

THE JUDGE ORDINARY.—The petitioner is entitled to her costs as a matter of course, without any order of the Court. Such was the practice in the Prerogative Court, and though this Court has, under the 20 & 21 Vict. c. 85. s. 51, a discretionary power as to ordering the payment of costs, yet, where no order is made, the practice of the Prerogative Court, as to costs, will be adhered to.

COCKBURN, C.J. — Where the Court pronounces a decree for a dissolution of marriage in favour of the wife, and makes no order as to costs, they will follow the decree, as a matter of course.

MATRIMONIAL.

1858:

June 15.

TEAGLE v. TEAGLE AND
NOTTINGHAM.*

Dissolution of Marriage — Practice — Costs against the Co-respondent when not granted.

Where costs against the co-respondent to a petition for dissolution of marriage on the ground of the wife's adultery are applied for, evidence should be given of the circumstances under which the adulterous connexion was formed. Where no such evidence is given, and it does not appear that the co-respondent, at the time the adulterous connexion was formed, knew that the respondent was a married woman, he will not be condemned in costs.

This was a petition for dissolution of marriage, on the ground of the wife's adultery with Nottingham, the co-respondent. The marriage took place in December 1840. The respondent left her husband in November 1851, and had for the last four or five years been living with the co-respondent as his wife, and had two children born since she left her husband, who, as well as the wife, passed under the name

* *Coram* Cockburn, C.J., Wightman, J. and the Judge Ordinary.

of Nottingham. There was no evidence as to the circumstances under which Nottingham had become connected with the wife.

On proof of these facts by oral evidence, the Court decreed a dissolution of marriage.

Dr. Middleton, for the petitioner, asked for costs against the co-respondent.

[COCKBURN, C.J.—We do not know how the connexion commenced.]

THE JUDGE ORDINARY.—It is consistent with the evidence, that when it commenced the co-respondent did not know the wife was a married woman.

COCKBURN, C.J.—In cases where costs against the co-respondent are applied for, it is necessary to give the Court an insight into the circumstances under which the adulterous connexion commenced and those which led to the disruption of the marriage. We are of opinion that, in this case, the co-respondent ought not to be compelled to pay the costs.

Application for costs against the co-respondent refused.

In *Badcock v. Badcock and another*, (June 16, 1858,) the Court (Cockburn, C.J., Wightman, J. and the Judge Ordinary), on proof of the petition, decreed a dissolution of marriage on the ground of the adultery of the wife, and ordered that the petitioner's costs should be paid by the co-respondent, he having at the time he committed the adultery known that the respondent was a married woman.

PROBATE.

1858.

April 16.

In the goods of H. C. GARDNER (deceased).

Will—Probate of Missing Will.

G. made his will in 1855, appointing his wife sole executrix. In May 1857 he fled from Delhi when the mutiny broke out, leaving there a desk containing the will. After the recapture of Delhi, an attempt was made to recover it, but without success. G. died in June 1857. On proof of the due execution of the will and of its contents, the Court granted probate to the executrix.

The deceased Herbert Calthorpe Gardner, a captain in the 38th regiment of Bengal Native Infantry, in 1855, at Cawnpore, in the East Indies, made his will, which was duly executed and attested, leaving to his wife, Emma Gardner, all his real and personal estate, and appointing her sole executrix. The deceased, with his wife and two children, fled from Delhi in May 1857 when the mutiny broke out, leaving there, with the rest of his effects, a writing-desk which contained the will. The deceased died on the 28th of June 1857. Since the recapture of Delhi, inquiries had been made for the will, but nothing had been heard of it.

The deceased had not revoked the will.

These facts were deposed to by the widow of the deceased and one of the attesting witnesses.

Dr. Phillimore moved the Court to decree probate of the will, as contained in the affidavit, to be granted to Emma Gardner, the widow of the deceased, the sole executrix, limited until the original will, or a more authentic copy thereof should be brought into the Registry.—In *Trevelyan v. Trevelyan* (1), it was held, that if a will, duly executed, is destroyed in the lifetime of the testator without his authority, it may be established upon satisfactory proof being given of its having been so destroyed and also of its contents. Here there is ample evidence of the due execution and of the contents of the original will, and of its destruction without the deceased's authority.

SIR C. CRESSWELL.—I think that I ought to grant the motion. The decision of the Court of Queen's Bench in *Brown v. Brown* (2), on which I acted in *In the goods of Brown* (3) is an authority in point. There parol evidence of the contents of a missing will was admitted for the purpose of shewing that by it a will of an earlier date, which was in existence at the death of the testator, was revoked.

Motion granted.

PROBATE. }
1858. } **BELBIN v. SKEATES AND WARD.**
June 8. }

Will—Proof of Will in Solemn Form—Evidence of both attesting Witnesses unnecessary.

To prove a will in the Court of Probate, it is not necessary that both the attesting witnesses should be examined.

This was a cause of proving in solemn form of law the last will of Moses Hibberd promoted by Jane Belbin, the next-of-kin, against R. Skeates and H. Ward, the executors.

Two issues were raised: First, whether the will was intentionally executed by Hibberd. Secondly, whether the signature of Hibberd to the will was not surreptitiously and fraudulently obtained, he being at the time ignorant of its purport and effect.

These issues came on for trial before a jury.

Dr. Deane (*Coleridge* with him), in support of the will, having called *Phillips*, one of the attesting witnesses, stated, he was about to call *Ward*, the other attesting witness, as he considered he was bound to do so, such having been the practice of the Prerogative Court.

SIR C. CRESSWELL.—You are certainly not bound to call both the attesting witnesses. I have nothing to do with the practice of the Prerogative Court on this point. It is purely a question of evidence, and by section 33. of the 20 & 21 Vict. c. 77. the rules of evidence observed in the superior courts of common law are to be observed in the trial of all questions of fact in this court. In those courts, to prove a will, it is sufficient to call one of the attesting witnesses. In *Wright v. Dodd*, *Tatham* (1) the Exchequer Chamber held, that, in an ejectment by the heir-at-law against the devisee, who claimed under a will made before the Wills Act, it was not necessary to call all the attesting witnesses. The authority of that case has never been disputed.

(1) 1 Phill. 153.

(2) *Ante*, Q.B. 173.

(3) *Ante*, P. & M. 20.

(1) 1 Ad. & E. 3.

MATRIMONIAL.

1858.

May 10.

EVANS v. EVANS AND
ROBINSON.*

Dissolution of Marriage—Suit in Ecclesiastical Court for Divorce à Mensâ et Thoro on same Grounds—Estoppel—Lis Pendens.

The answer to a petition for a dissolution of marriage, by reason of the wife's adultery, pleaded that the husband had instituted, in the Court of Arches, a suit for a divorce à mensâ et thoro, on the ground of the same acts of adultery, and that judgment had been given against him for defect of proof of the adultery. It also pleaded that the husband had appealed from that judgment to the Privy Council:—Held, first, that by such judgment the husband was not estopped from bringing a suit for dissolution of marriage; secondly, that the pendency of the appeal was no bar to such suit.

This was a suit instituted by the husband for a dissolution of marriage, on the ground of his wife's adultery with Robinson, the co-respondent.

The answer of Mrs. Evans stated (*inter alia*,) in substance, that in May 1855 Mr. Evans instituted against the respondent in the Arches Court a suit for a divorce à mensâ et thoro, by reason of adultery committed with the co-respondent; that the said suit was contested by the respondent; that on the 9th of June 1857 the Judge of the Arches Court gave judgment, and by his decree pronounced that Mr. Evans had failed in proof of the libel given in by him, and dismissed Mrs. Evans from the said suit; that the respondent believed that Mr. Evans had appealed to Her Majesty in Council from this decree; that the acts of adultery alleged in the petition were the same as those charged in the libel in the Court of Arches.

The replication pleaded that the part of the answer above set out was bad in substance, and insufficient to bar the petitioner of his right to a dissolution of marriage.

The rejoinder took issue upon this.

* Coram Lord Campbell, C.J., Pollock, C.B. and the Judge Ordinary.

The Queen's Advocate (Sir J. D. Harding) (Dr. Deane with him), for the respondent.—First, the petitioner is estopped from proceeding in this court by reason of the same cause having, in effect, been decided in the Ecclesiastical Court. Secondly, the pendency of the appeal against the judgment of the Court of Arches is a bar to proceedings for a dissolution of marriage.

[LORD CAMPBELL, C.J.—The question decided in the Ecclesiastical Court is not the same as that we have to decide. The grounds on which each suit was instituted may be the same, but the redress sought is different. The suit here is for a dissolution of marriage; there it was simply for a divorce à mensâ et thoro, in a court having a very different mode of procedure.]

[POLLOCK, C.B.—This Court was instituted for the purpose of giving the relief which the House of Lords only had power to grant.]

The Queen's Advocate.—The House of Lords would not grant a divorce to a husband who had failed to obtain a divorce à mensâ et thoro.

[LORD CAMPBELL, C.J.—That was in consequence of the Standing Orders of the House of Lords, with which we have nothing to do.]

Dr. Addams and W. G. Harrison appeared for the petitioner, but were not called on to argue.

LORD CAMPBELL, C.J.—We are all of opinion that there is no estoppel; the former suit was for a different object. Here the suit is for a dissolution of the marriage before a tribunal armed with much larger powers than those possessed by the Ecclesiastical Courts, and governed by different rules, *e. g.*, this Court is bound by the rules of evidence observed in the common-law courts. As to the second question, for like reasons, we think that the pendency of an appeal against the judgment of the Court of Arches is no bar to this suit. *Lis alibi pendens* is a bar only where the *lis* is *de eodem re*, which is not the case here.

Judgment for the petitioner.

MATRIMONIAL. }
 1858. } LING v. LING AND CROKER.
 June 2, 14. }

Dissolution of Marriage — Practice — Hearing Suit on Affidavits — Costs against Co-respondent when not given — Costs of Wife when paid by the Husband.

The petitioner for dissolution of marriage on the ground of the wife's adultery, having recovered substantial damages in a defended action against the co-respondent for *crim. con.*, which, with the costs of the action, had been paid, and having also obtained a sentence of divorce *à mensd et thoro* :—

The Judge Ordinary, on the application of the petitioner, the other parties to the suit consenting, directed that the cause should be heard on affidavits.

The full Court, on decreeing a dissolution of marriage, refused to condemn the co-respondent in costs.

Where dissolution of marriage, on the ground of the wife's adultery, is decreed, if no order to the contrary is made, the husband pays the wife's costs.

This was a suit for dissolution of marriage on the ground of the wife's adultery.

Mrs. Ling appeared, but had put in no answer.

The co-respondent, Major Croker, appeared and put in an answer, in which he stated that the petitioner had recovered against him 1,000*l.* damages in a defended action for *crim. con.*; that the co-respondent had moved, without success, for a new trial in the Court of Common Pleas, and had paid the damages and costs of the action.

The petitioner had also obtained a divorce *à mensd et thoro* in the Ecclesiastical Court.

Dr. Phillimore, for the petitioner, now moved for an order that the cause should be heard on affidavits.—Such an order was made in a similar case, *Armitage v. Armitage and Macdonald* (1).

Dr. Deane, for the co-respondent, consented.

Dr. Middleton.—Mrs. Ling will not give in any answer.

The JUDGE ORDINARY.—I heard the motion for a new trial in the Court of Common Pleas, and it certainly is not desirable that the facts should be paraded again. I think, however, the application is premature. Mrs. Ling has, by Rule 14, twenty-one days from the service of the citation to put in her answer; that time has not elapsed, and I think, though she now says she does not intend to put in an answer, that she may retract that any time before the twenty-one days have elapsed. You may renew your application when that time has elapsed, and may take it for granted that if I continue to take the view I do now, the application will be granted.

Motion refused.

The JUDGE ORDINARY subsequently, at chambers, before the twenty-one days had elapsed, granted the motion, on being informed that Mrs. Ling had instructed counsel to consent to the motion, to which his attention had not been called at the time the motion was made.

Order that the cause should be heard on affidavits.

See *Potts v. Potts*, post, 59.

June 14 (2).—The cause came on for hearing, when the Court decreed a dissolution of marriage.

Dr. Phillimore (*Currey* with him), for the petitioner, asked for costs against the co-respondent.

[COCKBURN, C.J.—Under ordinary circumstances in a case like this, the co-respondent would be condemned in costs.]

Dr. Deane.—This is an exceptional case. The petitioner has taken proceedings partly under the old, partly under the new law. Under the old law the paramour would not have to pay the costs of the proceedings for a divorce in the Ecclesiastical Court or in the House of Lords; he would only be liable to the costs of the action for *crim. con.* The object of making the adulterer a co-respondent is twofold :

(2) *Coram Cockburn, C.J., Wightman, J. and the Judge Ordinary.*

(1) *Ante*, 50.

first, that he may have an opportunity of clearing himself from the charge; secondly, to punish him if guilty by saddling him with the costs of the suit. Having paid the damages and costs of the action, the second object of the legislature has been effected. He ought not to be in a worse position than if the proceedings had commenced since the Divorce Act.

[COCKBURN, C.J.—So far as the co-respondent is concerned the legislation is certainly *ex post facto*.]

Dr. Phillimore.—One of the objects of the legislature was that the adulterer should pay the costs of the proceedings which his conduct has rendered necessary. By the practice of this Court, unless there is an order to the contrary, the petitioner will have to pay his wife's costs in this suit. It would not be inequitable that the co-respondent at least should pay those costs, if not the petitioner's costs.

[The JUDGE ORDINARY.—Such an order might not be inequitable; but it would be *ultra vires*.]

Currey.—By section 51. of the Divorce Act the Court may make such an order as to costs as may seem just; it might, under that section, order the co-respondent to pay a sum equal to the amount of Mrs. Ling's costs.

COCKBURN, C.J.—We do not wish to lay down any rule which may be applicable as a precedent in cases which may differ from this; but, looking at all the circumstances of this case, that Major Croker has had to pay damages and costs in the action for *crim. con.*, and that but for a sort of *ex post facto* legislation the husband would, in obtaining a divorce in the House of Lords, have had to pay the expenses of that proceeding, and that Major Croker would have been liable to no further costs, we think that he ought not now to be condemned in costs.

Dr. Phillimore.—Should the petitioner pay Mrs. Ling's costs?

The JUDGE ORDINARY.—That would follow as a matter of course.

Dissolution decreed; co-respondent not condemned in costs.

MATRIMONIAL.
1858.
June 26.

POTTS v. POTTS AND
ANOTHER.

Dissolution of Marriage—Practice—Mode of Hearing Petition—When not on Affidavits.

Where the petitioner for a dissolution of marriage, on the ground of the wife's adultery, had obtained a divorce à mensâ et thoro, and also a verdict in an action against the co-respondent for crim. con., but for nominal damages only, the Judge Ordinary refused to allow the petition to be heard on affidavits, but required oral evidence.

Jacobs moved the Court to direct that this, which was a petition for dissolution of marriage, on the ground of the wife's adultery, should be heard on affidavits.—The petitioner has obtained a verdict for nominal damages in an action against the co-respondent for *crim. con.*, and also a sentence of divorce à mensâ et thoro.

The JUDGE ORDINARY.—As the damages given were merely nominal, affidavits will not do. Oral evidence must be given.

Motion rejected.

MATRIMONIAL.
1858.
June 26.

MARCHMONT v. MARCHMONT.

Judicial Separation—Practice—Mode of Hearing—Right to a Jury—20 & 21 Vict. c. 85. ss. 28, 36.

In a suit for a judicial separation the parties cannot, as in a suit for dissolution of marriage, demand as a matter of right that issues of fact be tried by a jury; but the Court has a discretionary power under section 36. to grant or refuse one. It will however, generally, on the application of either party, direct that questions of fact be tried by a jury.

In a suit by the wife for judicial separation on the ground of cruelty, the petitioner asked that the case should be heard without a jury, and that an early day should be fixed for the hearing, as she apprehended that the respondent would use force to compel her to return to him. The Court, on the applica-

tion of the respondent, directed that the issues of fact should be tried by a jury, but, having a discretion in the matter, made the order conditionally on his undertaking not to interfere with or annoy his wife, and directed that such condition should be embodied in the order.

This was a suit instituted by the wife for a judicial separation, on the ground of cruelty.

The respondent had put in an answer, to which the petitioner had replied.

Dr. Deane, for the wife, now moved the Court to direct that the cause should be heard on oral evidence without a jury. He also, on the affidavits of the petitioner and medical men as to the state of the petitioner's health in consequence of her husband's treatment, and her apprehensions that the husband would use force to compel her to return to him, asked the Court to appoint an early day for the hearing.

Dr. Swabey, on behalf of the respondent, moved the Court to direct that the issue should be tried before a jury. As to the latter part of the respondent's application, he contended there was no ground for taking the cause out of its order, and relied on an affidavit of the respondent.

THE JUDGE ORDINARY.—In a suit for dissolution of marriage either party has, under section 28. of 20 & 21 Vict. c. 85, a right to insist on having any contested matter of fact tried by a jury. But that section does not apply to a suit for a judicial separation; and though I have power under section 36. to allow issues of fact in such a suit to be tried before a jury, I am not bound to do so. I think it is, however, very desirable that, on the application of either party, the privilege of having questions of fact submitted to a jury should be granted; and in this case, the features of which are not of an ordinary character, I am disposed to grant the application. As however the respondent cannot demand a jury as a matter of right, I shall only grant his application for one, conditionally, on his undertaking not to interfere with or annoy the petitioner. This condition may be embodied in the order, and if he annoys the petitioner, he will be liable to an attachment. I cannot name any early day for

the hearing; the cause must come on in its proper order in the list.

Order, that the cause be tried before a jury, the respondent undertaking not to annoy the petitioner.

Huboyet. Huboyet 28 2 9 P. D. A. 2.

MATRIMONIAL.

1858.

June 26.

RATCLIFFE v. RATCLIFFE
AND ANOTHER.

*Dissolution of Marriage—Practice—
Mode of Hearing—When before a Jury.*

The Court has power to order issues of fact to be tried before a jury, though none of the parties to the suit apply for one, and will generally do so in cases to be tried before the full Court where there is likely to be much dispute as to the facts.

Where, however, in a suit for dissolution of marriage, the main question was one for the exercise of the discretion of the full Court, the Judge Ordinary, neither of the parties applying for a jury, directed that the case should be heard without one.

This was a suit for dissolution of marriage, on the ground of the wife's adultery.

The respondent, in her answer, pleaded the adultery of the husband,—undue delay,—connivance,—and that the wife's adultery was caused by the conduct of the husband.

Dr. Spinks, for the petitioner, now moved the Court to direct the cause to be heard on oral evidence without a jury. The main question will be one for the discretion of the Court, the respondent having, in her answer, set up the conduct of the husband as a bar to the suit, under the latter part of section 31, which is as follows:—"Provided always, that the Court shall not be bound to pronounce such a decree if it shall find that the petitioner has during the marriage been guilty of adultery, or if the petitioner has, in the opinion of the Court, been guilty of unreasonable delay in presenting or prosecuting such petition, or of cruelty towards the other party to the marriage, or of having deserted or wilfully separated himself or herself from the other party before the adultery complained of, and without rea-

sonable excuse, or of such wilful neglect or misconduct as has conduced to the adultery."

Dr. Swabey, for the wife, and *Dr. Philimore*, for the co-respondent, consented.

The JUDGE ORDINARY.—This is a singular case, and I doubt whether I ought not to direct the issues to be tried before a jury. I have the power to do so, though neither of the parties may require it. I am inclined to think that in every case which has to be tried before the full Court, in which there is likely to be any considerable controversy as to the facts, it would be desirable to have a jury. Amongst other advantages, there is a greater probability of getting unanimity on disputed questions of fact from a jury, who can be locked up if they do not agree, than from the full Court. As, however, all parties are agreed in not requiring a jury, and the principal questions seem to be for the decision of the Court, the cause may be heard without a jury.

Motion granted.

MATRIMONIAL.

1858.

June 26.

HOOKE v. HOOKE.

Dissolution of Marriage—Practice—Special Grounds for not making a Co-Respondent—20 & 21 Vict. c. 85. s. 28.

Where the wife was living in a brothel as a prostitute, the Court excused the husband from making a co-respondent to his petition for dissolution of marriage.

Quære—Whether a wife has any right to oppose the application of the husband to be excused from making a co-respondent.

This was a petition for dissolution of marriage, on the ground of the wife's adultery.

Dr. Spinks now moved, under section 28. of the 20 & 21 Vict. c. 85, that the petitioner might be excused from making a co-respondent to the petition. The special grounds on which he relied were that the wife was living in a brothel as a prostitute, and that though there was ample evidence of adultery the persons

with whom it had been committed were unknown to the petitioner.

Brown, for the wife, opposed the application.

The JUDGE ORDINARY.—I think good reason has been given for not making a co-respondent. Assuming that the husband had grounds for suspicion, or even knowledge as to two or three persons, he might not be able to obtain satisfactory evidence as to them, but might have conclusive evidence as to persons unknown to him. I doubt whether the wife has any right to oppose such an application.

Motion granted.

MATRIMONIAL.

1858.

June 15.

ROBOTHAM v. ROBOTHAM.*

Dissolution of Marriage—Order that Husband secure Money to Wife—Custody of Children—20 & 21 Vict. c. 85. ss. 32. and 35.

In a suit for dissolution of marriage, on the ground of the husband's bigamy and adultery, the Court was asked on decreeing dissolution—First, To order, under section 32. of 20 & 21 Vict. c. 85, that a sum of money standing in the names of the husband and wife in a savings-bank should be paid to the wife. Secondly, That the custody of the children should remain with the wife.

The Court, first made an order that the husband should secure to the wife the sum of money in the bank, that being all they had power by section 32. to do; but, secondly, declined to make any order as to the custody of the children, on the grounds that there was no present necessity for it, the husband being in America and not likely to interfere with the custody of the children,—that no Court would aid him to wrest them from the wife,—and that the order could not afterwards be modified, though circumstances might arise which would render such a modification desirable.

This was a petition, presented by Grace Augusta Robotham, for a dissolution of

* *Coram Cockburn, C.J., Wightman, J. and the Judge Ordinary.*

marriage, on the ground of the husband's bigamy and adultery.

Since the application to allow substitutional service of the citation on the respondent's father (1) personal service had been effected on the respondent in America, but he did not appear.

The petition now came on for hearing on oral evidence before the Court, when the following facts were proved.

The marriage took place in November 1849, and there was issue of it two daughters. On the 22nd of March 1856 the respondent married a Miss Ling, with whom he lived as his wife for a short time in England, and then went to America.

It was also proved that a sum of 34*l.* 9*s.* was standing in the names of the petitioner and the respondent in a savings-bank. A letter, dated the 5th of April 1856, from the respondent to a brother of the petitioner shortly before he left England, was put in. In this the respondent expressed contrition for his conduct to the petitioner, and a desire to make any reparation in his power for the injury he had done to her, of whom and his children he spoke in affectionate terms, and said that he would willingly sign a paper that his wife might get the money in the savings-bank.

The respondent had left his wife and children without any means of support.

Dr. Phillimore (*Macqueen* with him), for the petitioner, now asked the Court, in addition to the decree for dissolution of marriage, first, to make an order, under section 32. of 20 & 21 Vict. c. 85, that this sum of 34*l.* 9*s.* should be paid to the petitioner; secondly, to order that, under section 35, the petitioner should have the custody of the two children.

[*COCKBURN, C.J.*—We cannot order that the money in the bank should be *paid* to the petitioner; all that section 32. enables us to do is to order the respondent to *secure* that sum to her.]

[*THE JUDGE ORDINARY.*—We can order the respondent to secure that sum to the petitioner; and if he fails to do so, she can apply to the Judge Ordinary for an at-

tachment, though it will not be of use unless he comes within the jurisdiction. The second part of the application, viz., as to the custody of the children, involves a question of much importance, as to which I feel great difficulty, viz., whether this Court is to assume to itself a larger jurisdiction than that exercised by the Court of Chancery, or whether it should adopt the principles by which that Court is governed. In terms, the 35th section would seem to give the Court an absolute discretion in dealing with the custody of the children, but the Court of Chancery has always exercised very sparingly the power it possesses of interfering with the common-law right of the father to the custody of the children, even in cases where the marriage has been dissolved.]

Macqueen.—In *Tarbut v. Tarbut* (2), before the Divorce Court on the 13th of May, where the marriage was dissolved for bigamy, Lord Campbell directed that the mother should have the custody of the child.

COCKBURN, C.J. now delivered judgment. —We think that the petitioner is entitled to a dissolution of marriage, the charges of bigamy and adultery against the respondent having been clearly established. Beyond the sentence of dissolution of marriage the Court is asked to do two things:—first, to order that the sum of 34*l.* 9*s.*, standing in the joint names of the husband and wife in the savings-bank, should be paid to the petitioner. From the husband's letter, which has been put in evidence, it appears that he would be a consenting party to that being done, and therefore the Court would not be unwilling to do so, if empowered by the act. We cannot, however, make an order that the husband

(2) In *Tarbut v. Tarbut*, on the 13th of May, before the full Court, Lord Campbell, C.J., Pollock, C.B. and the Judge Ordinary, the Court having decreed a dissolution of marriage on the ground of bigamy and adultery—application having been made for an order that the wife should have the custody of a child, issue of the marriage—Lord Campbell, C.J., in pronouncing his decree for dissolution of marriage, directed that the mother should have the custody of the child.

(1) See *Robotham v. Robotham*, *ante*, p. 33.

should hand over this sum to the wife, but merely that he *secure* it to her. That is all section 32. enables us to do. We will make that order, though it may not be of much use, as the husband is beyond our jurisdiction. We are also asked to make an order that the children shall remain in the custody of the mother. We have no hesitation in thinking that they ought, under the present circumstances, to remain under her care. The father has deserted them, and since that desertion they have been maintained entirely by her. At the same time, as he appears from his letter to entertain a strong affection for them, it would not be right that he, though repentant, should be excluded from ever seeing them again. Again, an alteration of circumstances may take place: the wife may marry again, and it may not be desirable that the stepfather should have the controul of them; or the father may return from America in altered circumstances, and be able and willing to maintain and educate them. By the act of parliament whatever order we make as to the custody of the children must be final; we have no authority to modify it when once made. Therefore, without saying that there may not be cases in which we should think it right to exercise the power given us by the act, we think this is not a case in which we should make any order as to the children. The husband has gone to America, and it is not likely that he will interfere with the custody of them. If he should return and seek to wrest them from the mother, he can only do so by an application to some Court, and we think that no Court would aid a father, who had been guilty of bigamy and adultery, in wresting the children from an affectionate mother. Taking into consideration all the circumstances of this case, we think that no order as to the custody of the children should be made.

*Dissolution of marriage decreed.
Order that the husband secure
to the wife the sum of money
in the bank.*

MATRIMONIAL.

1858.

June 14, 16. }

WARD v. WARD.*

*Dissolution of Marriage — Desertion —
20 & 21 Vict. c. 85. s. 27.*

*To sustain the charge of desertion, the act
relied on as such must have been done con-
trary to the will of the person charging it.*

*The fact of a man leaving his wife to
live with another woman does not necessarily
constitute desertion.*

*A, having been charged before a magis-
trate with assaulting his wife, was bound
over to keep the peace towards her. He
immediately left her, and went to live with
another woman, she making no effort to
induce him to return to her.*

*Quære—Whether these facts would sus-
tain a charge of desertion by the husband.*

In this case the wife presented a petition for dissolution of marriage on the two-fold grounds of, first, adultery and cruelty; secondly, adultery, coupled with desertion, without reasonable excuse, for two years and upwards.

The respondent did not appear.

June 14.—The petition came on for hearing.

C. R. Kennedy and O. B. C. Harrison, for the petitioner.—Upon the evidence it appeared that the respondent was a co-terminer; that the marriage took place about 1839; that the parties did not live happily together, and that in 1840 the respondent left his wife, and was away from her two or three years, and then returned to her; that he again left her in 1844, and went to live with a woman, by whom he had two children, and had not since returned to his wife. There was no proof of cruelty. One of the witnesses stated that, in 1844, the respondent told her that he and his wife had been before a police magistrate, when each was bound over in recognizances to keep the peace towards each other; that the respondent after that never came back to his wife.

[COCKBURN, C.J.—This evidence has very much embarrassed the petitioner's

* Coram Cockburn, C.J., Wightman, J. and the Judge Ordinary.

case, which previously was a very clear one. If both parties were bound over to keep the peace towards each other, and they then separated, would such separation amount to desertion? There may have been some arrangement before the magistrate that they should mutually agree to live separate. The respondent's leaving the petitioner, if she consented to his doing so, would not constitute desertion. The word "desertion" necessarily implies that the act relied on as such is done contrary to the will of the person charging it.]

[The JUDGE ORDINARY.—You must not assume that the fact of separation is conclusive proof of desertion; it is, no doubt, evidence which tends to prove it. I had a case before me the other day, where the wife alleged desertion, the only evidence of which was, that the husband, who was in the army, had been for ten years in New Zealand with his regiment. Nor does the fact, that the husband left his wife and has since been living with another woman necessarily prove desertion of his wife.]

COCKBURN, C.J.—By this evidence so much doubt has been cast upon the case of the petitioner, that we must have it cleared up, and know what actually passed before the police magistrate; whether they separated by agreement or not. We will adjourn the case, under section 44, for further evidence upon this point.

June 16.—It now appeared, on production of the magistrate's book and the bail book, that on the 19th of December 1844, at the Southwark Police Court, the respondent was charged with assaulting his wife, and bound over to keep the peace towards her for six months. It did not appear that she was also bound over. The landlady of the house where the parties were living in 1844 also proved that the respondent was a drunkard, and in the habit of violently beating his wife; and that by her advice the petitioner had preferred the charge against her husband, and that he had made no charge against her before the magistrate. The witness said:—"He left his wife at that time. She was quite agreeable. She made no exertion to get him to live with her again. He

went directly to live with another woman, and left her without a shilling."

COCKBURN, C.J.—The charge of cruelty has now been proved; and we think, therefore, that the petitioner is entitled to a dissolution of marriage, on the ground of adultery and cruelty. We do not feel quite clear that the charge of desertion has been established.

Dissolution of marriage decreed.

MATRIMONIAL.

1858.

July 19.

CUDLIPP v. CUDLIPP.

Judicial Separation—Desertion—20 & 21 Vict. c. 85. s. 16.

In November 1843, A, having a residence at Birkenhead, went to Birmingham. His wife joined him there, and after staying with him at an inn for a short time, by his direction, went to pay a visit to a friend, he saying that he should soon join her. He did not do so, and the wife returned to Birkenhead, when she found an execution in their house. She wrote to A, but got no answer, and the furniture was sold under the execution. She then went into lodgings, and on his refusing to return to her, took a situation as a governess, and had since entirely maintained herself. In 1844 A. wrote a letter to his wife, containing a vague intimation that she might rejoin him, but not making a definite offer of another home. She replied that it would be time enough to talk of that when he could place her in as good a position as she was able to maintain herself in. In 1848, A. wrote to his wife, bidding her "farewell for ever":—Held, by the Judge Ordinary, that as the husband deserted his home in 1843, and never afterwards made any definite offer to provide another for his wife, she was entitled to a judicial separation, on the ground of desertion without cause for two years and upwards.

Petition by the wife for a judicial separation, on the ground of desertion without cause for two years and upwards.

The respondent appeared, but put in no answer.

The petition now came on for hearing.

The following were the facts of the case:—The marriage took place in 1832, the respondent being an attorney, then practising at Birmingham. He afterwards left that place, and went, with his wife, to reside at Birkenhead. In November 1843 he left Birkenhead, and went to Birmingham. His wife joined him there, and stayed with him a fortnight at an inn. She then, by his direction, went to pay a visit to a Miss Swinnerton, in Staffordshire, he saying that he must remain in Birmingham to collect some debts, but that he would join her on the next day. He did not come to her; and, after remaining a fortnight, she returned to their house at Birkenhead, where she found that an execution had been put in. She wrote several letters to the respondent, but got no answer, and the furniture was sold under the execution. She then went into lodgings, and lived there until May 1844, at the expense of her friends, and then went into a situation as a governess, and had since entirely maintained herself, not having seen or received anything from her husband since 1843. In February 1844 two of the witnesses went to Birmingham, where the respondent then was, and tried to induce him to return to his wife. He refused to do so. In 1848 he wrote a letter to the petitioner, being the last she received from him, bidding her "Farewell, for ever."

In answer to questions put by the Court, the petitioner said—"When I left him to go to Miss Swinnerton's I had no notion that he was not going to return home. I have never seen him since. On one occasion, in May 1844, he wrote a letter proposing my rejoining him. It was merely a vague intimation that I might do so. I have not that letter. I replied, 'That when he could place me in as good a position as I could keep myself in by my own industry, it would be time enough to talk about doing so.'"

Dr. Twiss and Mr. E. Moore, for the petitioner.

The JUDGE ORDINARY.—I think there was a wilful desertion of the petitioner in December 1843. They had a home; he left it, went to Birmingham, and refused to

return. Two persons went to Birmingham to remonstrate with him for leaving his wife unprotected, and tried to induce him to return. He refused to do so. I think there was desertion from the first. The letter sent by the respondent in 1844 suggested a slight doubt in my mind whether the petitioner was not a consenting party to the continuance of the separation, but as she states that it merely contained a vague intimation that she might rejoin him, and not a definite offer of another home, I think she is entitled to a judicial separation. They had a home, he deserted it, and has not provided another for his wife. This is not like some cases in which a living apart by mutual consent is sought to be converted into desertion.

Judicial separation decreed.

Queen v. G. of Maidstone Union 49 L.J.M.C. 26.

MATRIMONIAL.

1858.

July 20.

THOMPSON v. THOMPSON.

Judicial Separation—Desertion—20 & 21 Vict. c. 85.

To entitle a wife to a judicial separation, on the ground of desertion without cause for two years and upwards, the husband must have wilfully absented himself from her in spite of her wish.

In 1842 A, having failed in business at Leeds, sent his wife and children to her father, who lived there, and went to London for the purpose of obtaining employment. In the course of that year he wrote several letters in affectionate terms, expressing a hope that they might soon be able to live together again, and in the latter ones complaining that she did not answer his letters. She answered none of them, and no communication took place until 1850, when he went to Leeds and saw his wife, and said that he should come the next day, but did not do so. They never afterwards met or communicated with each other. From the time A. first left Leeds he never contributed to the support of his wife or children, nor had his wife expressed to him a desire to live with him again. The wife having presented a petition for judicial separation, on the ground of desertion without cause for two years and upwards, — Held, by the Judge Ordinary,

K

refusing to grant judicial separation, first, that there was no desertion in the first instance, the husband not having wilfully absented himself, but of necessity; secondly, that the continuance of his absence, considering the conduct of the wife, did not constitute desertion.

This was a petition for a judicial separation, presented by the wife, on the ground of desertion without cause for two years and upwards.

The husband did not appear.

July 16.—The suit came on for hearing, before the Judge Ordinary, on oral evidence, when the following facts appeared:—

The petitioner was the daughter of a publican at Leeds, and on the 8th of August 1838, without the knowledge of her parents, was married, at York, to the respondent, an engraver, who resided with his mother, at Leeds. On the same day they returned to Leeds, the husband going back to his mother's house, and the wife to her father's, where she resided for three months, when her father, having discovered that she was married, ordered her to go to her husband. She did so, and lived with him at his mother's for about three months. He then took a house in Leeds, where they resided for about two years, and then left in consequence of his losing a situation. In 1842 he took a provision-shop, where they resided for eight months, when, the business not succeeding, he sold off his stock-in-trade and fixtures, and told his wife to return to her father as he intended to go to London, to seek for employment. She accordingly, with her two children, returned to her father's house, and he went to London. They never afterwards lived together. In July 1842 the husband went to Leeds, and had an interview with his wife, at the house of a Miss Conyers, when he told her that he had not yet succeeded in his undertaking, but thought that he should soon be successful. He also said (as the petitioner supposed to annoy her), that he had met a lady in London who had been very kind to him, and had made him a present. He returned to London, and they did not meet again till the beginning of 1850; when, shortly after the death of one

of the children, he met her, in Leeds, going to chapel, and reproached her for not having told him of the death of the child. In the evening of the same day he went to the house of the wife's mother intoxicated, and said he had come to claim his wife and children. The petitioner asked him whether he had any place to take them to; he said he had plenty of money, and would call again next morning. The petitioner said, "Pray, come sober." He did not go next morning, and never saw or wrote to his wife again. From the time he went to London he never in any way contributed to the support of his wife or children.

In answer to questions put by the Court, the petitioner said—"I had no quarrel with my husband when he went to London. He said he thought if he went there he could manage to support himself. I asked him to write to me under cover to a Miss Kitchin. I did this because my father and he were at variance, he had been so unsteady. When I asked him in 1850 if he had any place to take me to I did not ask him to take me with him, or give him to understand I would like to go and live with him. I never wrote to him afterwards. I received four letters from him in 1842, whilst he was in London, dated the 8th of June, the 1st of August, the 19th of September, and the 3rd of October. I did not answer the last three. The fourth letter I did not answer because it was insulting. I did not answer the others because I had not the opportunity, as I had two little children to attend to; my father would have opposed my doing so."

It also appeared that the husband had for thirteen years been book-keeper to a firm at Huddersfield, and that his wife knew that he was residing there.

The following was the substance of the letters:—

In the letter of the 8th of June 1842 he says—"I write these few lines to you hoping that they will find you and our dear children well and enjoying good health and spirits. I did not intend writing so soon, but if I may judge your feelings by my own, I doubt not but you will be very anxious to hear from me. I arrived safe, &c. &c. I went on Saturday to see a review, and saw Her Majesty. I scarcely saw Prince Albert I was so much engaged

in admiration of Her Majesty. But you might ask, What were his thoughts then? Why, I would plainly answer, they reverted back to the pleasant scenes of our own early days—the pleasant hours we have spent together—the happiness that I have frequently pictured to myself we might enjoy together, for years to come, encircled by our little family, but all of which appears now blasted as the trees in winter. * * Who knows I may yet be favoured by the smiles of fortune. Do not fret. I sincerely hope the time is not far distant when I shall be able to maintain you all without the assistance of any one. I have no fear I shall be able to obtain a situation shortly. I have only to beg you will write by return of post."

In the letter of the 1st of August 1842 he says—"I have been very low-spirited since I saw you last, in a great measure in consequence of being separated from those I love most dearly, viz., yourself and children. I have not yet met with a situation, but am daily in expectation of obtaining one. * * I hope you will not neglect writing immediately. Accept my affectionate regards for yourself and children, and I hope the time is not far distant when we shall all be comfortably settled together again."

The letter of the 19th of September 1842 was as follows:—

"Dear wife,—I really know not how to address you as I have received no answer to my last letter. I think you treat me very unkindly, for the situation I am placed in I deserve a little notice from you. I did not think the first time I left Leeds that you would ever have treated me like this; but it is said 'out of sight out of mind,' but whether it is so with you or not I cannot judge. I was jealous when I met you at Conyers' that something was wrong, for I then thought that you was very cold towards me; but it is an old saying 'when a person is down, down with him, kick him while he is down.' But I wish to upbraid you with nothing, only I should like you to write. Write and let me know your reasons for not writing before, as I cannot be anywise free in my writing until I know whether my correspondence is acceptable or not. You told me when I first left you should be anxious

to hear from me; it does not appear so, or you would have written before this. You will be kind enough to write and say whether it will be agreeable or not to keep up a correspondence with me. I think you are in duty bound to let me know how the children are. When I had plenty you was welcome to it, now I have nothing I am treated thus. I have not discovered the philosopher's stone, but when I do you shall have anything that it will produce, until then, choose how you treat me, allow me to remain, your affectionate husband,

"J. H. Thompson."

"P.S.—Though I have not mentioned it before, I have not forgot my kind love to you and the children, hoping they are well and will prove a credit to you."

In the letter of the 3rd of October 1842 he says,—

"Dear wife,—as by this title I suppose I have still the prerogative to address you, I am at a strange loss to account for your conduct towards me; I have written two letters and you have deigned to answer neither of them. What can be your motive for such cool reserve? I cannot divine; but let me tell you this is the third and last time of asking. If you will not write to me, you cannot expect anything more in the shape of correspondence from the person you should love. * * *

Let me request you will write and give an explanation, or, at least, charge me with something that I may defend myself. * * * Let me tell you candidly this is the last time I shall write, unless you will answer this scrawl, and unless that is done I have two letters you wrote to me (which is the only thing I have to keep you in my remembrance) that will be returned. And I shall expect you to return me every trifling thing also. * * *

You may probably think you are causing some trouble and punishing me by not writing; but mind and be cautious you do not punish yourself in the long run, for it is a long lane that has never a turn: perhaps fortune may yet smile upon me, and then what will you say? why, I suppose, that you never wished to see it, and are very sorry that it has occurred. Again, I know you have some ill advisers, for I am sure your conscience and your better feel-

ings would not let you act thus; but let me beg of you not to take their advice, but act according to your own feelings, and let me know what are your real sentiments towards me, for though you are under good protection at present you may survive it, and still there may not be sufficient left to maintain you and your small family; then, I would ask, who is to become your protection and support in the time of need? Accept the kind love of a sincere friend and well wisher."

Dr. Middleton, for the petitioner, summed up the evidence.—The question is, whether the husband had not the intention to desert his wife. The evidence establishes this: he has contributed nothing towards her support, and has made no effort to provide her with a home or to induce her to live with him again. At all events, from the date of their interview at Leeds in 1850, when he promised to return and claim her, but did not do so, he must be considered to have deserted her. The main object of this proceeding is to obtain protection for the property of the wife against any claim of the husband.

The JUDGE ORDINARY.—So I concluded. There is no doubt both parties are willing to live apart, but that is no ground for my decreeing a judicial separation. I must take time to consider, as this is one of a class of cases that may become of extensive importance.

Cur. adv. vult.

The JUDGE ORDINARY now delivered judgment.—In this case, which was heard the other day, a petition was presented by the wife for a judicial separation on the ground of "desertion, without cause, for two years and upwards." This is a new ground for separation. Authority to decree judicial separation in cases of desertion was not possessed by the ecclesiastical Courts; but has for the first time been given by the 20 & 21 Vict. c. 85, which, in that respect, has conferred on this Court original jurisdiction. There is great difficulty in giving a precise definition of desertion, and cases may arise in which it will be difficult to say whether the facts proved do or do not constitute "desertion"

within the meaning of the statute. Without, however, attempting to define "desertion" so as to meet all possible cases, I think it clear that to constitute desertion by the husband, it must be shewn that he has wilfully absented himself from the society of his wife, and in spite of her wish, she not being a consenting party. Assuming this to be the meaning of "desertion," I am of opinion that, on the facts proved at the hearing, in this case there has been no desertion. From the evidence of *Mrs. Thompson* it appears that she and her husband were living at Leeds, that they went to York, and were there married without the knowledge of her parents; that after the ceremony they returned to their respective homes, and that the marriage was kept secret until in a few months it was discovered by *Mrs. Thompson's* father, who then desired her to go to her husband. Accordingly she did so. Her husband was at first in a situation; that he lost, and the house in which they were living was, in consequence, given up. He then took a provision-shop, and, after a few months, that business failed, and the stock in trade was sold off. At his desire she went back to her father's house, and he went up to London to seek employment. The desertion is supposed to have begun at that time. In the course of the case it came out, almost accidentally, that several letters had been written by him from London to his wife. On production of them, it appeared that shortly after he reached London he wrote to her a letter, expressing great affection for her, great impatience of their separation, and a hope that before long he would be able to maintain her and her children, and speaking of his prospects of obtaining a situation. Shortly after this, it appeared by her own evidence that she saw him at the house of a *Miss Conyers*, at Leeds, when he said that he had not yet succeeded in his undertaking, but he thought he should be successful. It would appear from a little incident that occurred at that interview, that she had been rather cold in her manner towards him, and that he had tried to pique her by saying that he had met a lady in London who had been very kind to him, and had made him a present. He returned to London, and wrote another letter in extremely affection-

ate terms, stating that he hoped soon to get a situation, and that before long they should live together again. To that she returned no answer. He then wrote another letter, after an interval of about a month, complaining of the manner in which she treated him in not answering his letter, and telling her that she was in duty bound to let him know how the children were. She left that also unanswered. He wrote a fourth letter, certainly a rather angry one, complaining of her not having answered his last two letters, and saying, that if she did not write, that would be the last letter he should send. She took no notice of that. I asked her why she had left those three letters unanswered. She said she had not answered the last because it was insulting—and certainly some passages in it had better have been omitted. As to the other two, she said she had not the time to answer them, she was busy attending to her children—a frivolous reason for a wife to give for not answering the letters of her husband. When pressed for a more satisfactory answer, she said her father would have opposed her doing so. And thus we arrive at the truth. It would seem that the marriage was never approved by the father, and when his daughter went to live with him, he did not wish that she should have any further communication with her husband. I think, therefore, that the husband, in the first instance, having absented himself not wilfully, but of necessity for the purpose of obtaining employment, after his failure at Leeds, it cannot be said that he deserted his wife at that time; and, further, the continuance of his absence, when the conduct of his wife is taken into consideration, cannot be treated as desertion within the meaning of the statute. I must, therefore, dismiss the husband from the suit.

Judicial separation refused.

MATRIMONIAL.

1858.

July 29.

CARGILL v. CARGILL.

Judicial Separation—Offer by Husband to renew Cohabitation with Wife deserted for two Years—20 & 21 Vict. c. 85. ss. 16, 21, 27.

Desertion without cause for two years and upwards gives a wife a right to a judicial separation under section 16. of 20 & 21 Vict. c. 85, of which she cannot be deprived without her concurrence. A bona fide offer by the husband after that right has accrued to renew the cohabitation will not per se take away such right.

Semble, first, such an offer would not take away the right of a wife to a dissolution of marriage for adultery coupled with desertion, without excuse, for two years and upwards, under section 27. Secondly, that the offer of a husband who has deserted his wife to return to and provide for her, would take away her right to have an order made, under section 21. for the protection of property acquired by her since the desertion.

This was a petition, presented by Mary Burnes Cargill, for a judicial separation from her husband, John Cargill, on the ground of desertion without cause for two years and upwards.

The petition was filed on the 12th of May 1858. The citation was served on the husband on the 14th. No appearance was entered.

July 19.—The petition came on for hearing on oral evidence, and was adjourned till the 22nd for further evidence.

Dr. Deane and Dr. Middleton, for the petitioner.

The following facts were proved:—The marriage took place on the 7th of June 1848, at Tynemouth, the husband being a physician. The parties lived together at Newcastle-upon-Tyne from the date of the marriage until the 2nd of December 1850, when the husband sent his wife back to her father, with a letter accusing her of misconduct (of which not the slightest evidence was given), and declaring that he never would live with her again. He soon afterwards quitted his house, sold his effects, and went to Australia, and his wife never heard from or of him till March in this year, when, having returned to England, he addressed a letter, dated the 30th of March 1858, to her at her father's house, from an hotel in London, proposing that they should live together again. The wife returned no answer, and shortly afterwards filed this petition. The respondent

in no way contributed to the maintenance of the petitioner after he sent her back to her father.

The evidence in support of the petition having been given—

The JUDGE ORDINARY said—The return of the respondent to this country and his letter to the petitioner raise a very important question, viz. whether, supposing I should be of opinion that that letter was a *bond fide* offer on the part of the husband to renew cohabitation, such offer having been made before the petition was filed, would bar the petitioner of her right to a judicial separation? In other words, must the desertion continue down to the date of filing the petition? The question involves the interests of society to a great extent. A married woman who has been deserted, and has subsequently acquired property, may wish to continue deserted in order that she may have the sole enjoyment of it. It is very important that a desire to live separate, always much to be deplored, should not be encouraged in such cases.

Cur. adv. vult.

The JUDGE ORDINARY (after stating the facts) now said—There is no doubt that the respondent deserted his wife for two years and more, nor is there any evidence of any cause for it; and the sole question is, whether her right to the remedy, which the statute would otherwise have given, was taken away by his proposal to live with her again. Various remedies are by different sections of the 20 & 21 Vict. c. 85. given to a wife deserted by her husband, and the word "desertion" may not in all places mean the same thing. Thus, by section 21, it is enacted, that a wife deserted by her husband may, at any time after such desertion, apply to a magistrate or certain other authorities for an order to protect any property she may acquire by her own lawful industry, and property which she may become possessed of after such desertion: "And such magistrate, &c. if satisfied of the fact of such desertion, and that the wife is maintaining herself by her own industry or property, may make and give to the wife an order," &c. In that section I apprehend that "desertion" means, not only that the husband has absented him-

self, but has left his wife unprovided for, and such desertion must continue at the time of making the order; and a *bond fide* offer of the husband to return and provide for his wife, would take away her right to have such an order made. By section 27. a wife is authorized to present a petition, praying that her marriage may be dissolved, on the ground that, since the celebration thereof her husband has been guilty of adultery, coupled with desertion, without reasonable excuse, for two years and upwards. I think that in this instance the legislature could never have intended that the wife should be deprived of the right to a divorce, which accrued on the expiration of the two years, by a subsequent offer on the part of the husband to return and cohabit with her. In such a case he certainly could have no right to call upon her to return to cohabitation with him; for, by so doing, she would have to condone the adultery of which he is supposed to have been guilty. I consider, therefore, that adultery, coupled with desertion, without reasonable excuse, for two years, is a compound offence, giving a right to relief by dissolution of the marriage, no part of which could be blotted out without condonation by the wife. The 16th section gives a minor remedy for either part of the compound offence, viz. judicial separation for adultery, or for desertion without cause for two years and upwards; and I see no more reason for saying that the husband can obliterate either, when separate, without condonation by the wife, than when they are combined. Either, when committed, gives the wife a right to proceed, of which she cannot be deprived without her concurrence. This being my opinion as to the true construction of the statute, it is unnecessary to consider the terms of the letter addressed to her by her husband, for the purpose of ascertaining whether it was written in good faith or not. Assuming that it was, I nevertheless hold, that the wife is entitled to the remedy for which she has petitioned, and I decree a judicial separation.

Judicial separation decreed.

MATRIMONIAL.

1858.

June 8.

PEACOCK v. PEACOCK.

Judicial Separation — Condonation — Practice—Costs of Wife succeeding in a Suit by her for Judicial Separation.

Condonation is forgiveness of a conjugal offence on the full knowledge of all the circumstances. It is not a question of law, but of fact, depending on the circumstances of each particular case. When the issue of condonation is to be tried before a jury, it is a question entirely for their determination.

This was a suit, instituted by the wife, for a judicial separation, on the ground of adultery.

The answer of the husband pleaded, amongst other pleas, condonation.

Dr. Swabey, H. Hawkins and Phear, for the petitioner.

Dr. Phillimore and H. T. Cole, for the respondent.

The issues now came on for trial, before the Judge Ordinary and a common jury, when it appeared that, in the beginning of 1857, a girl in the service of Mr. Peacock left, in consequence of her pregnancy, and that she afterwards gave birth to a child, of which the respondent was the father. In February 1857 the petitioner was informed by her father that it was rumoured that the respondent was the father of the child; she then taxed her husband with adultery, but he denied it; she however left her home, and went to her father's house; but in a few days returned, and lived with her husband for six months, when she again left him, and never returned.

The only question of importance was, whether or not the plea of condonation was proved.

The case for the petitioner was, that she, after first leaving home, had an interview with the respondent, at his request, when she said, if he was guilty, and would say so, she would forgive him, but that he strenuously denied his guilt; and that, believing he was innocent, she returned home; but in the September following, being satisfied that he was the father of the child, she finally quitted him.

For the respondent, it was said that Mrs. Peacock had returned home with full

knowledge that he was the father of the child. The evidence on this point was conflicting. It is unnecessary to go further into it.

Dr. Phillimore having opened the case for the respondent,—

[The JUDGE ORDINARY said:—Do you treat the question, whether or not there has been condonation, as a question of fact to be decided by the jury, or as a question of law for the decision of the Court, after the jury have found the facts?]

Dr. Phillimore.—It is a question of law arising out of facts.

[The JUDGE ORDINARY.—It is rather embarrassing; but, in my opinion, it is not a question of law, but purely one of fact. Suppose a wife has a choice between two evils, viz. either to remain with her husband, who has committed adultery, or separate from a sick child, and leave it with her husband, and she remains with the sick child, would that amount to condonation?]

Dr. Phillimore.—If she returns to her husband's bed, I should say it would.]

[The JUDGE ORDINARY.—There you put it as a question of law, and not of fact. How is it that Judges of great eminence have said that there is a great difference between what would constitute condonation of the adultery of the husband, and what that of the wife? That conduct would be considered culpable in a husband which would be praiseworthy in a wife; that forgiveness on the part of the wife, in the hope of reclaiming her husband, would be meritorious, while a similar forgiveness by the husband would be dishonourable. Such passages abound in the judgments of Lord Stowell and Sir J. Nicholl. Therefore, if matrimonial cohabitation does not *per se* constitute condonation, it would seem that it is not a question of law.]

Dr. Phillimore.—In *Snow v. Snow* (1) *Dr. Lushington* says:—"A return to conjugal intercourse is, *primâ facie*, a condonation of past adultery and previous cruelty; liable to be rebutted, however, in many cases, as where the return to conjugal intercourse is compulsory, or where the whole of the adultery committed is not known to the party aggrieved."

[The JUDGE ORDINARY.—That seems to shew that it is a question of fact.]

The JUDGE ORDINARY, on summing up the case to the jury, said:—Condonation is forgiveness of a conjugal offence with full knowledge of all the circumstances, and is, in my opinion, a question of fact for the jury, and not one of law. I wish my opinion to be known, that, if wrong, I may be better instructed by a higher Court. It is for the Court to direct the jury what will constitute condonation; and for the jury to determine whether, subject to that direction, the circumstances of the particular case amount to condonation. If a woman, having full knowledge that her husband has committed adultery, continues still to live with him, you would be justified in inferring that she had pardoned the offence. The question for your consideration is, did the petitioner pardon her husband's adultery? In order that you may come to the conclusion that she did so, you ought to be satisfied that when she returned, after leaving his house, she had full knowledge that the offence had been committed. There is no doubt that when she left, in the first instance, she thought that it had, and that when she returned she had at least strong grounds for suspicion; but had she full knowledge? —[His Lordship then went through the evidence.]

The jury found all the issues for the petitioner.

The JUDGE ORDINARY decreed a judicial separation.

Dr. Swabey, for the petitioner, applied for costs.

The JUDGE ORDINARY.—It is not necessary that you should make the application. When the wife proceeds for a judicial separation, and it is granted, she is entitled to her costs as a matter of right. In the absence of any order of the Court to the contrary, they would follow the decree for a separation as a matter of course. It is undoubtedly a case in which the husband should pay costs.

Judicial separation decreed.

MATRIMONIAL }
1858. } NORRIS v. NORRIS AND
May 10, 11. } GYLES.*

Dissolution of Marriage—Practice—Appearance at the hearing by a Co-respondent who has not answered—Marriage Settlement—20 & 21 Vict. c. 85. s. 45.

In a suit for dissolution of marriage, where the co-respondent has appeared, but has put in no answer, he cannot, at the hearing of the petition, be allowed to take any part in the proceedings. He cannot dispute the allegations of the petition either by cross-examining the witnesses in support of it, or by addressing the Court, nor can he be heard even on the question of costs.

In decreeing dissolution of marriage, on the ground of the wife's adultery, the Court has no power, under section 45. of the 20 & 21 Vict. c. 85, to alter a settlement made on the marriage.

This was a suit for dissolution of marriage, on the ground of the adultery of the wife.

The respondent did not appear. The co-respondent appeared, but put in no answer.

The petition came on for hearing (May 10.)—The fact of adultery committed by Mrs. Norris with the co-respondent Gyles, who had been curate of the parish in which the petitioner resided, and on intimate terms with him, was fully proved.

Dr. Twiss and *Mr. W. H. Cooke* appeared for the petitioner.—The settlement made on the marriage of the parties, giving the respondent an interest in some real and personal property, was put in in order that the Court might make an order, with reference to such interest for the benefit of the husband, under section 45. of the 20 & 21 Vict. c. 85 (1).

* Coram Lord Campbell, C.J., Pollock, C.B. and the Judge Ordinary.

(1) Section 45.—“In any case in which the Court shall pronounce a sentence of divorce or judicial separation for adultery of the wife, if it shall be made appear to the Court that the wife is entitled to any property either in possession or reversion, it shall be lawful for the Court, if it shall think proper, to order such settlement as it shall think reasonable to be made of such property or any part thereof, for the benefit of the

H. T. Cole appeared for the co-respondent, and without objection cross-examined the witnesses for the petitioner, and at the close of the petitioner's case was about to address the Court.

Per Curiam.—The co-respondent, not having put in any answer, has no right to appear at all at the hearing. It was from inadvertence he was allowed to cross-examine the petitioner's witnesses. He might have put in an answer and denied the allegations in the petition; but not having done so, he is not now at liberty to dispute them.

H. T. Cole.—Assuming that the co-respondent, not having put in an answer, may not now deny the charge of adultery, yet, as the Court has power, under section 34, to order him to pay the costs of the suit, he ought to be heard on the question of costs. He may not be able to disprove the charge of adultery, and consequently there may be no ground for his putting in an answer, although there may be circumstances in the case which would make it unjust that he should have to pay costs.

LORD CAMPBELL.—We are all of opinion that the alleged paramour has no right to be heard, not having put in an answer. Such a practice, if allowed, would lead to great inconvenience. Not only might he cross-examine the witnesses for the petitioner, but he might call others, and so change the whole aspect of the case. The petitioner is entitled to a dissolution of marriage, the adultery having been established. With regard to the settlement, we will take time to consider what should be done.

Dr. Twiss asked that the co-respondent should be ordered to pay the costs of the suit.

H. T. Cole asked for leave to be heard on this question.

LORD CAMPBELL.—At present we are of opinion that the co-respondent cannot be heard even on the question of costs. He

innocent party, and of the children of the marriage, or either or any of them."

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is not before the Court for any purpose. If we see any reason for altering that opinion, we will give notice. We think the co-respondent should pay the costs; —he knew that Mrs. Norris was a married woman.

May 11.—**LORD CAMPBELL**.—We retain our opinion that the co-respondent, not having put in an answer, cannot be heard on the question of costs. As to the marriage settlement, we think we have no authority to interfere with it (2).

Decree for dissolution of marriage, with costs as against the co-respondent.

MATRIMONIAL.

1858.

June 21.

CURTIS v. CURTIS.

Judicial Separation—Cruelty—Condonation—Custody of Children—Practice—Question as to Custody of Children not subject for separate Hearing—Mode of conducting Case where Respondent appears in Person—20 & 21 Vict. c. 85. s. 85.

To entitle a person to a decree of judicial separation on the ground of cruelty the acts relied on must be of such a nature as to shew that further cohabitation is unsafe—there must be proof of ill-treatment and bodily injury, or of a reasonable apprehension of such bodily injury.

Acts of cruelty condoned and not revived by subsequent misconduct would not be a legitimate foundation for a decree of judicial separation, though condonation were not pleaded.

(2) In *Tourle v. Tourle* and another, before the full Court, (May 13, 1858), in decreeing dissolution of marriage, on the ground of the wife's adultery, the Court refused to make any order as to the marriage settlements, Lord Campbell, C.J. stating that they had considered the point, and were of opinion that they had no power to alter marriage settlements. The Court also refused to hear the counsel of the co-respondent, who had not put in an answer, on the question of costs. In *Gingell v. Gingell* (August 31, 1858), *C. W. Wood*, on behalf of the petitioner for a judicial separation, having moved that the petition might be heard without a jury, the Judge Ordinary refused to hear *Pritchard*, who was instructed to apply for a jury on behalf of the respondent, on the ground that he, not having put in any answer, had no right to be heard on the application.

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Condonation is not absolute forgiveness, but forgiveness on the implied condition that the misconduct condoned shall not be repeated. Harsh and insulting treatment, though unaccompanied by personal violence, constitutes a breach of such implied condition in a case of cruelty.

Cruelty generally consists in a series of acts, therefore condonation is not lightly to be presumed from a continuance of cohabitation after one or even several acts of cruelty.

Continuance of cohabitation does not necessarily constitute condonation; it may be caused by the apprehension of some evil which is considered greater than personal injury, e. g., the privation of children.

Acts of violence committed under the influence of an acute disorder, such as brain fever, where, the disorder having been subdued, there is no danger of their recurrence, would not be ground for a decree of judicial separation. Aliter, if the result of such disease were a new condition of the brain, rendering the party liable to ungovernable fits of passion, which would make further cohabitation dangerous.

Quære—whether the Court for Divorce in exercising the power given it by section 35. of 20 & 21 Vict. c. 85, to make provision for the custody, maintenance and education of children, should act in accordance with the rules and principles by which the Court of Chancery is guided in such cases, or is vested with an absolute discretion.

On decreeing a judicial separation on the ground of the husband's cruelty, the Judge Ordinary, considering that under the circumstances of the case, the children ought not to be delivered up to the father—that he had no power to vary an order when once made, though it might afterwards be desirable to do so, and that there were no funds applicable to the maintenance and education of the children, declined to make any order under section 35. of 20 & 21 Vict. c. 85, as to their custody, maintenance and education; but directed that they should remain with their mother for three months, in order that an application might be made to the Court of Chancery.

Semble—That where the Court is asked, under section 35. of 20 & 21 Vict. c. 85, to make a provision as to the custody, &c. of the children in its final decree for a judicial

separation, &c. that question must be gone into at the hearing of the suit, and cannot be made the subject of a separate hearing.

Where the respondent conducts his own case, the most convenient course is, that he should at once call his witnesses without making an opening speech, then give his evidence, and reserve any comments on the case for his summing up.

This was a suit for a judicial separation, instituted by Frances Henrietta Curtis against her husband John George Cockburn Curtis, on the ground of cruelty.

The petition stated that, on the 11th of June 1846 the petitioner, a spinster, aged twenty-two, married the respondent, a bachelor, aged thirty; that the petitioner lived and cohabited with the respondent from the date of the marriage till March 1849 at 16, Charing Cross,—from March 1849 till November 1849 at Alpha Road, St. John's Wood,—from November 1849 till June 1851 at Blenheim Terrace, St. John's Wood—that in June 1851 the petitioner went to New York with the respondent, and that from July 1851 till June 1852 she lived and cohabited with him at different places in the State of New York; that there had been issue of the marriage five children, of whom two were dead, viz., Frances, born on the 10th of April 1847, died on the 2nd of March 1849; Mary, born on the 31st of July 1848; John, born on the 25th of December 1849; Julia, born on the 4th of June 1851, died on the 30th of August 1851; and Frances Adelaide Maria, born on the 19th of June 1852. That the respondent treated with cruelty, and assaulted, beat, and used personal violence to the petitioner whilst they were residing at 16, Charing Cross—at 8, Blenheim Terrace—and in the State of New York.

The answer of the respondent denied the cruelty alleged.

May 18.—The cause came on for hearing before the Judge Ordinary, and occupied that and the four following days. The evidence was taken orally, and consisted of that of the petitioner, the respondent and other witnesses. The material facts of the case are fully stated in the judgment.

Forsyth and Mundell, for the petitioner.

The respondent appeared in person and conducted his own case.

May 19.—Evidence of the ill-treatment of the children by the respondent having been tendered with a view to obtaining an order under section 35. that Mrs. Curtis should have the custody of them in the event of the Court decreeing a judicial separation, was withdrawn, at the suggestion of the Judge Ordinary, who ruled that the question as to the custody of the children should be reserved for a separate hearing; but—

May 20.—The JUDGE ORDINARY said—Upon consideration, I think any evidence bearing on the question as to the custody of the children should be given now. By section 35. of the 20 & 21 Vict. c. 85, any provision I might think right to make as to the children must be embodied in the decree for a judicial separation. I have only power to make *one* decree; and it is therefore very doubtful whether I have the power to make each question the subject of a separate hearing, though it might have been more convenient to do so.

At the close of the petitioner's case, the respondent having stated that he should call witnesses and give evidence himself—

The JUDGE ORDINARY said—It has been held, by the Court of Queen's Bench, that a party to a suit, where he conducts his own case, may address the jury, and afterwards give evidence in support of his case—*Cobbett v. Hudson* (1). I think the most convenient course to adopt will be, that the respondent should not make any opening statement, but at once call his witnesses, then give his evidence, and reserve any remarks for his summing up.

This course was adopted.

Cur. adv. vult.

The JUDGE ORDINARY now delivered judgment.—This was a petition presented to the Court, by Frances Henrietta Curtis, praying a judicial separation from her husband, John George Cockburn Curtis, on the ground of cruelty. The respondent denied the facts alleged in the petition. The marriage between the parties was solemnized in 1846, and they had issue five children, of whom three are

still living, now of the respective ages of nine, eight, and five years. Before the case could be heard, the petitioner applied for an interim order as to the custody of the children, and by consent it was arranged that the two elder children should remain at a school, where they had been previously placed by her, and that the youngest should remain with her until the petition was disposed of—see *Curtis v. Curtis*, *supra*, 16.

The case, in statement and evidence, occupied the attention of the Court on the 18th and four following days of last month, and I have since bestowed upon it much anxious consideration, on account of the great importance of the subject generally, and the peculiar circumstances disclosed in the individual case. Some of the most learned Judges who have presided in ecclesiastical courts have declined attempting to give a strict legal definition of cruelty; but in several cases the rules by which a Court should be governed in deciding on such a question have been stated, and the leading cases on the subject are collected in the judgment of the Dean of the Arches in the case of *Westmeath v. Westmeath* (2). At page 70 he says, "In the case of *Evans v. Evans*, Lord Stowell said, 'What is cruelty? In the present case it is hardly necessary to define it, because the facts here complained of are such as to fall within the most restricted definition of cruelty. I shall, therefore, decline laying down a direct definition. The causes must be grave and weighty, and such as shew an absolute impossibility that the duties of a married life can be discharged. In a state of personal danger no duties can be discharged, for the duties of self-preservation must take place before the duties of marriage.' Further on he says, 'Proof must be given of a reasonable apprehension of bodily hurt. I say an apprehension, because, assuredly, the Court is not to wait till the hurt is actually done; but the apprehension must be reasonable, not arising merely from diseased sensibility of mind.' So in *Harris v. Harris*,—'There must be something that renders cohabitation unsafe, or is likely to be attended with injury to the person, or to the health of the party. Words of menace may war-

rant the Court to interpose and prevent the actual mischief; but when such violence of language is accompanied by blows, it is a more aggravated case.' Again, in *Waring v. Waring*,—'The usual principles require that such complaints should be supported by proofs of violence and ill-treatment, endangering, or, at least threatening the life, or person, or health of the complainant.' The same doctrine is held in the case of *Holden v. Holden*,—'The Court has to decide whether the conduct of the husband amounts to that *sævitia* which authorizes a separation. On this point the Court has had frequent occasion to observe that everything is, in legal construction, *sævitia*, which tends to bodily harm, and in that manner renders cohabitation unsafe. Wherever there is a tendency only to bodily mischief, it is a peril from which the wife must be protected. It is not necessary to inquire from what motive such treatment proceeds; it may be from turbulent passion, or sometimes from causes which are not inconsistent with affection. If bitter waters are flowing it is not necessary to inquire from what source they spring. If the passions of the husband are so much out of his own controul, as that it is inconsistent with the personal safety of the wife to continue in his society, it is immaterial from what provocation such violence originated.' "

The first question to be determined, then, is, whether the respondent is proved to have been guilty of acts constituting cruelty, judging of the question by those rules. In order to do that it is necessary to examine with care the evidence given in the cause, and to make allowance for the exaggerations which may be expected in the accounts given by parties whose feelings are much interested and excited, more especially when they are deposing to transactions which occurred several years ago. The necessity for caution, if not suspicion, on such occasions, was pointed out by Lord Stowell, in *Oliver v. Oliver* (3) and *D'Aguilar v. D'Aguilar* (4). It appeared in evidence that the marriage of these parties took place in 1846, not with the approbation, but with the reluctant assent of the lady's parents, who considered

that his station in life was beneath hers; and I fear that to that feeling and the want of cordiality between the husband and the parents of the bride, a good deal of what followed may be ascribed. On the eve of the marriage, when the parties met to execute a settlement which had been prepared, differences arose, and an unfriendly discussion lasted from ten at night till two in the morning; and here we have at once an instance of the imperfection of memory as to the transactions in which parties are engaged under excited feelings. Several alterations were, during this discussion, made in the settlement. Mr. Flood, the petitioner's father, stated in his evidence before this Court, that they were made at the instance of his intended son-in-law, who had refused to execute the deed until they were made. In this he was directly contradicted by his own solicitor and the clerk of Mr. Curtis's solicitor, who attended on that occasion; and the nature of the alterations induce me to think that their statement is correct. Soon after the marriage, viz., in July 1846, the parties went to reside in lodgings in the house of Mrs. Carberry, 16, Charing Cross, and remained there till the spring of 1849, and there two children were born, Frances on the 10th of April 1847, and Mary on the 31st of July 1848.

The petitioner, in her affidavit filed with her petition, deposed that, during their residence at Charing Cross, her husband treated her with cruelty, and assaulted, beat, and used personal violence towards her. Being cross-examined by him before this Court, she stated that the assault and beating mentioned in the petition was pushing her out of a room, and that before she would swear to the affidavit she inquired whether that was assaulting and beating. She was told, correctly, that it amounted in law to assault and battery, but she should have been told at the same time that the Court would probably be misled by such a description of it. When examined before the Court other matters were stated as instances of cruelty, *e. g.*, that he would not allow his first child to be baptized—a refusal which he ascribed to his opinion that infant baptism was wrong; and, however erroneous his view of the subject, such conduct cannot be deemed an instance of cruelty; that, when

(3) 1 Consist. Rep. 364.

(4) 1 Hag. Ec. Sup. 782

the child was dying he would not have medical advice, which was not true, but when it came to be sifted amounted to no more than this, that having consulted one physician of eminence, who said that nothing could be done for the child, he declined having another. To these another witness (Mary Gally) added two other charges of cruelty: one, that when the child above mentioned died, she made some tea for Mrs. Curtis, which her husband would not give to her, because he was then praying with her; the other, that after the birth of the first child Mrs. Curtis was suffering severely from a bad breast, and he would not allow her medical advice. The former is simply ridiculous as the foundation of a charge of cruelty; the latter must have been stated by mistake, for Mrs. Curtis never mentioned it at all, and until after the second child was born she was always, when she wished it, attended by Dr. Tweedale, an intimate friend of the husband. But Mrs. Curtis deposed also to another transaction of a very different character, viz., that during an angry argument on some religious or political subject her husband spat in her face. This disgusting insult has been frequently treated, and very properly so, as an act of cruelty; but Mr. Curtis's denial was as positive as his wife's assertion, and as she never mentioned it at the time, nor, indeed, until the present proceedings were about to be commenced, I cannot but hope that something of a less aggravated character took place, which, contemplated by her now at this distance of time, and with her imagination excited by other grievances, leads her to suppose that he really then insulted her as she has sworn. But whichever may be the true state of the facts, what was said by the Judge of the Consistory Court, in *Westmeath v. Westmeath*, is applicable to this part of the case—"A natural test of injuries of this kind is the sense in which they are received; if they are not resented as injuries at the time a state of things intervenes which either detracts from the weight of particular evidence when brought forward at a subsequent period, or may introduce quite another view of the relative situation of the parties."

It is needless, then, to pursue this part of the inquiry further, for if the act was

committed as alleged, the continued cohabitation of the parties afterwards, as proved before me, would induce me to decline acting upon it as a ground for decreeing judicial separation. But to pursue the history of this unhappy couple. In March 1849 they removed from Charing Cross to Mr. Flood's house, in Alpha Road, and remained there till November in the same year, living during all that time in perfect harmony. After that they took apartments in Blenheim Terrace, Regent's Park. There their dissensions were renewed and increased. Mr. Curtis objected to his wife going to parties, even at her father's house. He imagined that he was considered and treated by her family as her inferior, and she admitted that at her father's house "engineering rubbish" was often talked of (Mr. Curtis being by profession a civil engineer), although she said it was not done offensively; and on one occasion, when irritated by a dispute, she told him that the only compensation he could make to her for having induced her to marry him was to die. He became jealous, and accused her of infidelity (for which there was no foundation whatever), and called her by opprobrious names, and she, in return, provoked by such treatment, in some discussion about the children, said "perchance they were not his, but had each a different father," whereupon he beat her, or, as he said, "boxed her ears."

In November 1850 Mr. Curtis had a severe attack of brain fever, became delirious and was placed under restraint for some weeks. After that he talked of going to Australia, and wished his wife to accompany him, and, on her refusal, according to her account, became violent, and on more than one occasion beat her with his closed fists.

And here I must refer to some of the evidence.

Mrs. Curtis stated that on one occasion, in February or March 1850, whilst she and the respondent were in the sitting-room down-stairs, one of the children up-stairs cried; that she went up-stairs to try and pacify it; that the respondent followed her up-stairs; that they both came down-stairs, when high words ensued, and the respondent struck her with his fist five or six times on the head, whilst she had the baby in her arms. On another occasion,

about September 1850, Mrs. Curtis stated that the baby cried in the night; that the respondent said he would dash the child's brains out against hers; that he turned her out of the room, and bit her on the shoulder. Mr. Curtis did not deny that he committed this last act of violence, but excused himself on the ground that at that time he was suffering from brain fever, and there is no doubt that was the case, and it is, therefore, not the most serious part of the case.

We now come to the period when Mr. Curtis wished his wife to go with him to Australia. In reference to this, Mrs. Curtis's evidence was this:—"In the spring of 1851 Mr. Curtis was anxious to go to Australia. I did not wish to go. He cursed me, and threatened that if I continued disobedient, it would end by his killing me. He said if I would not go, he would take the children without me. He often charged me with infidelity. In February 1851 the boy was ill, I wished to take him to a medical man, he objected, and said I wished to act improperly. High words ensued: he struck me on the face and head several times. About a month afterwards, when I was near my confinement, whilst the baby was in my arms, he struck me with his fist. He ordered me to sit in a particular chair without moving. I began to play with the baby, and he struck me again. My mother, Mrs. Flood, came in, I called out 'Save me, mamma, he is going to kill me.'" Mrs. Curtis's evidence is partly confirmed by that of Mrs. Flood, although she did not see the blow struck. She stated that in the spring of 1851, not long before the birth of the fourth child, she called at Blenheim Terrace, and that when she went into the room she found the petitioner in tears, her face red and swollen, and that she exclaimed immediately, "Oh, mother, save me, or he will kill me;" that the respondent was standing over her, looking exceedingly savage; that she asked him what was the reason of such conduct, and was told not to interfere with his affairs. Mrs. Curtis also stated that in April or May 1851 there was another dispute about going to Australia, and the respondent struck her on the mouth and made it bleed, that he also struck her three or four times on the head. Again, in the spring of 1851, Mrs. Curtis stated that she

wished to go to a party at her mother's house; that the respondent said she was to go at her peril, and struck her on the face with his open hand; that Mary Gally, a servant of Mrs. Flood's, came in to the room, when the respondent's manner changed. This evidence is confirmed by that of the witness Mary Gally, the witness upon whose evidence as to the occurrences at Charing Cross I have already commented. As to this part of the case also, I think a little allowance must be made in considering her evidence, as she is evidently a person whose feelings are strongly enlisted on one side. She was in the service of Mrs. Flood, and was sent in the spring of 1851 with a message about a party at Mr. Flood's. Her account is as follows:—"In the spring of 1851 I was directed to deliver a message to Mrs. Curtis. I went up-stairs. I heard high words between Mr. and Mrs. Curtis, and went into a bed-room adjoining the one in which they were; there was a door between the two rooms. I heard him say if she did not consent to go abroad with him he would murder her. I heard him strike her; Mrs. Curtis said 'Oh!' I went into the room without knocking. They were both sitting on the sofa. Mr. Curtis received me with the greatest kindness; I saw a mark on Mrs. Curtis's cheek, her face was smothered with tears. I went down-stairs and opened the front door and slammed it, and then returned into the bed-room. I heard Mr. Curtis say, 'Madam, if you leave the house, and go to your father's party, I will murder you.'"

In two of these instances Mrs. Curtis's evidence is confirmed by that of Mrs. Flood and Mary Gally, and I cannot doubt that on both of the occasions the respondent struck the petitioner. Mrs. Curtis also stated that on the 4th of June 1851 her daughter Julia was born. Mr. Curtis came into the bedroom and discussed going to Australia. He read from the Bible God's judgment against sinners, and repeatedly urged going to Australia. Emily Hale, who was in Mrs. Curtis's service at Blenheim Terrace, confirms this statement of Mrs. Curtis. Again, on the 4th of July 1851, Mrs. Curtis said—Mr. Curtis came to me and said, that my father intended to take proceedings to prevent my taking my children to Australia. He became violent—pushed

me about the room. He pressed my throat with his hands, calling me bad names. He told me to go to my father's; he pushed me to go down-stairs, called me an abandoned woman. I found Mary Gally outside; she took me in a cab to my father's. This is confirmed by the evidence of Mary Gally, who says—"I was sent to Blenheim Terrace with a letter; I heard a noise up-stairs; I heard Mr. Curtis say 'Devil, go.' Mrs. Curtis rushed out of the house, I followed her, and found her leaning against the railing at the corner of the street; her bonnet was very much bent; she was bewildered; I took her in a cab to her father's house."

Upon this part of the case it is hardly necessary to observe that, if Mr. Curtis found that he did not succeed in his profession in England, and wished to remove with his family to Australia in hopes of improving his condition, he had a perfect right to do so, and no imputation on his conduct would arise out of such a resolution; but if he sought to put an end to his wife's objections and to obtain her acquiescence in his views by violence, and by threats and blows, he did that which was utterly inexcusable, and which shewed him to be unfit to claim the society of his wife. Mr. Curtis's own account of these alleged acts is this:—"I may briefly state that I did not, I firmly believe I did not, beat and assault Mrs. Curtis in the manner stated by those witnesses yesterday. I carefully went over the different periods and I certainly cannot recollect. The only occasion I can call to mind was that of boxing her ears when Mrs. Flood came in,"—which is certainly too feeble a denial to induce me to discredit the positive testimony of the other witnesses.

While these disputes about going to Australia were going on, Mr. Flood expressed an intention of making the children wards in Chancery, to prevent their being removed from this country, and on the 3rd or 4th of July Mary Gally (the witness) removed the two eldest children from Mr. Curtis's lodgings without his knowledge. They were afterwards taken back by Mr. Flood's order, and on the next day were removed by Mr. Curtis to his mother's, and he then resolved upon going to America and taking them with him. It appears that he had some apprehension

that it was Mr. Flood's intention to endeavour to get him placed in a lunatic asylum; and his wife then said that if he was so shut up, she would remain with him, and, at his desire, confirmed this with an oath. Mr. Curtis, in pursuance of his plan of going to America, went down to Liverpool next day, accompanied by his mother, his wife and children, and on the following day he, with his wife and children, embarked for America. Having carefully examined the evidence affecting this part of the case, I have come to the conclusion that his wife was most unwilling to leave England with her husband, and was only induced to do so by the apprehension of having her children taken from her and removed to a foreign land. Condonation was not pleaded by the respondent in answer to the petition; but if the evidence established a plain case of condonation, the Court would probably take notice of it, although not pleaded, for acts condoned and not revived by subsequent misconduct could not be considered by the Court as a legitimate foundation for a decree of judicial separation.

But there are one or two points connected with the doctrine of condonation in general, and especially with reference to cases of alleged cruelty, which it may be proper to notice. I quite concur in the opinion expressed by Lord Stowell in *D'Aguilar v. D'Aguilar*:—"All condonations by operation of law are expressly or impliedly conditional, for the effect is taken off by repetition of misconduct. Condonation is not an absolute and unconditional forgiveness." It has also been well observed by Sir J. Nicholl, in *Westmeath v. Westmeath*, that the cruelty which has been recognized as a sufficient ground for divorce *à mens et thoro* must, with few exceptions, consist of a series of acts; therefore, condonation is not lightly to be presumed from a continuance of cohabitation after one or several acts of cruelty. Again, such continuance may be obtained by the apprehension of some evil which is considered greater than the peril of personal injury, *e. g.*, the privation of children and their removal to a foreign land under the unrestricted controul of a harsh and excitable father. Had it been necessary to determine the point in this case, but subsequent events render it unnecessary,

I should have hesitated long ere I should have found as a fact, or laid down as matter of law, that the wife, by accompanying her husband to America, had condoned all the acts of cruelty which she now imputes to him. No act of cruelty was imputed to Mr. Curtis during the voyage to New York, but the wife alleged, and the husband denied, that he struck her on the evening of their arrival. They changed their lodgings once or twice, and in the month of August were lodging in Hudson's Place, New York, when Mr. Flood arrived from England. Mrs. Curtis stated that on several occasions about that time he was very violent, and pushed her about the room, but she did not speak positively to blows, and did not complain of any to her father. Mr. Flood made some offer to Mr. Curtis to induce him to return to England; but he refused to do so, and Mr. Flood returned in the month of November. It appeared that at that time Mr. Curtis apprehended that it was Mr. Flood's intention to get him placed in a lunatic asylum if he returned to England, and, because he would not promise not to do so, Mr. Curtis refused to return. In the month of March 1852 Mrs. Curtis wrote to her mother, giving an account of the manner in which she was then living, and that letter was produced at the desire of Mr. Curtis, and by him given in evidence. —[His Lordship here read a great part of the letter, the substance of which follows :] —“My own dearest mother,—I write to you only this time as I have things to say to you which I could not say to papa, and therefore you must look upon it that this letter is to you privately; besides I am so dreadfully low spirited to-day and so confused, perplexed and stupified, that I hardly know what I am doing or what I had better do. I know your advice before I ask it; but I do not dare to do it. I am afraid of the reproaches of my own conscience afterwards. First of all, your guess as regards myself is only too true. I am afraid I shall be likely to have another baby this next summer. You see, dearest mother, it is having this in prospect which makes me so dreadfully anxious about my other children; if it were not for this, I should be comparatively easy. I am sorry to tell you that things have not been going on so well lately. I do not know what to make

of Curtis, he completely baffles my penetration; but I sometimes feel his mind is going again, not into madness, but imbecility, and this terrifies me as regards the children while I am out of the way. I will just, as I am writing to you alone, tell you of what has happened since yesterday; but I am afraid of colouring it too highly, as, indeed, my feelings are greatly excited. Two little girls who live in this house, one four years old and the other six, came to play with my children yesterday afternoon for the first time. My poor dears were delighted, it did my heart good to see them; they went up stairs all together to the girl at supper-time, and I was on the point of following the minute after when Curtis came in, having been up-stairs first, and having found the children together. He was evidently much put out and excited, and asked me what I meant by allowing strange children, of whom I knew nothing, to play with his children, and went on, in an angry and excited manner, to say that all the misery of his life had arisen from immoral habits learnt from other children, and that he insisted I should go up-stairs and separate the children, and never allow them to be together out of my presence. I said they had not left my presence more than a minute, and agreed they should only play in my presence; but unfortunately on his going on to be much excited, and to talk, as I thought, very disgustingly, I got angry and said I refused to talk of such things, as I thought it corrupting. This only made matters worse, and at last I said, ‘Really, if things go on in this manner, I shall be obliged to put my children under the protection of the government.’ I said it, thinking it might do good to shew a little spirit, and also from being really angry and disgusted; but the words were hardly out of my mouth when I saw the mistake I had made, and really, my own mother, the persecution and humiliation I have undergone since have been enough to break a heart of stone. Seeing that I had been wrong, and only made him worse, and being convinced that opposition did no good, I said I was sorry for what I had said, and begged his pardon, but all in vain. Ever since I have hardly known what to do. In the first place he would not let me come to prayers with

the children, or have anything to do with them last night, and went on perpetually at me the whole evening. Next he made me beg his pardon over again in the presence of my servant, explaining to her that I had been impertinent to him, and the poor girl not knowing which way to look from not liking to be made such a fool of. Then this morning there has been the same thing over again. Scolding, scolding, scolding without end, and I can conscientiously say without provocation, pointedly helping the servant to bread at breakfast before me, and at last, on my making some slight remark, sending me out of the room to finish my breakfast in my bedroom. I should have told you before that last night he said he was not satisfied with the sincerity of my repentance, and should therefore devise some punishment for me; and so accordingly he came into my room when I had finished my breakfast, and said he had for this day given the charge of the children to Ann, that is the girl, instead of to me, that I might go out or do as I pleased, but that I was not to see his children or meddle with them in any way; and on the children running into the room he sent them off, telling them repeatedly that 'Mamma was naughty.' He then told me that, by submitting to his punishment with a good grace, I could shew my repentance, and, praying God to bless me, he went out; and the girl tells me that as he went away he was crying, and several times while he was lecturing both last night and to-day he appeared on the point of bursting into tears, and often at other times also. So you see, dearest mother, here I am to-day. I can only see my children by stealth and telling lies when he comes in, and pretending I have not seen them; and though this punishment is only to last one day, is it not a cruel and outrageous thing to do? I feel certain it is chiefly done from a feeling of fanatic enthusiasm, and thinking that I belong to the world and not to God. I am so stupified, and my mind is so completely lost by perpetual thinking on the same subject that I know not what to make of it. I had a great mind to go off to Dr. Nicoll after he was gone out to-day, but what can I say to him so long as Curtis is well enough to do his work and satisfy

his employers? I ought perhaps to have told you that I think the real offence to Curtis was that seeing him, as I thought, getting more odd for some time, and thinking it fair to warn him, I told him, I am afraid not in the most judicious manner, that it appeared to me that his mind was trembling on the verge of insanity, and this, I fear, is what rankles in his mind. I told it him simply because I thought it right to give him warning; but you see I went against the plan I had laid down for myself, and I did wrong. Now I certainly will never contradict him again. I would to God I could tell what to do; but he seems so wrapped up in the children that I do not like to take them away, in spite of anything I may suffer, and I do not see that they are at present threatened. Then there is this horrible confinement business, which, though I do not in the least fear it for myself, I fear for my poor dears, and my girl wants to go as soon as I can get another; the work is too much for her; besides which she does not like the whole concern, which I can't wonder at. Fancy Curtis saying in his rage last night that, by my opposition, I laid on him the temptation of being obliged to pray that he might not wish for me to die in childbirth, that he might be able to bring up his children in the fear of God, &c. I don't see what can be done. If you were even here, my dearest mother, it would do no good; and when you were gone he would again be worse. Betsy, I think, could do no good, as I could not have her in the house secretly; and papa would only make him furious. I would to God he would do something that would set me at liberty. I often wish he would strike me, but that he never attempts; indeed, he seemed much kinder for awhile. But the plain fact is, that he carries the idea of his authority to a mania. * * * He is so particular, that finding a magazine I had bought to read (*Harper's Magazine*, considered the best here), he tore it all to bits, and burnt all but a few pages, telling me not to bring books into his house, until he knew what they were about. I hardly like to bring a book into the house for fear of his objecting to it. Pray continue, dearest mamma, to send the papers; they help to keep me sane. I suppose I must give Curtis yet

another trial, and see what constant humouring will do ; but it is so impossible and wicked to be always deceiving and telling lies, and the children get such chatter-boxes, that the other night, after little Mary had a powder, she told her papa of it when he came in, and I was obliged to deny it, which grieved me much. I wish to induce Curtis to go to Hoboken or Brooklyn, which are the same as New York, only on the other side of the water, and much healthier for the summer ; but I fear if I spoke of it he would only set himself against it. I saw Mrs. Ashton the other day ; she sat with me some time. She tells me she was obliged to keep her children in New York one summer until after her confinement in July, and that though they suffered much from the heat they were not seriously ill. I am encouraged at hearing this, but I fear that Curtis's notions, such as hating blinds, and liking the full blaze of the almost tropical sun, will do harm ; for one's only chance is in keeping the rooms as dark as possible. He unfortunately found out that Mrs. Ashton had called, by finding some particular kind of cake which she always brings. He opened the drawer in which it was. He was very angry with me for not telling him she had been, and this morning desired Ann to tell him in future if anybody called. He cannot get over not knowing Mr. Ashton himself. You see it is necessary in everything to flatter his *amour propre*, if he is to be kept in tolerable humour. He now says boldly, that his object is to bring up his children away from the world, and you may be sure that is what keeps him here. I mean this letter for you especially, my dearest mother, because I think papa has undergone so much from Curtis, that he would think too much of all I say ; but indeed I am very, very miserable. If I ought to leave, I ought to leave of myself, and not from anything you say ; and when I look at those precious children, and think of perhaps dying here and leaving them, you cannot wonder that my heart should seem near breaking. If I even felt sure I was doing right in staying and suffering, and complying with all Curtis's notions, I should be less miserable ; but the uncertainty from day to day what is best for

me to do, or who is in the right, distracts me. I will write another letter, which I suppose you will get at the same time with this. I have written myself into better spirits, dearest mamma, and have stolen in to look at my darling as he lies asleep. God have mercy upon us all ! I do not like to be a trouble to people, but I am much tempted to go to the hospital on Monday at twelve o'clock, and try if I can see Dr. Nicoll ; but I do not know whether I ought to pay him, or how much ; and in fact, as I said before, while Curtis keeps on going to the office and getting his wages, I don't see that anything could be done. Still, I should like to know certainly. The extreme seclusion of the life which we lead is, I am sure, very hurtful to the mind ; one does not know right from wrong, and I am sure I could not say at this moment whether Curtis is right or I am right. Still, I cannot get over the fear that his mind is going. He seems to me to be nearly as bad as he was for a day or two before he took the wine. The extraordinary mixture of arrogance, self-love, love of power, with religious feeling and enthusiasm, is too much for me to understand ; and especially when, added to all this, there is the occasional break down into tears and misery. Good bye, my own dearest mother. Forgive me for all the grief I cause you, and believe how much I love you. Pray God to direct your own child, my own mother. Good bye.

"Ever your most affectionate,

"F. H. Curtis."

I presume that the object of the respondent in reading this letter was to draw the attention of the Court to two passages as affecting the charge, now made by the petitioner, of cruelty towards herself and her children. The first of them is :—"I would to God I could tell what to do ; but he seems so wrapped up in the children that I do not like to take them away, in spite of anything I may suffer, and I do not see that they are at present threatened." The other is in these words :—"I would to God he would do something that would set me at liberty. I often wish he would strike me, but that he never attempts ; indeed, he seemed much kinder for a while. But the plain fact is, that

he carries the idea of his authority to a mania." The first of these passages is certainly inconsistent with the idea of his being habitually cruel to the children; but the latter part of it,—“I do not see that they are *at present* threatened,”—rather leads to an inference that at other times they had been in peril of ill usage; and, taking the whole together, it is not by any means sufficient to induce me to reject as untrue the evidence of Mrs. Curtis on this head, although it is probable that her excited feelings have caused her to give a somewhat highly-coloured account of the acts complained of. The respondent, before this Court, admitted his habit of chastising the children, but denied any such severity as was imputed to him by his wife and her father. But the correction which, as described by himself, he administered to a girl not four years of age, and a boy hardly two years and a half, was not that which might have been expected from a father wrapped up in his children, unless he was subject to fits of passionate excitement strong enough to overcome, for a time at least, his parental affection. Again, with respect to the wish expressed,—that he would strike her, but that he never attempted it,—taking it in connexion with the evidence given, it rather leads to the conclusion, not that he never was guilty of such an act, but not recently, and that she considered that some fresh act of violence was necessary to found an appeal to the law. The whole letter, taken together, gives a melancholy picture of the condition in which the petitioner was then living, and there is an air of truth, and sincerity, and candour about it, which is well calculated to gain the confidence of the Court. It is true that the letter proves that she had not recently before that time suffered any personal violence; but assuming the whole letter to be true, she was treated with great harshness, insulted in the presence of her servant, displaced from her proper position in her house, and rendered subordinate to her own servant; not indeed on account of any immoral propensities of the respondent, but from a violent and unreasoning exercise of authority—a course of treatment, in my judgment, constituting a breach of the implied condition

which the law would annex to any condonation of earlier acts of cruelty, and sufficient to excite a well-founded apprehension of further violence. In consequence of this letter, Mr. Flood went again to America, and after a short time applied to the British Consul at New York, caused Mr. Curtis to be apprehended as a dangerous lunatic, and to be confined in a lunatic asylum. Mrs. Curtis gave birth to a daughter shortly after her husband's apprehension, and seven days after her confinement Mr. Flood took her and her children on board a steam-boat, and brought them to Ireland, where she continued to live at his house until 1857. Upon this transaction I make no comment, for Mr. Flood is not before the Court in any other character than as a witness; it is, therefore, no part of my duty to observe upon his conduct, except as a witness, or as taking part in transactions that have an immediate bearing on the question to be decided; but, I must observe, that he seems to have been actuated by a feeling of animosity towards Mr. Curtis, which induces me to receive with caution his statement of facts, where he is likely to have an impression respecting them under the influence of excited and hostile feelings. Before she left New York, the petitioner wrote to her husband, and on the 15th of August 1852 he wrote to his wife, as follows:—

“Bloomington Lunatic Asylum,
Aug. 15, 1852.

“My own dear Fanny,—I had been very anxiously expecting some tidings of you and the dear children when the doctor kindly allowed me to read your note of inquiry to him, and, though you say nothing as regards yourself and the dear children, it was so far satisfactory that, from your saying nothing to the contrary, I hope it shews that you all arrived in safety; and I trust, therefore, dearest, that you are all well and are enjoying the comfort and happiness which you hoped to derive from your return to your mother and to England. The doctor has kindly given me permission to write to you without my letter being subjected to examination, as is the ordinary rule of this place, and I do trust, dearest, that when you write, you will assure me that you neither

have nor will allow this or any other letter I may write to be read by or shewn to any one other than yourself. I hope, dearest, you will now discard from your mind all feelings of resentment as regards the past, and I entreat you fully and freely to forgive me for all the wrong I have done you. I have much time for reflection since I have been here, and I now see how unloving, unkind and unchristianlike all my conduct has been; but pray, dearest, to believe that notwithstanding all that has passed, my love and affection for you remain unchanged. On many points, also, the conceptions on which I acted I now see were erroneous, and could only have arisen from extreme anxiety coupled with the disadvantageous circumstances and impressions under which we mutually laboured. I am anxious to have some idea as to what course to pursue in reference to the future. I should be glad, therefore, my own dearest Fanny, if you would let me know candidly the state of your views and feelings on that point, and whether you think that we could manage to get along together again. Write fully, dearest, your opinion on these points, and, above all, let us both earnestly pray to God for his assistance and guidance. I shall be so glad to hear how you and the dear children are. Pray kiss them over and over again, and as regards the last, give her her first blessing from her father. I want you, if you have not already named her or fixed upon some other name, to call her Frances. Try and make peace for me with your father, and write me word what the state of his mind is as regards me. Kiss your dear mother for me, and make peace with all. I shall most anxiously await your reply, and meanwhile pray much for me and much for yourself, dearest, and let us both hope that God may turn these present troubles into blessings upon ourselves and our children. When you write communicate with me freely as to your present pecuniary position and also as to what steps you take as regards the different money and other matters of which I pointed out to you the papers as those it would be necessary to take charge of in the event of my death. Good bye, dearest, don't criticise or com-

ment on this my first letter too severely. I pray accept a kiss from your own affectionate husband.

"J. G. C. Curtis.

"P.S.—You must ask your father to forget all that I said that was flippant, harsh or unkind. Try, dearest, as I said before, your utmost to make peace between us. You, who have had time for reflection, will readily see how much of my conduct and views to both yourself and your father were occasioned by the lingering weakness incidental to my previous alteration of mind, and by the deep impression which your father's threats unfortunately produced: but let us hope and trust to set matters right as regards the future, and above all, dearest, as I said before, let us pray to God that he will guide us in all our works and ways. Good bye, dearest; again may God bless you and our children and join us all to him."

Now, this letter is important, for although it does not describe the particular acts of unkindness for which the writer reproached himself, it affords a strong confirmation to the evidence given by the petitioner on her oath before this Court. His mother went over to America, and soon afterwards procured his release from the asylum. He then went to Spain, and obtained some employment in the way of his profession there, nor did he attempt to have any communication with his wife until January 1856, when he wrote to her from Spain in substance as follows:—

"Madrid, 19th of March 1856.

"My dear Mrs. Curtis,—I duly received your letter of the 9th of last month. I had written previously to your brother Edward, and from him you will most probably have heard of my intention of coming up to Madrid. [The letter here stated that the Valencia Harbour works, on which he had been engaged, were suspended for a time.] I am, therefore, looking out for something else to occupy myself with till the Valencia affair is decided, and, amongst other matters, am in treaty with an eminent capitalist, under whom I have been employed before, for the making of the studies for a proposed branch railway, about half way from Madrid to Valencia. I write these details to shew you that my future

movements are somewhat uncertain. My health, thank God, is very good, and I think it right again to assure you that I am very anxious to maintain an uninterrupted correspondence with you. * * * Pray give my kindest love to your dear parents and the rest of your family, and notwithstanding all that has transpired, and of your having by your conduct released me from all tie or obligation as regards yourself, I do hope and trust that you will always believe me to remain your sincere friend and well-wisher

"J. G. C. Curtis."

In 1856 he came to England, but did not attempt then to see his wife, and sent to her, through her brother, the following letter:—

"8, Bury Square, St. Mary Axe, Leadenhall Street, London, June 26, 1856.

"My dear Madam,—I write to inform you that I have this day arrived in London from Spain, and also to notice that I have as yet received no answer to the last two letters which I wrote to you, viz., of the 19th of March and the 4th of June instant. I can only, therefore, again repeat that, notwithstanding all that has transpired, I shall always be glad to hear from you, and with kindest love to your dear mother and family, I remain, my dear Madam, your very sincere friend and well-wisher,

"J. G. C. Curtis."

In 1857 he went to her father's house, in Ireland, in the county of Wexford, and presented himself to her and pressed her to return to live with him. This she refused to do. High words ensued on both sides. He became much excited, as she stated, and called down curses on her and her father, which he does not now deny; whereupon she quitted the room, and soon afterwards quitted Ireland with her children, and assumed a feigned name, and resided at Hornsey, Middlesex. The respondent caused placards to be issued and posted in the neighbourhood of Mr. Flood's residence. The placards were in substance as follows:—

"10l. Reward.—Whereas, Frances Henrietta, wife of J. G. C. Curtis, having left the protection of her husband and absconded from her father's residence, on or about the 25th of July 1857, without the knowledge or consent of her said husband,

taking with her his three children, Mary, John and Frances. Notice is hereby given that the reward of 10l. will be paid to any person who will give such information as will lead to the recovery of the said children, or a reasonable sum will be paid to any person giving information as to their whereabouts."

[Then followed descriptions of the personal appearance of Mrs. Curtis and the three children.]

"Any information will be gladly received and promptly attended to by the deeply afflicted father of the children, addressed to his present residence at Kavanagh Park, Kyle, county Wexford, Ireland.

"Kavanagh Park, Kyle, Sept. 10, 1857."

After some months he discovered her abode in England, went there, and claimed to have possession of his children, whereupon this suit was instituted. With regard to the conduct which Mrs. Curtis in her letter of March 17, and in her evidence imputed to her husband at New York, his answer did not amount to a contradiction, but only to a belief that it could not be true, and that any violence of which he had been guilty must be ascribed to his having never perfectly recovered from the effects of the brain fever, by which he was attacked in November 1850. It is possible, perhaps not improbable, that there is truth in that suggestion; but if it be true, is there not reason to apprehend now a repetition of the same conduct? Has not the respondent since shewn himself liable to violent excitement, both in the scene with his wife at her father's house in Ireland, and afterwards by the deliberate act of issuing and posting placards in the terms which I have read? Whatever may be the cause, I cannot but think that the respondent is now liable to become so much excited in any controversy with his wife that their cohabitation would be attended with danger to her; and the observations made by the learned Judge of the Consistory Court, in *Dysart v. Dysart* (4), are applicable to this case. He there says, "When I find conduct towards a wife likely to prove dangerous to her safety, but not in other

(4) 1 Curt. 116.

cases, I shall consider it within my cognizance, whatever may have been the cause thereof, whether having arisen from natural violence of disposition, from want of moral controul, or from eccentricity. It is for me to consider the conduct itself, and its probable consequences; the motives and causes cannot hold the hand of the Court, unless the wife be to blame, which is a wholly different consideration."

If, indeed, an act of violence were committed under the influence of an acute disorder, such as brain fever, and it were made clear that, the disorder having been subdued, there was no danger of a recurrence of such acts, the case would be different. But, if the result of such a disease has been a new condition of the brain, rendering the party liable to fits of ungovernable passion, which would be dangerous to a wife, then undoubtedly this Court is bound to emancipate her from such peril. Believing, then, as I do, that before the petitioner and her husband left England for America she had been treated with cruelty by him; that his conduct at New York was such that, bearing in mind his former acts, danger was to be reasonably apprehended from it, and that his more recent behaviour in Ireland proves that such danger still exists, I feel bound to grant the prayer of the petitioner, and decree a separation between her and her husband.

Having thus disposed of the question of judicial separation, it remains for me to deal with the very delicate question of the custody of the children. It appears to have been the intention of the legislature to invest the Court, now intrusted with the duty of deciding questions of nullity of marriage, dissolution of marriage, and judicial separation, with power to provide for the custody, maintenance and education of the children of the parties whose marriage is to be affected by its decrees. But the legislature has not prescribed any rules or principles by which the Court is to be governed in dealing with this peculiarly delicate subject. I am in doubt whether it was intended whether the Court should act as nearly as possible on the rules and principles by which the Lord Chancellor has been guided in questions relating to the

eustody of children, or whether it was intended to invest the Court with an absolute discretion, to be moulded by degrees into something like a system. For the purpose of the present case, it is unnecessary to solve that doubt. The evidence given before me by Mrs. Curtis and Mr. Flood respecting the treatment which the children received from their father, was probably highly coloured and in no slight degree exaggerated; but, after making due allowance for that, when Mr. Curtis's own admissions are taken into account, and I consider also his long absence in Spain, without any attempt to see or inquire after them, and his assertion in the letter of January 1856, that Mrs. Curtis had, by her conduct, exempted him from all charge and responsibility regarding them, and the great excitability since manifested by him in Ireland; I do not think it would be right that they should be delivered up to him. But, as I cannot vary a decree once made, and there are no funds which I can direct to be applied to the maintenance and education of the children, and circumstances may hereafter arise which may render it expedient and just to make some fresh order, I think that the most discreet course that I can pursue is to embody in the decree an order that the children shall remain in the custody of their mother for three months; and, in the mean time, application may be made to the Lord Chancellor, whose more ample powers will enable him to deal with them now and hereafter in a manner more consistent with their advantage and the rights of their parents.

Judicial separation decreed; the children to remain in the custody of the mother for three months.

MATRIMONIAL.

1858.

July 19.

BOSTOCK v. BOSTOCK.

Judicial Separation—Cruelty—Condonation—Revival of condoned Cruelty by Threats.

Where there have been acts of violence followed by condonation, threats subsequently uttered constitute sufficient ground for a

decree of judicial separation, if they are of such a nature and so expressed as to satisfy the Court that further cohabitation would be attended with danger to the party threatened, but not otherwise.

This was a suit instituted by the wife, in the Consistory Court of London, for a divorce *à mensâ et thoro*, on the ground of the cruelty of the husband, and transferred to this court by the statute 20 & 21 Vict. c. 85.

The libel, which was brought in on the 2nd of April 1857, alleged that the parties were married in 1827, and that they had had thirteen children, eight of whom were then living; that soon after the marriage her husband began to treat her with cruelty, and then in several articles specific acts were mentioned.

The sixth article alleged that in 1839 he presented a pistol at her. The seventh article, that in 1840 he was in the habit of saying, in the hearing of his wife and children, that she would not die a natural death, and that she and his children would be found with their throats cut. The eighth article, that in August 1841 he struck her in the face, and caused her ear-thing to cut her face. The ninth, that in November 1842, in consequence of his violent and abusive language, she went to bed in a room adjoining her husband's, and locked the door; that he broke it open with a hammer, and endeavoured to drag her out of bed, and that she, in consequence, about five o'clock in the morning, left her home and went to reside with her mother, but on his promising not to illtreat her, again returned to him in July 1843. The tenth, that in July 1845, he beat her violently, and that her face was in consequence swollen and bruised for several days. The eleventh, that in November 1848 he attempted to strike her with a constable's staff. The twelfth, that in September 1853 he burst open the door of his daughter's bedroom, in which his wife was, and used towards his wife violent and threatening language; that he told her next morning to go to her solicitor for the purpose of making arrangements for a separation; that as no arrangement was made, she, being alarmed for her safety, on the 31st of October 1853, left her home and took lodgings at Green-

wich, in the house of her son, but not having the means of supporting herself, she returned to her husband on the 10th of December 1853. The thirteenth and three following articles alleged threats uttered at various times between the middle of February and the 13th of June 1856, that he would serve her as Corrigan had served his wife. And the seventeenth, that on the 13th of June 1856 she, dreading further personal violence from him, finally quitted his house and went to reside with her mother.

To this libel the personal answer of the husband was taken; then he brought in a responsive allegation, to which the wife gave her personal answer. Witnesses were examined and cross-examined on both sides.

The respondent in his answer denied the greater part of the alleged acts of violence. He denied having ever struck his wife, except on one occasion, when, irritated by her provoking language, he had boxed her ears with his open hand. As to the threats charged in the thirteenth and three following articles, he denied having ever threatened to serve his wife as Corrigan had his wife, but admitted that, provoked by her conduct, he had on several occasions said, "If he were to serve her as Corrigan had his wife, considering the provocation he had received, though a jury would find him guilty of murder, they would recommend him to mercy." Condonation was also pleaded.

May 25.—The cause came on for hearing before the Judge Ordinary. The case resolved itself into three questions: first, whether there was any proof of cruelty; secondly, if there was, whether such cruelty had been condoned; and, thirdly, whether, assuming there was proof of cruelty and condonation, such cruelty had been revived by the subsequent conduct of the respondent. The last was the only question about which there was any real dispute. As to this—

Dr. Deane and *Dr. Robertson*, for the petitioner, contended that threats, though unaccompanied by personal violence, if of a nature to satisfy the Court that further cohabitation would be dangerous, would revive condoned acts of cruelty. That upon the evidence it was proved that the

respondent had threatened to serve his wife, in 1856, as Corrigan had served his wife, and that such threats were sufficient to revive the acts of cruelty prior to 1856, assuming them to have been condoned. They cited—

D'Aguilar v. D'Aguilar, 1 Hag. Ec. Sup. 775.

Westmeath v. Westmeath, 2 Ibid. 1.

For the respondent, it was contended, by the *Queen's Advocate* (*Sir J. D. Harding*) and *Dr. Twiss*, that mere threats, without personal violence, would not revive condoned acts of cruelty; and further, that it was not proved that the respondent had used the threats imputed to him by his wife. They cited—

Dysart v. Dysart, 1 Robert. 105.

Lockwood v. Lockwood, 2 Curt. 282.

The material facts are fully stated in the judgment.

Cur. adv. vult.

The JUDGE ORDINARY now delivered judgment. After stating the substance of the case, as above detailed, his Lordship continued:—It is unnecessary for me to enter into any examination of the greater portion of the evidence. There can be no doubt that during the thirty years that have elapsed since these parties were married, they have often quarrelled, and the husband, on several occasions, was guilty of inexcusable violence, excited by more or less provocation on the part of his wife. But, whatever might have been the result of any proceeding founded at the time on those acts of violence, it is indisputable that down to the summer of 1855 all quarrels had been followed by reconciliation and condonation; and in the month of May in that year, Mrs. Bostock, having gone to Hastings, wrote to her husband to announce her arrival there, and gave a description of her lodgings; and in the letter there is this passage: "My room has a four-post bedstead, a nice feather bed, and I fancy I shall sleep so soundly to-night; I only want you with me; I cannot bear sleeping alone." The decision of the Court must, therefore, depend on what happened after that time. It was hardly alleged, and certainly was not proved,

that the husband was guilty of any personal violence after the date of that letter. But in 1856, a person named Corrigan having been convicted and executed for murdering his wife by cutting her throat, it is said that the husband Bostock threatened to treat his wife in the same manner, and that in consequence of these threats, she quitted his house, with a resolution never to return.

On behalf of the wife, it was contended that where there has been personal violence followed by condonation, subsequent threats are sufficient to revive former transactions. On the other hand, it was alleged, that threats are insufficient for that purpose, unless accompanied by some act amounting to assault at common law.

After an examination of the authorities on this point, to be found in reports of cases in the Ecclesiastical Court, I do not hesitate to declare my opinion, that where there have been acts of violence followed by condonation, threats subsequently uttered, if of such a nature and so expressed as to satisfy the Court that further cohabitation would be attended with danger to the party threatened, constitute sufficient ground for a decree of judicial separation.

Now, Mrs. Bostock, in her evidence, given on the thirteenth article of her libel, or in chief, as to these threats, says, "On several occasions my husband, in his excited state, declared to me that he would serve me in the same way as Corrigan had served his wife, and he used to say that if he were to do it, he was sure any jury would acquit him. He repeated this so often, and at the same time he looked at me in such a dreadful way that I got quite terrified and apprehensive whether he might not carry his threat into execution." On the fourteenth article she says, "I was awoken by feeling his hand on my throat. He did not threaten to serve me as Corrigan had done his wife, but he asked me how I should like to be served as Corrigan had served his wife. I was a good deal frightened. It was not done in joke: oh, no." On the sixteenth article she says, "Three or four times in the course of the 12th of June 1856, the day before I left his house for the last time, my husband, in the presence of my children, threatened to serve me as Corrigan had served his

wife." And on the seventeenth article, describing her fears at night, she says "I determined then that nothing should induce me to pass another night within his power, and when I left the next day, as I did, I did so with the determination never to return. I quitted and went to my mother's, who took me next day to the sea-side."

Now, this is not altogether a candid statement, as appears from her own evidence and that of some of the witnesses. In her answer to the 39th interrogatory, she says, "I will swear that I left the house, having the determination, as I then had, that I would not return; that, after the night of dread I had passed, I would never pass another night within his power, only because I feared that he would murder me. I had been going to Margate on that day in any case; but, going as I did with the determination never to return, was in consequence of my fear of his murdering me. I will swear that I left with the intention of saving my life, which I considered in danger, and with the intention that, if ever I returned, it should be under protection, and to live wholly separate from my husband, so as never to pass another night in his power." She afterwards, on being further pressed, says, "I did, before I went, take luncheon with the respondent and the three children; at least I sat to the table;" and also, "If I am obliged to say what my ideas were, I answer, that I did think of returning shortly, but only with the determination of living separate from my husband, and out of his power to injure me."

I must say that, after having said that when she left she left with the determination never to return, that it is not consistent for her to say, as she does afterwards, that when she left she did think of returning shortly.

One of the daughters, Catherine Elizabeth Bostock, in her evidence says, "Several times after there was that trial of Corrigan for murdering his wife by cutting her throat (about Christmas 1855 the murder was committed, I think), I heard my father threaten my mother that he would serve her as Corrigan had done his wife, and his looks at the time he said it, proved

that it would be no idle threat. The looks of hatred that he cast at my mother at these times were so horrid that they quite made my blood run cold. I heard him threaten my mother in this way many times in the course of the spring of last year. I cannot specify particular times, except on two occasions. The last of these was on the day before she left home."

Another daughter, Charlotte, gives evidence as to the threats used to the same effect. She also says, "My mother was about to leave home then to go with my grandmother to Margate." So far she confirms the statement of Mrs. Bostock, that she had previously arranged to go to Margate. She also says, "On the day before my mother left to go home, I heard my father ask her when she was going, and on her telling him, he told her it would be a good thing when she went; that he never wanted her back again; that he never wished to see her again."

Benjamin F. Bostock, one of the sons, says, "On various occasions previous to my mother quitting my father's house, I heard him use threats against her. I heard him several times use the threat to her, that he would serve her as Corrigan had served his wife. I recollect, on one Sunday in particular, while we were at dinner, my father said to her before us, that if he were to do the same to his wife as Corrigan had done to his, that no jury would hang him. He accompanied these threats by such savage looks to her, that no one could doubt that he meant what he said." Another son, Samuel P. Bostock, says, "I often heard my father use the threat to my mother, that he would serve her as Corrigan had served his wife. I have heard him at such times say to her, that he would serve her as Corrigan had served his wife, and tell her that if he did the jury would not bring it in a murder. He did not say why they would not; that was what we wanted to know, why they would not bring it in murder against him. My father uttered these threats in a very cool way—a sort of determined way—such a way as to lead me to think that he meant it as an actual threat."

In several of his judgments Lord Stowell remarks on the strong partisanship to be

observed in the way the witnesses give their evidence in family quarrels; and looking at the way in which the sons have given their evidence, I cannot but think that they are not impartial witnesses. Again he says, "I will swear that I believe that my mother left the house because she feared to be under the same roof with my father. I cannot say if she left with the intention of never returning, but I can swear to her having left because she was afraid to stay."

If the witness knew that his mother had previously intended to go to Margate, this is an uncandid way of giving evidence.

A servant is brought to prove the threats, but she does not. She says, Mr. Bostock threatened to serve his wife as Palmer, not as Corrigan, did his wife, *i. e.*, poison her. Her evidence I cannot attend to, as her memory is evidently very imperfect.

There is a singular discrepancy between the evidence of Mrs. Bostock and the children as to the threats used in the presence of the children. Mrs. Bostock, in her answer to the 39th interrogatory, says, "He has on occasions *before the children* said 'if I were to serve you as Corrigan did his wife, so great have been my provocations that a jury would acquit me,' but *to myself* he has said, 'I will yet serve you as Corrigan served his wife,' and also he has added, 'if I did so no jury would condemn me.'" The children, however, all say that they have heard their father threaten to serve their mother as Corrigan had, as well as use the expression Mrs. Bostock says that he used to her in their presence. They, in this respect, not only confirm her evidence, but go further in attributing to the respondent direct threats which Mrs. Bostock's evidence would imply were used only to her in private.

The respondent gives his own version of these alleged threats in his answer: he says, "It is not true that on any occasion in February 1856 or in June 1856 I threatened to serve my wife as Corrigan had done his wife (meaning thereby that I would murder her by cutting her throat), or that I ever threatened her at all. When I have been much provoked by her conduct to me I have on occasions expressed myself to the effect, that 'if I were to serve

her as Corrigan had his wife, considering the amount of provocation she had given by her disrespectful treatment and constant neglect and desertion of me and her children, though a jury of my country would find me guilty of the offence, I was certain I should be recommended to the merciful consideration of the Crown.' It was only with the 'if' or 'were I,' and under such circumstances as those described that ever I alluded to anything of the kind, not that I ever entertained the least notion of doing anything of the sort. It was merely an ebullition of anger at her conduct, for there is a limit to human endurance." This version very much resembles the statement made by Mrs. Bostock as to the expressions used to her in the presence of her children; and considering the uncandid way in which Mrs. Bostock has given her evidence as to her departure from home, and that the evidence of the children is far from satisfactory, I think most probably his version of the expressions used to his wife is the correct one.

The two servants, who were then in Mr. Bostock's service, had been so but for a short time, and knew very little of the quarrels that had occurred between him and his wife, but they both prove that Mrs. Bostock left him avowedly for the purpose of going to the sea-side with her mother, and without giving them any reason to suppose that she would not return.

Upon this evidence I have to say whether I think that the wife's person was in danger from the violence of her husband at that time. The angry expressions of the husband, whether they amounted to threats or not, had been repeated on various occasions between February and June, and no act of violence had during that time been committed, nor do I believe that Mrs. Bostock was in danger of any such injury as she says she feared, or of any other bodily injury. I cannot, upon this evidence be satisfied that Mrs. Bostock really entertained any such fears, and that she quitted her home in consequence of them; for her evidence on this point is far from candid. She had previously made an arrangement to accompany her mother at that time to Margate. Her statement on the seventeenth article is, that she left in consequence of her

husband's threats, not daring to pass another night within his power, and with a determination never to return; but her answer to the thirty-ninth interrogatory, to which I have already adverted, gives a very different aspect to the case. The result of this examination is, that I am satisfied that all quarrels between this excitable and unhappy couple had been from time to time arranged, and that so late as May 1855 there was full condonation by the wife of any acts of cruelty of which her husband had been guilty, and that I am not satisfied that the wife had reasonable ground to apprehend bodily injury when she quitted her home, or that she did actually quit it under the influence of such apprehension.

The history of the married life of these parties is most melancholy; for thirty years they have been continually quarrelling; they have brought up a large family of children, upon whom the example of their parents cannot have failed to produce injurious effects; but I cannot, because they make each other unhappy, decree that they shall be separated. To use the language of Lord Stowell, in *Evans v. Evans* (1), "Everybody must feel a wish to sever those who wish to live separate from each other, who cannot live together with any degree of harmony, and, consequently, with any degree of happiness; but my situation does not allow me to indulge the feelings, much less the first feelings, of an individual. The law has said that married persons shall not be *legally* separated upon the mere disinclination of one or both to cohabit together. The disinclination must be founded upon reasons which the law approves, and it is my duty to see whether those reasons exist in the present case." In my judgment such reasons did not exist at the time when this suit was instituted, and I must dismiss the husband from it.

Husband dismissed from the suit.

MATRIMONIAL.

1858.
June 14, 15, } ROBINSON v. ROBINSON AND
16, 21; } LANE.
July 3. }

Dissolution of Marriage—Evidence—Practice—Confessions of the Wife—Entries in a Private Diary—Co-respondent not a competent Witness—Dismissing Co-respondent from Suit, in Order to make him a competent Witness—Priority of Case of Respondent over that of Co-respondent—20 & 21 Vict. c. 85.—14 & 15 Vict. c. 99.

In a suit for dissolution of marriage on the ground of the wife's adultery, the Court held, first, that entries in a private diary kept by the wife, detailing acts of adultery committed by her with A, the co-respondent, were evidence against her, as an admission or confession, though not as against A.

Secondly, that the co-respondent, so long as he remains a party to the record, is not a competent witness.

Thirdly, that when the respondent and co-respondent appear by different counsel, the case of the respondent should generally take priority of that of the co-respondent; but that by arrangement of counsel the case for the co-respondent might be taken first.

Quære, whether under 20 & 21 Vict. c. 85, where there is no evidence against the co-respondent, the Court has power to dismiss him from the suit before its termination, for the purpose of rendering him a competent witness for the respondent (1).

This was a suit for dissolution of marriage, on the ground of adultery alleged to have been committed by Mrs. Robinson with Dr. Lane, the co-respondent.

The respondent and co-respondent in their answers denied the adultery.

(1) But see now 21 & 22 Vict. c. 108. s. 11, which enacts, "In all cases now pending or hereafter to be commenced, in which on the petition of the husband for a divorce the alleged adulterer is made a co-respondent, or in which, on the petition of the wife, the person with whom the husband is alleged to have committed adultery is made a respondent, it shall be lawful for the Court after the close of the evidence on the part of the petitioner, to direct such co-respondent or respondent to be dismissed from the suit, if it shall think there is not sufficient evidence against him or her."

(1) 1 Consist. Rep. 36.

June 14.—The cause came on for hearing (2), on oral evidence, without a jury.

Montagu Chambers, Dr. Addams, Skinner and J. B. Karlake, for the petitioner.

Dr. Phillimore, for the respondent.

Forsyth and J. D. Coleridge, for the co-respondent.

The following statement of facts is sufficient for the purpose of the present question:—

The evidence for the petitioner consisted mainly of entries in a private diary kept by Mrs. Robinson, from which it appeared that in October 1854, when on a visit at the house of Dr. Lane, she had on several occasions committed adultery with him. Witnesses were called for the purpose of corroborating the statements in the diary, but beyond confirming them on some minor points they utterly failed to establish the charge, and it may be assumed that without the diary there was no evidence of adultery.

The case for the respondent and co-respondent was, that the statements in the diary as to the adulterous intercourse were mere hallucinations, Mrs. Robinson being subject to a disease of the uterus, which not unfrequently causes similar hallucinations.

Forsyth, on behalf of Dr. Lane, objected to the entries in the diary being admitted in evidence.

[COCKBURN, C.J.—In the Ecclesiastical Court they would have been evidence as against Mrs. Robinson as confessions or admissions.]

Forsyth.—The present proceeding differs from a suit for divorce in the Ecclesiastical Court. The alleged paramour was no party to such a suit. Here two persons are charged with one joint act, and the case must fail as against Mrs. Robinson, unless adultery with Dr. Lane is proved. Unless, therefore, the entries would be evidence as against him they are altogether inadmissible.

COCKBURN, C.J.—It never could have been the intention of the legislature in passing this act, that the petitioner should

be placed in a worse position as to evidence than he would have been in if proceeding for a divorce in the Ecclesiastical Court or the House of Lords, in either of which cases the entries would clearly have been evidence against Mrs. Robinson as confessions or admissions.

The JUDGE ORDINARY.—There is no pretence for your objection. The entries may be evidence against Mrs. Robinson, but not against Dr. Lane. If several persons are indicted for burglary or conspiracy, and one of them makes a confession inculcating the rest, against whom there is no other evidence, he may be convicted, though the others must be acquitted.

WIGHTMAN, J. concurred.

The evidence was admitted.

June 15.—The case for the petitioner having closed,—

Forsyth proceeded to address the Court.—Though the case of the co-respondent is subordinate to that of the wife, by an arrangement with her counsel it has been agreed that I should first address the Court.

[COCKBURN, C.J.—The case for the wife is certainly the principal case, that of the co-respondent subordinate to it; the main object of the Divorce Act, in requiring the adulterer to be joined as a co-respondent, being to give him an opportunity to vindicate his character. The correct practice would be, that the case of the wife, which is the principal one, should be gone into before that of the co-respondent, which is merely accessory to it. However, if counsel have arranged otherwise, I see no reason why we should interfere.]

The case for the co-respondent was accordingly taken first.

Dr. Phillimore having stated the case for Mrs. Robinson, and examined witnesses, called Dr. Lane as a witness for her.

His evidence was objected to by the counsel for the petitioner.

[COCKBURN, C.J.—This being a proceeding instituted in consequence of adultery, is Dr. Lane's evidence admissible?]

[The JUDGE ORDINARY.—Dr. Lane is a party to this suit; and, therefore, unless the statute 14 & 15 Vict. c. 99, or the 16 & 17 Vict. c. 83, render him a competent witness, he cannot be examined. The

(2) *Coram Cockburn, C.J., Wightman, J. and the Judge Ordinary.*

former statute rendered parties to suits competent witnesses; but the 4th section is as follows:—"Nothing herein contained shall apply to any action, suit, proceeding, or bill, in any court of common law, or in any Ecclesiastical Court, or in either House of Parliament, instituted in consequence of adultery." This is a proceeding instituted in consequence of adultery. That statute does not, therefore, render him a competent witness. There is nothing in the 16 & 17 Vict. c. 83, the statute which rendered the husbands and wives of parties to suits competent witnesses, which affects the exception in the 14 & 15 Vict. c. 99. s. 4.]

Dr. Phillimore.—It has been said by Cockburn, C.J. that it never could have been the intention of the legislature by the Divorce Act to place persons in a worse position as to evidence than they were before. Dr. Lane might have been examined in the proceedings in the ecclesiastical court. If he cannot be now examined, the wife is placed in a worse position than she was in before the Divorce Act. By section 22. of that act this Court is directed to act on the principles and rules on which the Ecclesiastical Court acted.

[COCKBURN, C.J.—But we are bound by the rules of evidence observed in the common-law courts. There he clearly could not have been examined.]

Dr. Phillimore.—It is impossible to imagine a case in the common-law courts in which the same point could arise.

[COCKBURN, C.J.—Suppose a statute had enacted, that every person charged with adultery should be made a party to a suit for divorce in the Ecclesiastical Court, you could not in such a suit have examined him. Section 28. of the Divorce Act does substantially that. If the legislature puts a party in a position to which the existing law is clearly applicable, we must apply it. Previously to the Divorce Act, no party to a proceeding instituted in consequence of adultery was competent as a witness. That act makes the co-respondent a party to such a proceeding. Surely he is not a competent witness.]

[WIGHTMAN, J.—Before that act the proceedings in the Ecclesiastical Court were

against the wife alone, and in a court of common law against the adulterer alone. It might be argued, that here there are two substantially different suits tried under one form of proceeding.]

Dr. Phillimore.—Yes; one for divorce, the other for damages and costs.

[THE JUDGE ORDINARY.—Here there is no petition for damages.]

Dr. Phillimore.—If the Court should be of opinion that Dr. Lane's evidence is not admissible, he might be dismissed from the suit at once, there being no evidence against him, and then he could be examined.

Addams, contra.—The Court have no right to pass a substantive judgment, dismissing the co-respondent from the suit before its termination.

[WIGHTMAN, J.—It is a common thing in criminal proceedings and in civil proceedings in the common-law courts, to dismiss a party for the purpose of allowing him to give evidence. Dr. Lane is not a defendant in a proceeding for divorce. If, having no evidence, the petitioner had applied to the Court to be excused from making Dr. Lane a co-respondent, he could have been called for the wife. Suppose the Court should think there is no case against Dr. Lane, but that the charge of adultery against the wife is proved, would the Court make him pay the costs?]

Cur. adv. vult.

June 16.—COCKBURN, C.J. said—that the Court were all clearly of opinion that, on the true construction of the statute relating to the evidence of parties to suits, 14 & 15 Vict. c. 99, and of the Divorce Act, Dr. Lane, so long as he continued to be a co-respondent, could not give evidence for Mrs. Robinson; but that the question whether, it being admitted that there was no evidence against him except the confession of Mrs. Robinson, the Court ought not *ex debito justitiæ* to dismiss him from the suit for the purpose of rendering him a competent witness on her behalf, was one of such importance with reference to the future administration of justice under the Divorce Act, that the further hearing would be adjourned in order that the other members of the full Court might be consulted before making a precedent.

Adjourned to June 21.

June 21. — COCKBURN, C.J. now said that the Court had consulted with Lord Campbell, C.J., Pollock, C.B., and Mr. Justice Williams, and that they agreed with the Judge Ordinary and himself in thinking that the Court had not power to dismiss Dr. Lane from the suit in order to render him a competent witness for Mrs. Robinson; but that Mr. Justice Wightman entertained a contrary opinion. That the grounds on which they had formed their opinion were, that section 28. of the Divorce Act having expressly provided that in every petition presented by a husband the petitioner should make the alleged adulterer a co-respondent to the petition, unless on special grounds he should be excused by the Court from so doing, that provision was in their opinion imperative, and that where at the outset the petitioner had not been excused from so doing the alleged adulterer was a necessary party to the suit, not only in its inception, but also throughout its continuance, until final sentence should be pronounced, unless the petitioner should apply to the Court to dismiss him from the suit,—that the object of the legislature was probably not confined to enabling the alleged adulterer to defend himself from a demand for damages and costs, because it was not left to the discretion of the petitioner to make him a co-respondent, but that it was intended also that a person whose conduct and character were involved in a proceeding not directed immediately against himself, should have an opportunity of defending himself by counsel and witnesses,—that the act having made the alleged adulterer a necessary party to the suit, neither directly nor indirectly had the Court power to dismiss him,—that it was said this was a course the Court ought to adopt *ex debito justitiæ*, in order that injustice might not be done: but that considering that the whole jurisdiction of the Court was derived from and limited by the Divorce Act, they were of opinion that they would not be justified on such a ground in acting in defiance of a clear and imperative rule laid down by the legislature.

WIGHTMAN, J.—I regret that I cannot come to the same conclusion as that of the rest of the Court, on the question whether we have power to dismiss from the suit

before its final termination Dr. Lane, against whom it may be assumed that no case has been made out by the evidence which is admissible as against him.

Prior to the 20 & 21 Vict. c. 85. the alleged adulterer would have been a competent witness for the wife both in the Ecclesiastical Court and in the House of Lords in proceedings in those Courts for a divorce. His evidence is only excluded indirectly by the operation of section 28. of that act, which makes it necessary that he should be made a co-respondent to the petition; and where, as in this case, there is no evidence against him, and he must therefore be absolved from the charge of adultery—in other words, dismissed from the suit *at some time*—I find nothing in the statute which would prohibit the Court from making an order dismissing him until the suit has ended as against both.

Must there of necessity be but one decree? The proceedings against the wife and the alleged adulterer are so dissimilar, that I see no reason why the Court should not pronounce separate judgments as to them. By section 28. the parties, or either of them, may insist on having questions of fact tried by a jury. Suppose the co-respondent only should apply for a trial by jury, and obtain a verdict, could not the Court after verdict dismiss him from the suit at once? Would it be precluded from doing so until it pronounced its final sentence? Again, it is not absolutely necessary that there should be any co-respondent. When the case closed against Dr. Lane, and it appeared there was no evidence against him, I see nothing in the statute to shew that the Court could not dismiss him at once from the suit. The sole evidence against Dr. Lane is Mrs. Robinson's journal; that journal shews clearly that she is a person of a most excitable and imaginative temperament, and might well write that which had no existence in fact. Dr. Lane is the only person who can disprove her statements. If this Court has not the power to dismiss him before the termination of this suit, the circumstances of which are of such a peculiar nature, the greatest injustice may be done; and I cannot think that the legislature can have contemplated or intended such a result. On these grounds, I think that we possess

the power, and possessing it should exercise it, of dismissing Dr. Lane now from the suit, and admitting him as a witness for Mrs. Robinson.

THE JUDGE ORDINARY.—I concur in the opinion of the Lord Chief Justice. My opinion is founded entirely on the provisions of the statute.

July 8.—**COCKBURN, C.J.**—Since this case was last before the Court considerable doubts have suggested themselves to the minds of certain members of the Court, as to the propriety of our decision in refusing to accede to the application of the counsel for Mrs. Robinson, to dismiss Dr. Lane from the suit, and allow him to be examined on her behalf. A strong impression seems to prevail in their minds that justice to a woman placed under such circumstances requires that, if no case be made out against the alleged adulterer, who has been made a co-respondent, he should be dismissed from the suit, and allowed to give evidence on her behalf. In these doubts I, for one, concur. It has been brought to our knowledge that in a bill now before the legislature, for amending the act by which this Court was constituted, it is intended to introduce a clause for the purpose of solving these doubts, and to enable the Court to dismiss a co-respondent against whom there is no evidence; and we understand that that clause is to apply to pending suits. If it should become law, we should be only too glad to avail ourselves of power so given to dismiss Dr. Lane from the suit, and allow him to be examined on the behalf of Mrs. Robinson. If there had been no prospect of such a provision I, for one, should think it necessary to reconsider the decision we came to; but as there is a probability that the question will be shortly settled by the legislature, we think the interests of justice require that Dr. Lane, against whom there is no evidence, should be dismissed from the suit and allowed to give evidence.

We shall, therefore, adjourn the further consideration of the case.

Adjourned.

MATRIMONIAL.

1858.

July 29.

WELLS v. WELLS.

Practice—Costs of Wife defending Suit for Divorce when paid by the Husband.

In the Ecclesiastical Court, the proctor of a wife defending a suit for divorce was always entitled to receive from the husband the reasonable costs of conducting her defence.

In such a suit, transferred to the Divorce Court an additional allegation on behalf of the wife was brought in after the evidence had been published, setting up condonation during the progress of the suit, but was not supported by the evidence. According to the practice of the Ecclesiastical Court, additional allegations, at that stage of the suit, were only permitted if verified by affidavit. In this case it was verified by affidavit of the wife:—Held, that as the proctor of the wife is bound to bring before the Court any defence set up by her, and not plainly unfounded, he was entitled to receive the costs of this allegation from the husband.

This was a suit, instituted in the Consistory Court of London, by George Wells against Eliza Amelia Wells, his wife, for a divorce *à mensâ et thoro*, on the ground of adultery, and transferred to this Court.

The libel was brought in on the 27th of January 1857, and witnesses were examined upon it.

On the 16th of May a responsive allegation by the wife was brought in, and witnesses were afterwards examined upon it.

In April 1858, after the publication of the evidence taken on the libel and responsive allegation, additional articles were brought in on behalf of the wife, setting up condonation. In these it was alleged, that, in December 1857, Mr. Wells had on several occasions met his wife by appointment at the house of a mutual friend, named M'Quellin, and that at one of these interviews they were reconciled and mutually forgave each other; and that at another connubial intercourse had taken place. Two witnesses, Shanti and M'Quellin, were examined on these articles; but their

evidence failed to prove either that Mr. Wells had expressly forgiven his wife, or that connubial intercourse had taken place. Shanti was evidently a strong partisan of the wife, and was contradicted in many points by M'Quellin, whose evidence was more trustworthy. The latter only was examined on the article alleging connubial intercourse; and in his evidence he stated that he did not believe that it could have taken place.

July 16.—The cause came on for hearing, the only point in dispute being whether there was proof of adultery. The plea of condonation set up in the additional articles was abandoned by the counsel for the wife.

At the close of the case—

Dr. Tristram, on behalf of the wife, asked the Court to order that the wife's costs of the additional articles should be paid by the husband. By the practice of the Ecclesiastical Court the proctor of the wife against whom a suit for divorce had been instituted was entitled to receive from the husband the costs incurred in defending her. These, with the exception of the costs of the additional articles, have been paid. Though the evidence failed to sustain them, the proctor is entitled to his costs. He was bound to bring them in, Mrs. Wells having made an affidavit verifying the statements in them in accordance with the practice of the Ecclesiastical Court, which required an affidavit in support of additional articles, brought in after the evidence had been published.

Dr. Curteis (*Dr. Addams* with him), *contra*.—It was entirely through the negligence of the proctor in not ascertaining that he had good evidence to support the additional articles that these costs were incurred. The husband ought not, therefore, to have to pay them.

Cur. adv. vult.

The JUDGE ORDINARY now delivered judgment.—After an examination of the evidence, he pronounced the charge of adultery established, and decreed a judicial separation. He then continued—

I must now dispose of a question that was reserved respecting the costs of the

additional articles setting up condonation. In the Consistory Court the proctor defending a wife in a suit for divorce was always considered to be entitled to receive from the husband the reasonable costs of conducting that defence; but it was said in this case that the period at which the condonation, which was made the subject-matter of the additional articles, was alleged to have taken place, ought to have excited the vigilance of the proctor, and that, if he had exercised reasonable care in ascertaining what evidence his client could produce to support them, he must have known that there was no ground for such a defence, and, therefore, he ought not to have put the husband to the costs occasioned by it. It is difficult to draw the line in such cases, and a proctor refusing to bring before the Court any defence set up by his client, and not plainly unfounded, would incur a very grave responsibility, and, therefore, I think the costs must be allowed, although I cannot doubt that there was a miserable conspiracy to entrap the husband into a position which might be urged as evidence of condonation; and if anything were necessary to confirm my opinion as to there being good ground for the suit, it would be supplied by this attempt to defeat it by matter subsequent.

*Judicial separation decreed.
Costs of the additional articles
to be paid by the husband.*

PROBATE.

1858.

July 26.

ELMS v. ELMS AND OTHERS.

Will—Revocation by Tearing—Act of Tearing incomplete—Presumption of Revocation—Burthen of Proof—1 Vict. c. 26. s. 20.

In order that a will may be revoked by tearing, it must be shewn that the testator intended that which he actually did of itself to have had the effect of revoking it without more. If he commences tearing it with the intention of revoking it, and being about to tear further stops in medio, the act not being complete, the will remains valid.

A. having commenced tearing his will,

as admitted to have been duly executed, the intention of revoking it, had it in two pieces when he stopped. The evidence to lead to the conclusion was about to tear further, stopped at the entreaty of a

satisfied that the will was, and not satisfied on when revoked, granted

Will is propounded here is a prima facie it was put in that state by animo revocandi; but when evidence given for the purpose of shewing such is not the case, the matter is at large, and the presumption must be disregarded, and a Court or jury should decide on the evidence alone, and should not, if they are in doubt on the evidence, find against the will by calling in aid the presumption.

This was an amicable suit instituted for the purpose of taking the opinion of the Court upon the question whether the will of Vickers Gilbert Jacob, late a lieutenant in the 44th regiment of Madras Native Infantry, who died on the 25th of August 1857, leaving personal property to the amount of 8,000*l.*, had been revoked by him.

The plaintiff, who propounded the will, was one of the executrixes, and also residuary legatee subject to a bequest of 1,000*l.* to Harriet Moore, niece of a Major Watson. The defendants were the brothers and sisters and next-of-kin of the deceased.

The declaration, after stating the *factum* of the will on the 14th of January 1856, alleged that the deceased, on the 14th of August 1857, having the intention to make a new will and thereby to bequeath the whole of his property to the plaintiff, commenced tearing it, and did tear it in such manner as now appears, but without the intention of revoking it, and that on subsequent occasions he had alluded to it as being valid and unrevoked.

Plea—That after making the said will, the deceased revoked it, and the same was never revived.

On the 21st of July the cause came on

for hearing before Sir C. Cresswell, on oral evidence without a jury.

The Queen's Advocate (Sir J. D. Harding), Dr. Spinks and Welsby, for the plaintiff.

Dr. Phillimore and Coleridge, for the defendants.

It was stated by the Queen's Advocate in his opening speech that in 1856 the deceased came from India on sick leave and went to Jersey, where a relative of his, Major Watson, resided, and that whilst there he made his will, and left it in the custody of Major Watson, who subsequently, in consequence of deceased's intemperate habits, placed him under restraint, and that the deceased had since taken a great dislike to him.

The evidence was as follows.

E. B. Cox—I am a farmer at Fron, near Carnarvon. I became acquainted with Lieut. Jacob in April 1856. He was staying at Carnarvon. I was in constant intercourse with him. In October 1856 we went to London and called at the office of Mr. Few, a solicitor, and the deceased told me he had given orders to Mr. Few to obtain his will from Major Watson. In October 1856 a letter came for Lieut. Jacob, who was staying at my house, from Mr. Few. It contained the will. He told me to read it, and take care of it for him. I put it in a drawer. It was then in a perfect state. The will remained in my custody till May 1857, when we arranged to come to London. He told me to put the will in his portmanteau. I did so. We went to London. He told me he was going to make another will, and leave the whole of his money to Miss Elms, and that he should instruct Mr. Few to make a new will. I went with him to Mr. Few's office. He went in, and when he came out said that Mr. Few's head clerk was not in, and it must do when he came up to London again. I brought the will back to Carnarvon. I returned the next day with him. In June 1857 deceased had orders to proceed to India. In that month I came up to London with him. Nothing then occurred with respect to the will. We remained in London two or three days, and then we returned to Carnarvon. In August

1857 deceased was staying at my house. On the 14th, about twelve o'clock in the day, having drunk almost a pint of brandy that morning, he was lying on a sofa in the kitchen. He asked me to go up and fetch his will out of his port-manteau. I did so, and put it into his hand; as soon as I did so, he tore it,—ripped it. As soon as I saw what he was doing I said, "Stop, don't do that; if you do so, Miss Elms will not take one penny of your money, unless you were to make another will, and as it is she will get the greater part of it." He stopped. He said, "Oh, I shall make another." I said, "If you wish to destroy it, you had better burn it." He said, "Oh, you burn it." I said, "No, I won't." I said, "Will you?" He said, "No, I shan't." I then said, "Then I will take it up-stairs." I did so; he knew that I took it up-stairs.

To the Court:—After he tore it, he either gave it to me or I picked it up off the floor, I cannot say for certain; I think I picked it up; he was on the sofa; it did fall out of his hand at the time. He had it in his hand when I said "Stop, don't do that." It was on the instant. I told him it would be time enough to destroy it when he had made another. The tearing was all done at once, not sheet by sheet.

Examination continued.—Mrs. Cowlishaw, my sister, was in the kitchen when this took place. Mr. Cowlishaw was in the parlour. Deceased left my house on Sunday, the 16th of August 1857. I went with him to London; we arrived there on the 17th, and put up at the Cross Keys, Wood Street. On the 18th of August I went with him to Horsham. He said he went to Horsham to see Miss Elms, to bid her good-bye. He did meet her; he disguised himself for that purpose; he borrowed my mackintosh. I returned to London with him that day. He told me he had seen her; after seeing her he seemed very much distressed. He never went out again from the Cross Keys till Wednesday evening, the 19th, when he went to Southampton. I do not know of his having the will with him on that occasion. In September 1857 I found the will in my drawer. I had a letter from Mr. Few, to ask whether I had any papers of his. He looked over all his

papers the day before he left, and burnt all but the will. When we came to the will, I said, "There is the will, Jacob." We were packing up. He said, in answer to me, "I shall make another will when I get to London." I put it on his drawers in his room. When Mr. Few wrote to me, I went to find the will; it was in the drawers in my room. I forwarded it to Few by post; I do not know how it came in the drawer where I found it (2).

On cross-examination he said, He had the will in his hand when I said, "Stop"; and then it went on the floor. I cannot say whether he threw it on the floor. He had torn the will as much as ever he did when I said "stop"; it was all one act. I do not recollect whether he told me to pick it up; I picked it up at once.

To the Court:—I picked it up as soon as it dropped. After I picked it up I said, "If you were to die, Miss Elms would not get a penny."

On the 15th of August, when I found the will, I believe he said, "It is no use, I mean to make another will when I go to London." I think he used the expression "it is no use" when he tore the will. After he had come back from Horsham he said nothing to me about making another will. I reminded him that he should make another will. "I shall," he said, "but we have not time now." He was not in a state quite to make a will while in London. He said, "If I am taken ill on board ship, you may depend on it I shall make my will; I shall be sure to think of it; I shall speak to the captain."

Catherine Cowlishaw said—My husband and I were on a visit to Cox, who is my brother, in August 1857. On the 14th of August I was in the kitchen with Cox and the deceased; my husband was in an adjoining parlour. I heard Mr. Jacob say, "Cox, fetch my will down"; Cox fetched it down and gave it to Mr. Jacob, who was lying on the sofa at full length. He took the will and appeared as if he would tear it. He did begin to tear it; I said "Stop."

(2) It was suggested that Lieut. Jacob, after his interview with Miss Elms, had forgotten to take the will from the pocket of Cox's mackintosh, and that Cox had then taken it back to Fron, and it had been placed by some person in his drawer.

He tore it a little more, and I said, "Pray do stay." He was going to tear it a little further. Cox said, "Don't mutilate it like that," or words to that effect, "then Miss Elms would not have any of your money." He was going to tear it still further. I said, "Oh! pray don't," and he ceased. He let it fall on the floor. He was still lying at full length on the sofa. In a few moments he got up and picked it up, and said, "I'll take Cowlshaw this to read, he'll like to read it." He then went out of the kitchen into the parlour, and took the will with him—I did not go into the parlour.

On cross-examination she said—I heard no conversation about the will before he sent Cox up-stairs. He began at once to tear it. I am sure he tore it at three different times. Cox did not say anything to him till the second time; I did not hear him or Cox say anything about burning it. Cox followed him into the parlour. He said several times "He would not leave the little girl anything, Miss Elms should have the whole of his property."

On re-examination she said—After I said, "Oh, pray don't," he let it fall out of his hand as though accidentally.

James Cowlshaw, the husband of the last witness, said—Lieutenant Jacob frequently said that he intended to destroy his will and make another, leaving the whole of his property to Miss Elms; that he had left Major Watson's niece 1,000*l.*, but he intended that she should not have it. On the 14th of August, Mr. Jacob came into the parlour, followed by Cox. He said, "Cowlshaw, this is my will, I request you to read it," or words to that effect. I did read it, so far as to ascertain whom he had left his money to. He had left 1,000*l.* to the little girl, and the rest of his property to Miss Elms. I read so much and then handed it back to him. He said, "I mean to destroy this and make another in favour of Miss Elms." Myself with Cox said, "If you leave it in this mutilated state there will be a bother about it." Cox suggested he should put it in the fire in the back kitchen; Jacob asked me to do so; I said "No; it is a very serious affair; I won't interfere." Jacob asked Cox to do it; I then handed it back to Mr. Jacob, and Cox said, "Then if you

won't destroy it, I'll take it back up-stairs." He did so; he had been drinking brandy that morning frequently.

On cross-examination he said—He was not drunk, he knew what he was doing.

W. Cox, a waiter at the Cross Keys, in Wood Street.—I recollect Lieutenant Jacob coming to the Cross Keys two or three times; I remember the occasion of his going to India; I recollect his saying he was going to Horsham, and his putting a coat or mackintosh on; he said he was going in disguise to see his sweetheart; I recollect seeing him with papers once, I can't say whether at that time; they were in a coat hanging up; they looked like a roll; he said it was his will."

Helen Matilda Elms, the plaintiff, said—I was at one time engaged to be married to Lieutenant Jacob; he came down to Horsham in August 1857, just before he sailed; I had an interview with him; he told me he was going to sail; he produced a paper from the pocket of the coat he had on; he said it was his will; he opened it partly; I did not look much at it; I think I saw my name, but I am not sure; I don't think I saw his; he said it was a will made in my favour; he wished me to keep it; I said I did not wish to keep it; I did not observe whether it was torn; it was opened very partially.

On the will being shewn to the witness, she said—It was quite the colour of that paper, but it was more doubled up; I thought it was a journal when he first shewed it me.

The Queen's Advocate.—In order that a will may be revoked by any act done to the instrument itself three things must concur:—First, there must be an intention to revoke; secondly, the act must be one of those prescribed by 1 Vict. c. 26. s. 20, viz., "burning, tearing, or otherwise destroying"; thirdly, the intention and the act must both be complete. If the act be merely inchoate and the intention change before the completion of act, the will is unrevoked—*Doe v. Perkes* (3). In that case the testator, being angry with A, one of the devisees, began to tear his will with the intention of destroying it, and having

torn it in four pieces, was prevented from proceeding further, partly by a bystander, who held his arms, and partly by the entreaties of A. He then put by the several pieces, and expressed his satisfaction that no material part of the writing had been injured. It was held, that on these facts it was properly left to the jury to say whether he had completely finished all that he intended to do for the purpose of destroying the will; and the jury having found that he had not, the Court refused to disturb the verdict. Bayley, J. says, "If the jury were satisfied that the testator was stopped *in medio*, then the act not having been completed, will not be sufficient to destroy the validity of the will." Best, J. says, "If the testator, after tearing it, had thrown the fragments on the ground, it might have been properly considered that he intended to go no further, and that the cancellation was complete." In this case there is no doubt that the deceased, when he commenced tearing the will, intended to revoke it by tearing it; but the evidence shews that he was stopped *in medio*, and that he had not done all he intended. The evidence of Mrs. Cowlshaw, whose account of the transaction seems more accurate than that of Cox, shews that he was going to tear still further, when he was stopped by her saying "Oh, pray don't," and though the will got on the floor, it was by accident; there was nothing like throwing it. His own conduct tends to shew he had not done all that he had intended. He treated it as unrevoked by picking it up and taking it to Mr. Cowlshaw, and saying, "This is my will, I mean to destroy it." He also declined to adopt the most effectual mode of destruction, viz., burning. And when he destroyed other papers, preserved it, and shewed it to Miss Elms as his will.

He also cited—

In the goods of Colberg, 2 Curt. 832.
Brooke v. Kent, 3 Moore, P.C. 349.
Onions v. Tyrer, 1 P. Wms. 343.
Price v. Powell, 3 Hurl. & N. 341.
Deane on Wills, p. 157.

Dr. Phillimore, for the defendant.—It is a clear proposition of law that the burthen of shewing that an instrument found in such

a mutilated state in the house where the deceased had been living, though not in one of his repositories, was not put into that state *animo cancellandi*, is on the party who propounds it. The present state of the instrument is the strongest evidence in the case. The mutilation is complete. So far as revocation can be effected by tearing, this is a complete case of cancellation.

[SIR C. CRESSWELL.—The will was not torn completely through.]

The evidence of Cox and Cowlshaw is contradictory. Cox says the tearing was all one act; Mrs. Cowlshaw that it was done at three different times. The appearance of the tear confirms Cox's evidence.

[SIR C. CRESSWELL.—That is not my impression. The tearing may have been at different times, though the rent be continuous.]

Again, there was a great contrast in the conduct of the testator before and after the tearing took place. Before he took care of it and kept it himself; afterwards it was in nobody's custody. There was a clear *animus* of abandoning the will: he twice desired that it should be burnt. There is no proof that the paper shewn to Miss Elms was this will.

[SIR C. CRESSWELL. — So far as the question of identity is concerned, I think it must be taken to be this will. He told her it was his will; and there is no evidence of any other.]

To the last he intended to make another will.

[SIR C. CRESSWELL.—It is admitted that the will was duly executed by a competent testator. Suppose I should ultimately be in doubt upon the evidence whether it was revoked, ought I to pronounce for or against the will? Suppose I were to find, as a special verdict, that the will was duly executed; but that I cannot say, on the evidence, whether it was cancelled or not, what would be the result?]

In that case probate should be refused. The state of the instrument raises the presumption that it has been cancelled, and throws the burthen of proof on the other side. Unless the plaintiff proves that it was not revoked, that presumption must prevail.

[SIR C. CRESSWELL.—When you go into evidence on the question, the whole matter

is at large. The presumption is one of fact, which will only prevail in the absence of evidence. The subject of presumption is learnedly treated in *Starkie on Evidence*. If the evidence on either side is equally balanced, I have no right to call in aid the presumption, and say it results from one part of the evidence more than another. The question was considered by the Court of Common Pleas in a recent case—*Sutton v. Sadler* (4). There ejectment was brought by the heir-at-law against a devisee. At the trial, the devisee having proved the due execution of the will, evidence was given on both sides as to the competency of the testator. The Judge directed the jury that the heir-at-law was entitled to recover unless a will was proved, but when the due execution of a will was proved the law presumed sanity, and the burthen of proof shifted, and that the devise must prevail unless the heir-at-law established the incompetency of the testator; and that if the evidence left them in doubt, they ought to find for the devisee. The Court, however, held that this direction was wrong, and that the whole matter being before the jury in evidence given on both sides, they ought not to affirm that the will was that of a competent testator, unless they believed that it was really so.]

Dr. Phillimore cited—

Hobbs v. Knight, 1 Curt. 768.

Doe v. Harris, 6 Ad. & E. 209.

Stephens v. Taprell, 2 Curt. 467.

Cur. adv. vult.

After the hearing, a letter was sent to the Registrar by a Mr. Hughes, a solicitor, residing at Carnarvon, stating that he had, at Lieutenant Jacob's request, drawn up and engrossed a will for him, leaving all his property to Miss Elms; but that it was never executed.

Dr. Phillimore, now asked the Court to postpone judgment, that the draft and engrossment might be produced.

SIR C. CRESSWELL.—I do not think if produced they will at all affect my judgment.

Dr. Phillimore did not press the application.

SIR C. CRESSWELL now delivered judgment.—This was a question as to whether Lieut. Jacob, late of the Madras Native Infantry, left a will, or died intestate.

It was admitted on both sides, and on the record, that the deceased, in 1856, made a will, which was duly executed as required by the statute 1 Vict. c. 26. But it was alleged by the defendant that he afterwards revoked that will, and that it never was revived. At the hearing of the case there was some discussion as to the party upon whom the *onus probandi* was cast. On that subject, the remarks of Lord Brougham, in *Waring v. Waring* (5), are well worthy of attention. He there says :—"The burthen of proof often shifts about in the progress of the cause accordingly as the successive steps of the inquiry, by leading to inferences decisive until rebutted, cast on one or the other party the necessity of protecting himself from the consequences of such inferences; nor can anything be less profitable as a guide to our ultimate judgment than the assertion, which all parties are so ready to put forward in their behalf severally, that in the question under consideration the proof is on the opposite side."

Adopting that view of the subject, I will proceed to consider the whole of the evidence in this case, and endeavour to ascertain whether the will which Lieut. Jacob made in 1856 was afterwards revoked by him or not. The will, as brought into the registry, was written on five sheets of paper, which were attached together by tape at the upper left-hand corner. It appeared to have been folded up in the ordinary form of a brief. It appeared also to have been half opened, so that the sheets, when attached, were doubled only with the top and bottom edges brought together; and that all the sheets had been torn at the same time from the edge very nearly through, so that only a small portion of each sheet where it was doubled held the two parts together; but no one of them was entirely torn through so as to divide it into two portions. The manner in which it was reduced to that state was not left to conjecture or presumption. Positive evidence was given. It was torn by

(4) 26 Law J. Rep. (N.S.) C.P. 284.

(5) 6 Moore, P.C. 355.

the deceased, not by accident or mistake, but by design; and the question is, whether he intended to revoke it by so tearing it. The statute 1 Vict. c. 26. s. 20, amongst other modes of revoking wills, mentions "tearing by the testator with the intention of revoking the same." Now, by "tearing" I do not understand the legislature to have meant that the testator must rend the will into more pieces than it originally consisted of; and, therefore, although no one sheet of the paper was completely divided, I think the tearing might be sufficient to revoke it, if done with that intention. But, in order to make it effectual, he must have intended to revoke by so tearing it; by which I mean that he must have intended that which he actually did of itself to have that effect without more. In one sense it may be said that he tore the will with intention to revoke it, for, no doubt, he had that intention when he began to tear, and as soon as he had torn it a quarter of an inch, he had torn it with intention to revoke; but he did not intend to revoke by that tearing only: he intended to tear further. This brings me to the same question that was considered in *Doe v. Perkes*. When he ceased tearing, had he done all that he contemplated doing for the purpose of revoking? If he had, the revocation was complete, and he could not recall his act; he could only revive the will by some of the means prescribed by the 22nd section of the Wills Act, which he certainly did not adopt. But, in order to decide that the will, which was duly made, was afterwards revoked, I ought to be satisfied that the testator did all the statute makes necessary to work a revocation, viz. that he tore it, meaning by that act without more to revoke it. And here I must refer to the evidence.

[His Lordship here read the greater part of the evidence, and remarked on it, that the evidence, which was confirmed by the letter received from Mr. Hughes, shewed that Lieut. Jacob contemplated making another will. That it was clear that he began to tear the will with the intention of revoking it. That, in his opinion, the recollection of Mrs. Cowlshaw was more perfect than that of Cox, and that the conversation as to burning

the will took place in the parlour. That he thought it most likely Lieut. Jacob had himself picked it up as stated by Mrs. Cowlshaw, than that Cox had, as Lieut. Jacob said "I'll take it to Cowlshaw," and did so. That in his remark to Mr. Cowlshaw he treated the will as valid, and spoke of destroying it as a future act. That the advice given him by Cox and Cowlshaw to burn it was, taken by itself, equivocal. That it might be they meant that if he wished to destroy it he had better burn it, treating it as undestroyed; or that he had better burn it as it had already been destroyed. That taken in connexion with what he had first said, "I intend to destroy it," it would seem to favour the former view.]

The act of dropping or casting on the floor was relied on, no doubt, in consequence of the *dictum* of Best, J., in *Doe v. Perkes*; but the learned Judge must not be supposed to have ascribed to the act of throwing the torn will on the floor any other operation than that of shewing that he had done all that he had intended to do. But there his hand had been arrested; and if I am to place implicit reliance on Mrs. Cowlshaw's evidence in this case, the testator *was about to tear further* when she stopped him. The appearance of the paper confirms that; he had torn the will so nearly through, that one cannot but conjecture that he meant to effect a severance of the parts; but that remained unaccomplished, and I find nothing in the case upon which I can assume any other state of facts than that which Mrs. Cowlshaw describes. Her memory may be imperfect; but assuming it to be so, what other evidence have I before me? By what testimony has any other state of things been established? Her brother's evidence is not quite so full; but it leads to the same conclusion. I do not place reliance on what passed afterwards, viz. that when he burnt other papers he preserved the will, and that he shewed it to Miss Elms as his will. If it had appeared that he knew that the will once torn, with intention to revoke, was thereby revoked, the preservation and subsequent exhibition of it to Miss Elms would have tended to shew that he knew it had not been revoked, or in other words, that his hand had been

arrested in time, and that he had never completely revoked it; but he very probably supposed that, as long as no part of the will had been destroyed, it would still be valid, although torn with intention to revoke; and therefore the preservation of it is too equivocal an act to be relied on in forming my judgment upon this very nice question. But putting that out of consideration, upon the whole of this evidence, and dealing with it as if I were a jurymen, I say that I am satisfied that the instrument brought into the registry was duly executed by the deceased, Lieut. Jacob, as his last will and testament; and I am not satisfied that it was revoked by him. I must therefore pronounce for the will, and grant probate of it.

Probate decreed.

PROBATE.
1858.
June 26. }

SIMMONS v. DEAN AND
ANOTHER.

Probate—Practice—Attachment for Disobedience of Subpœna to bring in Will—Contentious Business.

The Court granted an order for an attachment against A. for disobedience of a subpœna to bring in a will; but directed that the attachment should lie in the Registry for eight days after notice to A. of its having issued, before proceedings should be taken to enforce it.

The application for such attachment is contentious business.

Elizabeth Simmons died in 1836, leaving a will, dated the 11th of September 1836, by which she appointed Richard Dean and Harvey Dean, the defendants, her executors.

The will not having been proved by the executors, in whose possession or controul it was, notwithstanding repeated applications to them for that purpose, by the plaintiff, the personal representative of a deceased legatee under the will, a subpœna issued on the 11th of May 1858 to the defendants to bring the will into the Registry.

Upon affidavits of the personal service of

the subpœna on the defendants respectively on the 13th and 15th of May, and that up to the 8th of June neither of them had entered an appearance, and that the deponent believed that no appearance had been entered, and that the defendants had neither brought in the will nor filed any affidavit as directed by the writ of subpœna,—

Prentice moved the Court for an attachment against the defendants for disobedience of the subpœna.—He submitted that he had a right to be heard, though not an advocate, as this was contentious business.

SIR C. CRESSWELL.—It is clearly a hostile proceeding, and I think also contentious. You may take the order; but let notice be given to the defendants that the attachment has issued, and let it lie in the Registry for eight days after such notice before you proceed to enforce it.

Order granted. Attachment to lie in the Registry eight days after notice to defendants.

PROBATE.
1858.
April 21. }

FARLAR v. FARLAR.

Proof of Will in solemn Form—Practice—Costs—Next-of-kin putting Executor to Proof of Will, when liable to Costs—Pleading.

Next-of-kin has generally a right to call upon the executor to prove a will per testes, and to cross-examine the witnesses produced in support of it, without being subject to costs. If, however, he gives in a plea, and fails to prove it, he will be liable to costs from the date of the plea.

Where pleadings contain irrelevant matter, application should be made at chambers to have it struck out.

This was a business of proving in solemn form the will of John Farlar, promoted by his widow, Francelina Farlar, the executrix named therein, against W. Farlar, the only brother and next-of-kin of the deceased.

The declaration stated that the deceased died on the 11th of October 1857, having

made and duly executed his will, bearing date the 3rd of October 1857, and appointed the plaintiff sole executrix.

To this the defendant, who appeared in person, pleaded, that he was the only brother and heir-at-law of the deceased, and had resided for many years past in Brompton Square, in the parish of Kensington; that the deceased, at the time of his death, was aged seventy-six, or thereabouts, and that the defendant and he had at all times lived on the most friendly and brotherly terms, and corresponded with each other, the address of the defendant being well known to the plaintiff; that the deceased suffered under a serious illness, which led to his death, and, as the defendant was informed and believed, for six months previous thereto, seldom left his fireside, or spoke or entered into conversation; that the cause of the illness of the deceased was communicated to the plaintiff by the deceased's medical attendant, but she, nevertheless, concealed the same from the defendant, under the pretence that she did not know his address, although the sister of the deceased visited the plaintiff, and as she well knew, also visited the defendant; that the plaintiff never informed the defendant of the deceased's death until after the funeral had taken place; that the defendant has good reason to assert that the disputed will was obtained by undue influence, not only from the extreme illness of the deceased, which incapacitated him from making a will, but from his having repeatedly expressed to the defendant and other persons his determination not to do so; that the said disputed will was drawn out and witnessed by a non-professional person of the name of W. King, who knew that the deceased had objected to the making of a will, and had constantly refused to do so; that the words "I constitute my wife the sole executrix," were inserted after the said disputed will had been signed and witnessed; that the deceased died on the 11th of October 1857, and the said disputed will bears date the 3rd of October 1857.

Replication—The plaintiff denies the greater part of the plea to be true or relevant, and says that no undue influence whatever was used by the plaintiff

or by any other person on her behalf for the purpose of procuring the execution of the said will, and denies that at the date of the execution of the said will the said testator was incapable from extreme illness or otherwise of making his will, and further says that the words—"I constitute my wife sole executrix" were written and interlined in the said will, and formed part thereof prior to the execution thereof.

The cause now came on for hearing.

Dr. Swabey appeared for the plaintiff. The defendant did not appear.

[SIR C. CRESSWELL.—The plea is a total departure from the system of pleadings which it was intended should be introduced. It is a sort of abstract of the old allegation, and is a rigmarole affair. The gist of the plea is undue influence and fraud, and might have been stated in a few lines. You should have applied at chambers to have the superfluous matter struck out.]

The attesting witnesses were called and proved the due execution of the will,—the deceased's capacity,—that there was no undue influence,—and that the clause appointing the plaintiff executrix was inserted prior to the execution of the will.

Dr. Swabey, for the plaintiff, submitted that on the evidence the plaintiff was entitled to probate and also to costs. By the practice of the Prerogative Court a next-of-kin had a right to call upon the executor to prove the will *per testes*, and if he merely cross-examined the witnesses produced in support of the will, he was not generally subject to costs; but if he went beyond this and brought in an allegation in opposition and failed in proof, he was liable to costs. Here the defendant did not appear to support his plea, which had rendered a reply necessary.

SIR C. CRESSWELL.—I decree probate of the will. I also think you are entitled to the costs from the date of the plea. The defendant's opposition seems to have been merely vexatious.

Probate decreed, with costs.

PROBATE. }
 1858. } *In the goods of SAMUEL SMITH*
 Feb. 24. } *(deceased).*

Administration—20 & 21 Vict. c. 77.
s. 73.

The Court has no power, under section 73. of 20 & 21 Vict. c. 77, to grant general administration to a person who, before that act, would only have been entitled to a grant of administration during the minority of an infant, that section not conferring power to substitute one kind of administration for another, but merely to substitute another person as administrator in the place of the person who would by law be entitled to administration.

Samuel Smith, deceased, by his will, dated the 16th of May 1839, appointed his sister Anne Smith (now Anne Baily, wife of William Baily), and his brother Charles Smith (since deceased), executors of his will and guardians of his children during their minority, and devised and bequeathed all his real and personal estate unto and to the use of the said Anne Smith and Charles Smith, their heirs, executors, administrators and assigns, upon trust for all his children living at his decease who should live to attain the age of twenty-one years or die under that age, leaving lawful issue, and also directed that until the share of his children became vested the income of the said trust estate, or so much thereof as by his said trustees should be considered necessary, should be applied for the maintenance and education of such children, and that the residue should accumulate, and authorized the said trustees to advance all or any part of the share of each such child for his or her advancement in the world.

The deceased died on the 25th of April 1855, and on the 24th of May 1856 letters of administration, with the will annexed, of the personal estate and effects of the deceased were by the late Prerogative Court of Canterbury, in accordance with the practice of that Court, granted to Jemima Smith, widow, the natural and lawful mother, next-of-kin and curatrix or guardian, lawfully assigned to the children of the deceased, minors, the universal lega-

tees named in the said will, for their use and benefit, and until one of them should attain the age of twenty-one years, the said Anne Baily, the surviving executrix and residuary legatee in trust having renounced.

The deceased died possessed of (*inter alia*) three leasehold houses held for the unexpired terms of seventy-nine, sixty-two, and thirty-one years, respectively.

Mrs. Smith, the administratrix, entered into a contract to sell one of these, but was advised that, in consequence of the limited powers conferred on her by the said letters of administration, viz., during the minority of her children, she could not make a saleable title.

The eldest child of the deceased, Jemima Smith, who is now the wife of C. J. C. Mordaunt, attained twenty-one on the 11th of October 1857, whereupon the said letters of administration expired. Mrs. Mordaunt, with the consent of her husband, renounced her right to letters of administration. The other children were minors; and to enable Mrs. Smith to sell the property, it was desired that letters of administration should be granted to her absolutely, instead of with the usual limitation *during her children's minority*.

These facts were deposed to in an affidavit of Jemima Smith.

The renunciation of Mrs. Mordaunt and her husband was brought in to the registry.

Dr. Phillimore moved the Court to grant general letters of administration, with the will annexed, of the personal estate and effects of the deceased to the said Jemima Smith, widow, the relict of the deceased, and the natural and lawful mother of his children without any limitation whatever, on her exhibiting an inventory, and on the sureties justifying.—He submitted that the Court had power, under section 73. of 20 & 21 Vict. c. 77, to grant the motion.

SIR C. CRESSWELL.—I think that I cannot grant this application. The power given to the Court by the 73rd section is, in certain cases, to grant administration to a person other than the one who by law would be entitled to administration. It is a power to substitute one person for another as administrator, not, as I am now

asked to do, to substitute one description of administration for another. The 73rd section gives the Court no power to grant general administration to a person who, before the 20 & 21 Vict. c. 77, would have only been entitled to a limited administration.

Motion rejected.

PROBATE. }
1858. } *In the goods of ELISHA PECK*
June 26. } *(deceased).*

Administration — Creditor appointed Guardian to Children of Intestate for Purpose of taking out Administration.

A. having died intestate and insolvent, leaving three children minors, who had no known relations and were the only persons entitled in distribution, the Court appointed a creditor guardian to the children, for the purpose of taking out administration to the estate of A.

Elisha Peck died on the 5th of June 1857, intestate, a widower, leaving three children of the respective ages of thirteen, ten and eight years, who had no natural guardian, the deceased having been a bastard, and his wife having left no known relations.

The deceased died insolvent, his personal estate being under the value of 100*l.*, and his debts amounting to 180*l.* Immediately after his death Kinger, a brother of his natural mother, took possession of his house, effects and account-books, and promised to aid in the appointment of Woodford, a creditor of the deceased, as administrator. Subsequently a paper, purporting to be an appointment of the said Woodford as the guardian of the eldest child, Elizabeth Peck, to enable him to administer to the effects of the deceased during her minority, was prepared by the registrar of the Archdeacon of Sarum, within whose jurisdiction the deceased resided, and presented to Elizabeth Peck for signature; but Kinger refused to permit her to sign it, and refused to administer himself, or allow any one else to do so; but had since resided in the

house of the deceased, and had disposed of a considerable portion of the effects, without paying any of the debts.

It was the general desire of the creditors that administration should be granted to Newman, who was a creditor to the amount of 150*l.* Woodford was a creditor to the amount of 15*l.*

These facts appeared on the joint affidavit of Newman and Woodford.

May 31.—*Dr. Tristram* now moved the Court, under section 73. of the Court of Probate Act, 1857, to decree letters of administration of the personal estate and effects of the deceased to the said Newman, on his exhibiting an inventory and giving justifying security. Newman was willing to distribute the assets rateably among the creditors.

SIR C. CRESSWELL. — I cannot grant what you ask, unless I have the children of the deceased before me. They should be cited.

Dr. Tristram.—That would render it necessary that a guardian should be appointed by the Court.

SIR C. CRESSWELL.—I cannot dispense with that proceeding. It is supposed that the 73rd section gives me much larger powers than it does in fact. I am not autocratic. I think that a guardian to the children must be appointed, that they may be cited to appear. I think the better course would be, that Kinger should be appointed guardian to them. If he will not accept the office, you must find out some one else who will. The motion had better stand over.

Dr. Tristram now moved the Court, on the same affidavit, to appoint Newman as guardian to the three children, for the purpose of taking upon himself letters of administration of the estate and effects of the deceased for their benefit, until one of them should attain twenty-one, and to decree letters of administration to be granted to him. The appointment of Kinger as guardian, as suggested by the Court when the case was last moved, might, considering his conduct with reference to the de-

ceased's estate, defeat the object of this application, which was to secure payment of the creditors. He has no special claim, not being the natural guardian of the children. The creditors on whose behalf the application is made have a claim on the estate to the extent of 165*l*.

SIR C. CRESSWELL.—Taking all the circumstances of the case into consideration, I think Newman may be appointed guardian for the purpose of taking out letters of administration.

Motion granted.

PROBATE. }
1858. } HAMER v. BOREHAM.
Feb. 15. }

Practice—Counsel of Person suing in Formd Pauperis.

A person suing in formd pauperis, who has had counsel assigned to him by the Court, cannot appear by another counsel.

This was a business of proving a will in solemn form, transferred to this Court from the Prerogative Court.

The plaintiff, suing *in formd pauperis*, had had a proctor and advocate assigned to him by the Judge of the Prerogative Court, and had appeared by them in that Court.

He had subsequently without having been dispaupered, instructed a solicitor and a barrister to appear for him.

Needham having stated these facts, and that he was instructed to make a motion in the cause,—

SIR C. CRESSWELL.—Assuming there is no other objection to your motion, there is this fatal one, that a plaintiff suing *in formd pauperis*, who has had counsel assigned to him by the Court, is appearing by another counsel. I cannot hear you. Until the plaintiff be dispaupered, or has other counsel assigned to him by the Court, he can only appear by the counsel already assigned to him.

Motion rejected.

The following cases will be reported in the Volume for 1859 :—

BATTYLL v. LYLES.
COOMBS v. COOMBS.
COOPER AND SPARKES v. MOSS.
HAYWARD v. HAYWARD.
NICHOLLS v. BINNS.
TOMKINS v. TOMKINS.
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— *Quære*—whether the Court for Divorce in exercising the power given it by section 35. of 20 & 21 Vict. c. 85, to make provision for the custody, maintenance and education of children, should act in accordance with the rules and principles by which the Court of Chancery is guided in such cases, or is vested with an absolute discretion. On decreeing a judicial separation on the ground of the husband's cruelty, the Judge Ordinary, considering that under the circumstances of the case, the children ought not to be delivered up to the father—that he had no power to vary an order when once made, though it might afterwards be desirable to do so, and that there were no funds applicable to the maintenance and education of the children, declined to make any order under section 35. of 20 & 21 Vict. c. 85, as to their custody, maintenance and education, but directed that they should remain with their mother for three months, in order that an application might be made to the Court of Chancery. *Semble*—That where the Court is asked, under section 35. of 20 & 21 Vict. c. 85, to make a provision as to the custody, &c. of the children in its final decree for a judicial separation, &c. that question must be gone into at the hearing of the suit, and cannot be made the subject of a separate hearing. *Curtis v. Curtis*, 78

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— In the Ecclesiastical Court, the proctor of a wife defending a suit for divorce was always entitled to receive from the husband the reasonable costs of conducting her defence. In such a suit, transferred to the Divorce Court, an additional allegation on behalf of the wife was brought in after the evidence had been published, setting up condonation during the progress of the suit, but was not supported by the evidence. According to the practice of the Ecclesiastical Court, additional allegations, at that stage of the suit, were only permitted if verified by affidavit. In this case it was verified by affidavit of the wife. It was held, that as the proctor of the wife is bound to bring before the Court any defence set up by her, and not plainly unfounded, he was entitled to receive the costs of this allegation from the husband. *Wells v. Wells*, 95

— Next-of-kin has generally a right to call upon the executor to prove a will *per testes*, and to cross-examine the witnesses produced in support of it, without being subject to costs. If,

however, he gives in a plea, and fails to prove it, he will be liable to costs from the date of the plea. *Farler v. Farler*, 103

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— Desertion without cause for two years and upwards gives a wife a right to a judicial separation under section 16. of 20 & 21 Vict. c. 85. of which she cannot be deprived without her concurrence. A *bond fide* offer by the husband after that right has accrued to renew the cohabitation will not *per se* take away such right. *Semble*, first, such an offer would not take away the right of a wife to a dissolution of marriage for adultery coupled with desertion, without excuse, for two years and upwards, under section 27. Secondly, that the offer of a husband who has deserted his wife to return to and provide for her, would take away her right to have an order made, under section 21, for the protection of property acquired by her since the desertion. *Cargill v. Cargill*, 69

DISSOLUTION OF MARRIAGE—The recovery of damages in an action of crim. con. by a husband does not constitute a special ground within section 28. of 20 & 21 Vict. c. 85, on which he will be excused from making the alleged adulterer a co-respondent to a petition for dissolution of marriage. *Ex parte Anon.*, 4

— A. presented a petition for dissolution of marriage by reason of the adultery of his wife. The co-respondent put in an answer, but the wife did not appear. Before 20 & 21 Vict. c. 85, A. had recovered damages in a defended action for crim. con. against the co-respondent. The Judge Ordinary, on the application of the petitioner, the co-respondent not objecting, directed that the cause should be heard upon affidavit; but that in addition to the affidavits of the facts, an examined copy of the record in the action should be brought into the registry. *Armitage v. Armitage*, 50

— *Semble*, that in a suit for dissolution of marriage, on the ground of bigamy, with adultery, the adultery and bigamy must be committed with the same woman; and, consequently some evidence beyond the mere solemnization of the bigamous marriage should be given, *e. g.*, that the parties cohabited as man and wife. And *per Pollock, C.B.*—Proof of a bigamous marriage with A. and adultery with B. is not sufficient. *Horne v. Horne*, 50

— Generally the mode in which the petitioner for a dissolution of marriage will be directed to prove his petition when no answer has been filed, and twenty-one days have elapsed, as required by rule 14, is by oral evidence before the Court without a jury. There may be cases in which it would not be desirable that the evidence should be taken orally in court. *Norris v. Norris*, 51

- A petition for dissolution of marriage on the ground of the wife's adultery charged various acts of adultery in 1856, 1857 and 1858. The respondent, in her answer, pleaded, first, a denial of the adultery; secondly, desertion on the 4th of September 1857; thirdly, condonation; fourthly, connivance. The affidavit of the petitioner, filed in pursuance of rule 2, did not verify the statements of the petitioner as to the adultery. The respondent's affidavit, filed in pursuance of rule 15, did not verify the third and fourth pleas, it being supposed that by doing so the adultery would be admitted. On motion to disallow the last three pleas and for leave for the petitioner to file an affidavit verifying the adultery charged "to the best of his belief," it was held, by the Judge Ordinary, first, that the second plea was bad, as, though it was pleaded to the adultery charged in the petition, it was only an answer as to part. Secondly, that the third and fourth pleas should be verified by affidavit, as the respondent, by doing so, would not admit the adultery, each plea being to be construed by itself. Thirdly, that the petitioner might in his affidavit state that the adultery was committed "to the best of his belief." *Tourle v. Tourle*, 52
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- On proof of a petition for dissolution of marriage, by reason of the adultery of the wife, some evidence should be given of the conduct of the husband towards her previously to the adultery. Where there was no evidence that the co-respondent, when he committed adultery, knew that the respondent was married, the Court refused to order him to pay the costs. *Boddington v. Boddington*, 58
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— Petitioner for dissolution of marriage, on ground of wife's adultery, having obtained a divorce *à mens et thoro*, and also a verdict in an action against the co-respondent for crim. con., but for nominal damages only, the Judge Ordinary refused to allow the petition to be heard on affidavits, but required oral evidence. *Potts v. Potts*, 59

— In a suit for a judicial separation the parties cannot, as in a suit for dissolution of marriage, demand as a matter of right that issues of fact be tried by a jury; but the Court has a discretionary power under section 36. to grant or refuse one. It will, however, generally, on the application of either party, direct that questions of fact be tried by a jury. In a suit by the wife for judicial separation on the ground of cruelty, the petitioner asked that the case should be heard without a jury, and that an early day should be fixed for the hearing, as she apprehended that the respondent would use force to compel her to return to him. The Court, on the application of the respondent, directed that the issues of fact should be tried by a jury, but, having a discretion in the matter, made the order conditionally on his undertaking not to interfere with or annoy his wife, and directed that such condition should be embodied in the order. *Marchmont v. Marchmont*, 59

— The Court has power to order issues of fact to be tried before a jury, though none of the parties to the suit apply for one, and will generally do so in cases to be tried before the full Court where there is likely to be much dispute as to the facts. But, in a suit for dissolution of marriage, the main question being one for the exercise of the discretion of the full Court, the Judge Ordinary, neither of the parties applying for a jury, directed that the case should be heard without one. *Ratcliffe v. Ratcliffe*, 60

— In a suit for dissolution of marriage, where the co-respondent has appeared, but has put in no answer, he cannot, at the hearing of the petition, be allowed to take any part in the proceedings. He cannot dispute the allegations of the petition either by cross-examining the wit-

nesses in support of it, or by addressing the Court, nor can he be heard even on the question of costs. *Norris v. Norris*, 72

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PLEADING—To an allegation propounding a will, dated the 7th of July 1857, by which a feme covert had exercised, in favour of her husband a general power of appointment, a responsive allegation was given in which in the earlier articles pleaded the personal history of the deceased, her dislike to her husband in consequence of his ill treatment, her wish to leave her property to her father, and that by the coercion of her husband she had been induced to

execute previous wills in his favour. The 21st article alleged the testamentary incapacity of the deceased at the date of the will, and stated facts from which that inference might be drawn. The admission of this allegation being opposed, it was held, that as the 21st article pleaded facts bearing directly on the question of incompetency at the time the will was made, the former part of the allegation which by itself would be inadmissible as irrelevant was no longer immaterial, but that the facts stated in it might properly be taken into consideration in combination with those stated in the 21st article. *Latham v. Woolbert*, 10

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cerning N. It was held, that, under the above circumstances, as N's history was traced up to a certain point, and he was then lost sight of, advertisements were unnecessary, and that his death was to be presumed. *In the goods of Norris*, 4

— On the 27th of January 1857, M, master of the ship B, sailed in her from L. for V, the average duration of the voyage being ten weeks. The ship never arrived at V, and nothing having been heard or seen of her or any of her crew since she sailed from L, the underwriters had paid as for a total loss of the ship. It was held, the death of M. in or since January 1857, might be presumed. *In the goods of Man*, 5

PROBATE—A testator died leaving personal estate, part being situate in the province of Canterbury, the residue in the diocese of Chester. A grant of probate was obtained from the Prerogative Court of Canterbury only, before the commencement of 20 & 21 Vict. c. 77. It was held, that by section 87. of that act such grant was rendered effectual with respect to the property in the diocese of Chester, without any order of the Court; such probate duty being payable as would have been chargeable on the diocesan probate. *In the goods of Freckleton*, 6

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service of the citation in a proceeding for dissolution of marriage. *Robotham v. Robotham*, 33

— An application was made on behalf of a wife, who had presented a petition for dissolution of marriage, to dispense with personal service of the citation, and allow substitutional service on the brother of the husband. The affidavits, in support of the application, shewed that the husband was living abroad under an assumed name, and that the wife could not ascertain where he was, but that her husband's brother was in communication with him, and had undertaken to forward the citation to him. The Judge Ordinary rejected the application, on the ground that personal service might be effected through the husband's brother. *Chandler v. Chandler*, 35

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WILL—G, in 1855, wrote his will on six or seven unattached sheets of paper. At the foot of each sheet he signed his name in the presence of two witnesses, who also subscribed their names in his presence. After G.'s death two only of these sheets, viz. the third and fourth, could be found, but they contained a disposition of part of G.'s property. On motion for a grant of administration, with these two papers annexed, as being the will of G, it was held, first, that it must be presumed that G. destroyed the lost sheets intentionally; secondly, that as the last sheet contained the only signatures which were in compliance with the Wills Act, the whole will must be presumed to have been revoked. *In the goods of Gullan*, 15

— A will, purporting in the commencement and testimonium clause to be that of S. C, was executed by a mark, against which was written the name S. B, and was handed by S. C, as her will, to one of her executors, shortly before her death. B. had been the maiden name of S. C. It was held, that, as there was sufficient evidence that the mark was that of S. C, the execution of the will by her was not vitiated by another name having been written against her mark. *In the goods of Clarke*, 18

— B, in 1846, made a will, which he revoked by another will made in 1855. On his death the former will was found, but not the latter. It was held, first, that it must be presumed the deceased destroyed the missing will, *animo revocandi*; secondly, that parol evidence of the con-

tents of the missing will was admissible; thirdly, that the earlier will was not revived by the destruction of the will which had revoked it. *In the goods of Brown*, 20

— In 1817 a husband and wife verbally agreed that they would divide their furniture and effects, and live separate; that the wife should maintain herself, and that the husband should allow her to enjoy her earnings for her separate use, and that neither should interfere with the other. In pursuance of this agreement, they divided their effects and separated; the wife engaged in business and died in 1856, leaving a will, bequeathing money which she had acquired in her business since the separation. In a suit instituted for a grant of administration against the executor named in the wife's will, an allegation was given in, by the latter, pleading the above facts. The admission of this allegation being opposed, it was held to be admissible, inasmuch as under the circumstances stated in it, the property acquired by the wife after the separation became her separate property, and as such might be bequeathed by her. *Haddon v. Fladgate*, 21

— An allegation responsive to one propounding a will made under a dower in April 1854 by A, a married woman, pleaded that A. in 1823 married in England B, a domiciled Englishman; that in 1839 they separated; that in 1854 "A, having discovered that B. was domiciled in Scotland" and living in adultery obtained a Scotch sentence of divorce *à vinculo*; that A. then married P, a domiciled Frenchman, and went to reside in France, where she remained until 1857, when she died, having previously, in 1856, made a will, revoking all previous wills, valid according to the law of France, but not attested, as required by the Wills Act. This allegation being opposed, was, by the direction of the Court, reformed so as to state specifically the facts as to B.'s residence in Scotland at the date of the divorce, when it appeared that such residence was merely temporary. It was held, that the allegation, as reformed, must be rejected for the following reasons: first, that the case was not distinguishable from *The King v. Lolley and Conway v. Beasley*, and therefore that the Scotch divorce did not dissolve the English marriage; secondly, that the Scotch divorce could not operate as a divorce *à mensa et thoro*; thirdly, that A.'s domicile continued to be that of her husband, viz. England; fourthly, that the will of 1856 not being made in accordance with the law of A.'s domicile, did not revoke the will of 1854. *Robins v. Dolphin*, 24

— On December 15, A, being very ill, made his will, and gave it to his mother to take care of. On the 21st, at his request, she gave it back to him. On the 22nd he died, when the will was found under the bolster of the bed on which he died, the attestation clause and signatures of the attesting witnesses having been torn off. The will was held to be revoked. *In the goods of Lewis*, 31

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— G. made his will in 1855, appointing his wife sole executrix. In May 1857 he fled from Delhi when the mutiny broke out, leaving there a desk containing the will. After the recapture of Delhi an attempt was made to recover it, but without success. G. died in June 1857. On proof of the due execution of the will and of its contents, the Court granted probate to the executrix. *In the goods of Gardner*, 55

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— In order that a will may be revoked by tearing, it must be shewn that the testator intended

that which he actually did of itself to have had the effect of revoking it without more. If he commences tearing it with the intention of revoking it, and being about to tear further stops *in medio*, the act not being complete, the will remains valid. A. having commenced tearing his will, which was admitted to have been duly executed, with the intention of revoking it, had nearly torn it in two pieces when he stopped. There was some evidence to lead to the conclusion that he was about to tear further, and that he stopped at the entreaty of a bystander. The Court being satisfied that the will had been duly executed, and not satisfied on the evidence that it had been revoked, granted probate. When a duly executed will is propounded in a mutilated state there is a *prima facie* presumption that it was put in that state by the testator *animo revocandi*; but when evidence is given for the purpose of shewing that such is not the case, the matter is at large, and the presumption must be disregarded, and a Court or jury should decide on the evidence alone, and should not, if they are in doubt on the evidence, find against the will by calling in aid the presumption. *Elms v. Elms*, 96

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TO THE SUBJECTS OF THE

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IN THE

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ACCOUNT—If a company does not discover, and has not the means of discovering, the correctness of entries in a succession of accounts rendered by their agent, they are not after decease of the agent precluded by lapse of time, or by certain shareholders omitting, against opposition, to press for explanations previously asked, from shewing that such entries are not only erroneous, but fraudulent. Where accounts of an agent acting for a company have been improperly kept or mystified, and not duly rendered and explained when asked for, the Court will direct them to be taken through a period of twenty-five years, though accounts sent in had been acted on, and though shareholders who asked for further information and explanations on such accounts did not persevere to obtain them. Manner in which the Court will direct the accounts to be taken. *Stainton v. the Carron Co.* 89

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in full, and they also repaid in full the deposit on shares made by three other shareholders; they then paid 10*s.* per share to such of the shareholders as would receive it. This was accepted by one of the plaintiffs. No accounts of any receipts and payments were ever rendered to the shareholders. A previous suit was instituted by a shareholder for an account; the solicitors in the present suit acted for the plaintiff in that suit; it was, however, compromised, and in 1853 the present suit was instituted by two shareholders to obtain an account of the receipts and payments made on behalf of the company and for a distribution of the surplus. It was held, that the provisional committee were trustees, and that the relief sought by the plaintiffs was not barred by lapse of time: that the dismissal of the bill against two of the committee had not rendered the suit defective, as it appeared in evidence that they had not sanctioned the repayment of the 9,975*l.*: that there was no misjoinder of the plaintiffs in consequence of one having received the dividend of 10*s.*: that the suit was defective, as three shareholders, who had received back their deposits in full, were not parties; but leave to amend and make them defendants was given: that the bill must be dismissed, with costs, against such of the defendants as had ceased to be of the committee when the resolution was passed to repay the 9,975*l.*, notwithstanding they were made defendants upon the suggestion and requisition in the answer of the original defendants: and that the plaintiffs were entitled to relief, though their individual interest was small, and though the proceedings were instigated by their solicitor. *Williams v. Page*, 425

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ADMINISTRATION OF ESTATE—A. and B. were trustees of a settlement, and a breach of trust was committed, B. being the guilty party. The trust fund was ultimately restored, and A.'s costs were directed to be paid out of B.'s estate. It was held, these costs were not a specialty debt as against B.'s estate. A. paid a sum on account of his costs, after the passing of the 19 & 20 Vict. c. 97, and it was held that the sum was paid in the character of surety, and therefore that, under the 5th section of that act, he was entitled to claim as a specialty creditor on account of it. *Lockhart v. Reilly and Reilly v. Lockhart*, 54

— Testator who had assigned during his life certain leasehold property, bequeathed other leaseholds and the residue of his property to tenants for life, with remainders over. Assignees of the leaseholds became bankrupt, and executors of testator took a re-assignment of those leaseholds. Liabilities having arisen under covenants in the original lease, it was held, that those liabilities must fall upon the corpus, and not upon the income of testator's estate. *Allen v. Embleton*, 297

— Testator, by will, dated in 1853, made specific devises of real estate, and also a specific bequest of personalty in favour of each of his six children, by name, viz. A, B, C, D, E, and F. He then made a specific bequest in favour of A. and B. equally, and finally he gave all the residue of his property, real and personal, to his said four children, C, D. and E. equally. It was held, upon the context of the will and the evidence in the cause, that the name of F. had been omitted by inadvertence in the gift of the residue contained in the will as executed, and that F. was entitled to one-fourth of such residue. The rule that a testator's real estate specifically devised, his real estate devised by way of residue, and his personal estate specifically bequeathed, are to contribute in rateable proportions to make up the deficiency of his residuary personal estate for payment of his debts, has not been altered or affected by the Wills Act, 7 Will. 4. & 1 Vict. c. 26. *Eddels v. Johnson*, 302

— Administration Summons. See Account. And see Costs. Legacy. Trust and Trustee.

— BY THE CROWN—A person died intestate, and no claim being made by the next-of-kin, the Solicitor to the Treasury administered to the intestate's estate and took possession of the property on behalf of the Crown. Thirty years afterwards the next-of-kin appeared and substantiated his claim. It was held, that the Crown must be treated as an ordinary administrator under similar circumstances, and the property refunded with interest at 4l. per cent. *Edgar v. Reynolds*, 562

ADVANCEMENT—In the event of the object failing for which money has been advanced by trustees under a power of advancement, the money belongs to the person for whose benefit it was advanced, and cannot be recalled into the original fund. *Laurie v. Banks*, 265

ALIEN—If real estates are devised to British-born subjects, upon trust for the benefit of aliens, the trust will, in equity, be executed for the benefit of the Crown. *Barrow v. Wadkin*, 129

AMENDMENT—of Bill after time for filing Interrogatories. See Interrogatories.

APPOINTMENT. See Power of Appointment.

APPORTIONMENT—A. B. died leaving shares in a joint-stock company, the dividends upon which were declared half-yearly and made payable at a fixed period, about a month afterwards. There was a further sum of money due to the shareholders in the company arising from profits upon the sale of shares. Dividends upon the shares were held to be apportionable under 4 & 5 Will. 4. c. 22, payment to be calculated from the last day on which the dividend was made payable, and not the day on which it was declared; but that the additional amount was not in the nature of a dividend, and therefore not apportionable under the act. *Hartley v. Allen*, 621

ARREST—An attorney and solicitor while on his direct road to transact professional business, first in the Insolvent Debtors Court, and next in the Taxing Master's Office, having been arrested on an attachment issued against him for contempt of an order of the Court of Chancery, the Court, on motion, ordered his discharge, and gave him his costs of the application. *Eyre v. Barrow*, 784

ASSIGNMENT—Injunction granted to restrain assignor from receiving a pension to a retired officer of the army for wounds. *Knight v. Bulkeley*, 592

— of securities without notice. See Set-off.

ATTACHMENT—for want of answer, ordered upon evidence consisting of a memorandum of service

of interrogatories upon defendant's solicitor in the handwriting of the clerk by whom the service had been effected, and an affidavit by another clerk of plaintiff's solicitor of verbal admission of such service by defendant's solicitor. *Sidbottom v. Adkins*, 152

— See Arrest.

ATTORNEY AND CLIENT—A compromise of a trial at law, made by counsel, upon the suggestion of an attorney that it would be desirable, was held by the Master of the Rolls not to be binding upon the client, who was not aware of it, had not sanctioned it, and would not acquiesce in it; and a bill to enforce the specific performance of the compromise was dismissed by the same Judge, but without costs, the Court being of opinion that the compromise arose from the mistake of parties acting for their respective clients, and a new trial of the issue was directed in the original suit. On appeal by plaintiff in the suit for specific performance, it was held, affirming the decision, that an attorney has no authority to compromise a suit without the sanction and consent of the client, and that the bill must be dismissed; but differing from his Honour, that (the client having repudiated the compromise from first to last, and refused to comply with it) the bill must be dismissed, with costs. *Swinfen v. Swinfen*, 35, 491

— It is well settled that it is not within the ordinary business of a solicitor to receive purchase-money belonging to his client, or money due to him on mortgage, nor to receive money from him for the purpose of investment generally; and one partner is not liable for the misapplication of money so received by another without his privity. *Secus*, where the money is received for the purpose of being invested on a particular security. *Bourdillon v. Roche*, 681

— By deed, dated in February 1837, Sir R. G. conveyed in fee to M., solicitor, certain manors, lands, and the minerals under the same, the purchase-money being about 7,000*l*. M. was, at the time, the confidential solicitor of Sir R. G., but the purchase was transacted through other solicitors, acting on his behalf. Sir R. G. died in October 1837, having devised all his property to trustees, upon trusts for sale, and, subject thereto, to convey upon trust, for his wife for life, and then to the use of his children in tail, and on failure of issue, to the use of W. N. G. for life, with remainder to the use of his first and other sons successively in tail, with remainders over. The testator left no issue, and W. N. G. died in 1847, leaving the plaintiff, Sir T. G., his eldest son, who attained twenty-one in January 1852. M. continued to act as confidential solicitor for Sir R. G. till his death, and afterwards for the trustees of his will, for whom he acted in an administration suit instituted against them. M. died in January 1853, having devised his estates to his two sons. The only evidence of the purchase-money having been

paid by M. was a receipt indorsed on the deed of conveyance to him, and signed by Sir R. S. It was held, upon bill filed in 1856, that the transaction must be set aside, the devisees of M. having repaid the amount of purchase-money appearing upon the receipt. *Gresley v. Mousley*, 779

— See Baron and Feme.

LIEN FOR COSTS—A cheque having been deposited by H. in the hands of a solicitor, to be applied by him in payment of any such amount as might be recovered by F, his client in an action then pending against H, the action proceeded to trial, and F. recovered a sum of money against H, and entered up judgment for the debt and costs. Before the exact amount due on the judgment was ascertained F. became bankrupt, and H, having a cross claim against his estate for a larger amount than was due on the judgment, was admitted to prove for the difference, the rest being set off against the judgment debt under section 171. of the Bankrupt Law Consolidation Act. It was held, the solicitor had a lien upon the proceeds of the cheque for his costs, to the extent of the sum found due upon the judgment, and such lien was not displaced by the set-off under the proceedings in F.'s bankruptcy. *Hanson v. Reece*, 118

— See Mortgage.

ATTORNEY AND SOLICITOR. See Arrest.

AUCTION—A sale of an estate upon sealed tenders must be treated as a sale by auction, and the biddings may be opened, on application to the Judge, within eight days after the certificate of the chief clerk, approved by the Judge, has been filed. The practice of opening biddings not in itself approved of. The word "party," in the 49th Order of October 16, 1852, must be taken to mean "person." *Barlow v. Osborne*, 303

BANKERS AND BANKING COMPANY. See Winding-up Acts.

BANKRUPTCY—A. B. a trader, on the 19th of April 1856, executed to C. D. a bill of sale of furniture on the premises where he, A. B. carried on business, the consideration being stated as for goods sold, money lent and money for which C. D. had become responsible for A. B. At the request of A. B. the bill of sale was not registered within the twenty-one days required by the statute 17 & 18 Vict. c. 36, but on the expiration of that time another bill of sale of the same furniture was executed in similar terms and was not registered. A third, a fourth, and a fifth bill of sale were in the same manner executed and not registered, and ultimately a sixth was executed on the 5th of August 1856, and was registered within the prescribed time, but none of the other bills of sale were cancelled. A. B. was adjudicated bankrupt in December 1856, the act of bankruptcy being committed in July previously by being denied to his creditors. Assignees

were appointed, who filed a bill against C. D., praying an injunction to prevent him from removing the furniture, and a declaration that the bills of sale were fraudulent and void, and that they might be delivered up to be cancelled. It was held, that neither of the bills of sale, nor the registration of the last, constituted a "dealing" within the meaning of the 133rd section of the Bankrupt Law Consolidation Act, 1842, (12 & 13 Vict. c. 106); and that, notwithstanding the registration of the last bill of sale, the furniture remained in the order and disposition of the bankrupt. *Per Lord Justice Turner*—The statute 17 & 18 Vict. c. 36. in no degree affects the doctrine of reputed ownership. *Stansfield v. Cubitt*, 266

— Purchases by assignees of bankrupts of claims on the estate are contrary to public policy and the policy of the Bankrupt Law. Even a fair, open, *bond fide* purchase by an assignee cannot be upheld for the benefit of the estate if the vendor questions it. *Pooley v. Quilter*, (reversing same case, 180,) 374

— An assignment by the Commissioners in Bankruptcy, under the old law, of the choses in action of a bankrupt, is not equivalent to a reduction into possession, and such assignment made without notice given to the trustees is not entitled to priority over a subsequent assignment for value, of which notice is given. The issue of the commission is not sufficient notice. Nor, *semble*, does the mere accidental knowledge of one of the trustees amount to notice. *Re Barr's Trust*, 548

— See Winding-up Acts.

BARON AND FEME—S. N. having paid off a debt secured by mortgage upon real estates, in the equity of redemption of which his wife was at the date of their marriage entitled to a life interest to her separate use, afterwards without her privity assigned the mortgage to the solicitor of himself and wife, as security for a debt due to such solicitor for costs principally incurred in a suit in which he acted, first for the wife before her marriage, and afterwards for both the husband and wife. It was held, that such assignment was a valid security as against the wife's life interest in the hereditaments assigned. The solicitor, having subsequently purchased from the original mortgagee, for 40*l.*, a debt for costs of 175*l.*, which the latter would have been entitled to have added to his mortgage debt, was held entitled, as against the wife, to the benefit of such purchase, but to the extent only of securing himself in respect of the debt due to him from the husband. *Nelson v. Booth*, 110

— Upon separation of husband and wife the husband covenanted with a trustee for the wife to pay her an annuity for her life. Shortly before the death of the husband, and at his solicitation, a reconciliation and reconviviality took place in consideration of a parol promise by him to the wife and to her trustee to continue the payment

of the annuity to her, and to charge it upon his real estate. The husband died without having carried into effect the parol promise. Such promise was held effectual to charge the land with the annuity as against the devise of real estate under the husband's will. *Webster v. Webster*, 115

— A bill of exchange was drawn in favour of a married woman, and sent by her trustees in a letter to her. Her husband surreptitiously obtained possession of the bill and signed her name to it, without her knowledge or concurrence, and having indorsed and discounted it through P., who also discounted it, absconded. The wife, before the bill became due, discovered the fraud, and gave notice to the acceptors, who refused to pay at maturity. The discounters recovered at law against P., who sued the acceptors. The wife, by her next friend, filed her bill to restrain this action, and prayed that the acceptors might be ordered to pay the money to her on her separate receipt. The Master of the Rolls decided that no rights could be gained under the forged signature; that the payee being a married woman affected the party taking the bill with notice that it was the separate property of the wife; that the holder had a right to retain it, though he must not sue upon it, and that the acceptors must pay the money to the married woman. Upon appeal, the Lords Justices held that P. was a *bond fide* holder for value, and as such legally entitled to the bill; that the Court would not interfere to defeat his title, and that no blame was attributable to him for not making inquiries other than of the husband, as to the wife's signature, and they dismissed the bill, with costs. Whether the fact of the payee being a married woman being known was constructive notice that the money formed part of her separate estate—*quære*. *Dawson v. Prince*, 169

— A wife has power to contract with her husband without the intervention of a trustee, not only in respect of her separate property, but in respect of all matters in which she is in the position of a *feme sole*. Therefore, where a wife has instituted a suit in the ecclesiastical court for a divorce, an agreement between the husband and wife alone for the compromise of the suit will be supported, provided it contains no stipulations which the Court cannot enforce. But where an agreement for the compromise of a suit for a divorce provided, amongst other things, that the wife should have the custody of two of the children, and should educate them in a particular manner, the first part of such provision being contrary to public policy, and the latter incapable of being enforced against the wife, a demurrer to a bill filed by her for specific performance was allowed. *Vansittart v. Vansittart*, 222. On appeal, 289

— A *feme covert* executrix having obtained an order for the protection of her property, under the 21st section of the Divorce and Matrimonial Causes Act, is entitled to a

transfer of stock standing in the name of her testator without the concurrence of her husband. *Bathe v. the Governor and Company of the Bank of England*, 630

— A husband, on his return from India, filed his bill asking the Court to secure and settle a sum of money which his wife had saved out of remittances made by him for her maintenance and support; but, upon a demurrer of the wife, who persisted in living separate from her husband, it was held that no case was made either for discovery or relief, and that the demurrer must be allowed. *Brooke v. Brooke*, 639

— A married woman having instituted a suit and obtained a decree for specific performance of a contract entered into by her husband, for the settlement of her estate, cannot afterwards repudiate the contract; for, by instituting the suit, she gives the Court jurisdiction to bind her interests, and it is no objection that this has not been done by deed acknowledged under the Fines and Recoveries Act. *Barrow v. Barrow*, 678

— Where husband and wife join in mortgaging the wife's separate estate, and the husband covenants to secure the repayment of the debt, parol evidence is admissible to shew the money so borrowed was for benefit of the wife; that the husband's joining in the mortgage deed was only by way of suretyship; and that his estate would be indemnified by the separate estate of his wife. *Gray v. Dowman*, 702

— See Trust and Trustee.

BENEFIT BUILDING SOCIETY. See Winding-up Acts.

BILL. See Practice.

BILL OF EXCHANGE. See Baron and Feme.

BILL OF SALE. See Bankruptcy.

CALLS—Forfeiture of. See Mine and Mining Company.

CHAMPERTY. See Limitations, Statute of.

CHARGE — on land. See Charity. Covenant. Legacy.

— on tolls. See Debtor and Creditor.

— See Mortgage.

CHARITY—In 1652 testator gave to the mayor and corporation of B. for ever an estate (which he described as producing 47*l.* a year), on trust to pay to the lecturer of B. 10*l.* a year, and to the schoolmaster 10*l.* a year, and to the testator's sister for her life 20*l.* a year, and after her decease the said 20*l.* were to be paid to three poor scholars of B. for their maintenance at the University of Cambridge; to each one of them the

sum of 6*l.* 13*s.* 4*d.* But if there should not always be three poor scholars of B. at the University, who should stand in need of that maintenance (for his will was, that no son of any alderman, or of any other of sufficient ability to maintain his son at the University, should be capable of that maintenance), he willed that, in the interim, so much as could be spared of the said 20*l.* (no poor scholar having above 6*l.* 13*s.* 4*d.* yearly) should be distributed amongst the poorest people of the town, and while the taxes for the maintenance of the army of the Commonwealth should continue, "what the mayor, &c., could not spare out of the overplus of rent, viz. 7*l.*," should be deducted out of the 20*l.* given to the lecturer and schoolmaster, so that his sister should always have her 20*l.* yearly. An increase in the rents took place. It was held, by the House of Lords, that subject to the specified charges the increased rents went to the mayor and corporation. *The Mayor, &c. of Beverley v. the Attorney General*, 66

— A. devised to B. a piece of land in the hamlet of N. He then declared that he had long contemplated erecting and endowing almshouses on some part of his estate in the parish of N, and if within twelve months after his decease any person should give a piece of land as a site for such almshouses, then as soon as the same had been legally dedicated to charitable uses he directed his trustees to pay to the trustees of the intended charity 60,000*l.*, to be devoted to the purposes of the said charity, but so that no part should be applied to the purchase of lands for the same. B. within the twelve months duly dedicated to the purposes of the charity that land which had been devised to him. On a bill filed to have the 60,000*l.* applied for the benefit of the charity, it was held, by the House of Lords, that the gift in the will of that sum, as it expressly excluded the purchase of land, was a valid bequest, and was not affected by the 9 Geo. 2. c. 26. *Philpott v. St. George's Hospital*; and *Attorney General v. Philpott*, 70

— If lands are given to a corporation, subject to certain specified charges for charitable purposes, the increased rents will belong to the donees of the lands. *Attorney General v. the Dean and Canons of Windsor*, 320

— Certain inhabitants of the town of I. purchased in 1549 property (long leasehold houses and buildings), and conveyed it to trustees, upon trust to provide an honest and discreet person to be schoolmaster, who should instruct as well in all godly learning and knowledge as in other manner of learning all such children as should be brought to him. The trusts then provided for the payment of the schoolmaster and repair of the buildings out of the rents, and the surplus to be applied in mending and repairing the highways, bridges and watercourses of the parish of I. Dissenters had for a very long period been appointed some of the trustees, and upon an application for the appointment of new trustees, the Master of the Rolls being of opinion that,

the charity being substantially founded for other objects besides a school, dissenters might be the trustees, appointed several who were not members of the Church of England; but, upon appeal, it was held, reversing his Honour's decision, that the primary object of the charity being education, including religious education, it must be understood as education in conformity with the tenets of the Church of England, and therefore that the trustees ought to be persons who were members of that church. *In re Ilminster Charities*, 496

— Trustees of a fund applicable in emergencies arising from war to maintenance of a volunteer corps, the income of which, after cessation of such emergencies, was applicable to the benefit of the poorer members of the corps, their wives and children, may pay it into court under 10 & 11 Vict. c. 96, and ask for a scheme for its future management, without the certificate of the Charity Commissioners, under 16 & 17 Vict. c. 137. s. 17. *In re St. Giles's and St. George's, Bloomsbury*, 560

— By long custom four measures of corn were distributed to the poor of two parishes by the owners of the M. estate. In 1795 a bill for partition was filed, and subsequently an act of parliament to effect the same was passed, and lot 2. in the schedule was allotted to W, and in the same schedule the above measures of corn were mentioned as attaching to that lot, though it was not expressly said that they were a charge on the land. For thirty years the owner of lot 2. paid a sum of money in respect of the measures of corn, and on F.W, the son of W, succeeding to lot 2, he refused further payment, though for two years later the money had been paid by the agents of F. W. On an *ex officio* information being filed against F. W, he insisted that the payments had been all along merely voluntary, and for the last two years without his authority; but the Master of the Rolls declared the value of the measures of corn were a charge on the land in lot 2, which was affirmed, on appeal. *Attorney General v. West*, 789

— Testator established a charity in the parish of M, but left in blank the space for the sum. In a subsequent part of his will he gave an annuity of 15*l.* to J. for life; and after his decease he gave "to the minister and churchwardens of the parish aforesaid the said sum of a year, in addition to the two sums before mentioned." It was held, that the gift not only referred to the 15*l.* a year given to J. for life, but also to the charity established in the previous part of the will. Also, that the charity was valid, and that it did not contemplate bringing land into mortmain. *Hartshorne v. Nicholson*, 810

— Appointment of Trustees. See School. And see Metropolis Management Act.

CHARTER—Construction of condition in, as to money payment made directly or indirectly. *Rendall v. Crystal Palace Co.*, 397

COMMISSIONERS—The Court appointed a gentleman, practising as an advocate and solicitor in Quebec, as a Commissioner, under the 38th section of the Settled Estates Act, to take the consent of a married woman resident there. *Turner v. Turner*, 232

— The Commissioner for taking the consent of a married woman under 19 & 20 Vict. c. 120. s. 38. must be a solicitor of the Court of Chancery; overruling *Turner v. Turner*, p. 232. *Turner v. Turner*, 272

COMPANY—Right of preference shareholders to have the full amount of their respective dividends before any payment in respect of dividends on the ordinary stock. *Henry v. the Great Northern Rail. Co.*, 1

— An award made by Commissioners under an act of parliament empowering a company to take the lands of an infant for a canal, since converted into a railroad, was informal, and it was repudiated by the infant on attaining twenty-one. No subsequent steps were taken either to fix the price of the land or the amount of rent-charge to be paid; but a rent was paid, which was, however, varied from time to time, and, with the exception of a small part, which was given up to the landlord, the company remained in possession of the greater part of the land. Fifty-seven years after disputes arose, and each party gave the other notice to quit such part of the land taken by the company as each held. The company then filed a bill, asking for a conveyance of the lands comprised in the award, and to restrain the defendants from making a bridge over the railroad. It was held, that the mistakes of the mutual agents of the parties acting under the compulsory clauses of the act of parliament, could not then bind the land or give vitality to an informal award on such a contract, and that the company could not ask for a conveyance of the lands on their securing a perpetual rent-charge of 14*l.* a year to the defendants as stated in the award. Further, that the landowners had no power to evict the company, or build a bridge over the railroad without the consent of the Commissioners or the directors, as mentioned in the act of parliament. Also, as the powers of the act were not limited, that the company, notwithstanding the lapse of time, could still take the lands; but, if not, that the Court could still make a hostile decree and fix the price to be paid by the company for the land. The Court, however, refused to restrain the defendants from using the bridge which had been completed, upon their undertaking to keep an account of all coal and goods which should pass over it. *The Somersetshire Coal Canal Co. v. Harcourt*, 139

— A company was formed to establish a harbour, and the proprietors had power by their acts to borrow money and to mortgage their freehold and leasehold property, and the expected tolls, &c. Money was borrowed from private individuals, and mortgages given to secure repay-

ment of the loans with interest. By several statutes the Exchequer Loan Commissioners were authorized to advance money to complete public works, and to take mortgages as security for repayment of principal and interest; and by one of these statutes four-fifths of any individual creditors were authorized by writing to consent to give the Commissioners priority over themselves, and such consent was to be binding on all creditors of a like description. The creditors of this harbour executed a consent of that kind, giving the Commissioners priority over themselves, first, in respect of the interest of the loan, and then (after satisfaction of the interest due to themselves) in respect of the principal. By another statute the Commissioners were empowered to enter and sell, and the purchaser was to hold the property free and discharged from all liability to the harbour proprietors, and all who claimed under them. The produce of the sale was to be applied in discharge of the claims of the Commissioners, but nothing in the statute contained was to prejudice the rights of the other creditors to any surplus. The interest on all the loans fell into arrear. The Commissioners entered and sold. It was held, by the House of Lords, that the memorandum of consent was valid and binding; and that after the Commissioners had taken from the purchase-money the amount of interest due to them, the other creditors were entitled to come on the surplus for their interest, but that no bill for any account could be sustained against the purchaser. *The South-Eastern Rail. Co. v. Jortin*, 145

— A banking company was established in July 1836, under the statute 7 Geo. 4. c. 46. It was provided by the deed of settlement that a portion of the profits should form a guarantee fund, and that if the company should lose the whole of the guarantee fund, and one-quarter of the paid-up capital, a meeting should be called, which by a majority might declare the company dissolved. On the 26th of November 1857 the company stopped payment, and on the 26th of December following a meeting was held, when it was resolved to register the company under the statute 20 & 21 Vict. c. 49, and this was done on the 30th of the same month. On the 22nd of January 1858, at a meeting, the directors reported that the whole of the guarantee fund was lost, and, as they believed, the whole paid-up capital, and the dissolution of the company was agreed to, and liquidators were appointed to wind up the company voluntarily, under the statute 19 & 20 Vict. c. 47. A petition was presented by creditors of the company, praying that a compulsory winding-up should be ordered, when one of the Vice Chancellors made an order for the continuance of the voluntary winding-up with various restrictions, and decided that the certificate of registration having been obtained, he had no jurisdiction to interfere. It was held, upon appeal (*Lord Justice Knight Bruce dissenting*), that the registration after suspension of payment was valid, but (both Judges agreeing) that a compulsory winding-up should be ordered, with liberty to adopt any proceedings in the

voluntary winding-up. *In re the Northumberland and Durham District Banking Co. and the Joint-Stock Banking Companies Act, 1857*, 354, 356

— If a party is induced to subscribe to a company, upon misrepresentation made by it or on its behalf, the shareholders, on the company being wound up, cannot insist upon such party being placed on the list of contributories. Misrepresentations made by a secretary or manager, in the absence of authority, do not bind the company; it cannot be assumed that he was an agent to commit a fraud. A judgment in favour of a company at law, for the payment of the deposit on shares subscribed for, will not prevent this Court from giving relief when the subscription was procured by fraud, which was not in evidence when the judgment was obtained. *In re Deposit and General Life Assurance Co., ex parte Ayre*, 579

— A managing director of a company induced contractors to receive payment for work done in preference shares of 5*l.* each, on which 3*l.* per share had been paid, upon an understanding, which was confirmed by a resolution at a board meeting, that no more than 3*l.* per share would be called, and that they would indemnify them against further calls, and also accept a part of such shares at par in payment of calls, should any be made. The company did afterwards make a further call, but they refused to abide by the contract or the resolution, alleging that it was invalid. Upon a bill by the surviving contractor against the managing director and another to obtain a performance of the agreement, it was held, upon demurrer, that the directors making the contract were not compellable to perform the agreement or to make good the representations made, that they could not comply with any decree or order that might be made for the specific performance of the agreement, and that the remedy was at law in an action for damages. *Ellis v. Colman*, 611

— A company having powers, unlimited as to time, to purchase land for the purposes of their undertaking, took possession, in 1797, of the lands of an infant, but no effectual steps were taken for fixing the price, an informal award only having been made, which, upon the infant's coming of age, was repudiated by him, and an annual rent only being from time to time paid. Disputes having arisen in 1854, fifty-seven years after the lands had been taken, it was held, that the company could not compel a conveyance of the land, upon the footing of what had already taken place between them and the landowner; but that both parties must, with reference to their respective rights, proceed under the act of parliament. *The Somersetshire Canal Co. v. Harcourt*, 625

— Power of company registered under Joint-Stock Companies Act, 1856, to issue debentures for payment of debts. *Bryon v. the Metropolitan Saloon Omnibus Co.*, 685

— Adoption by company of agreement by promoters. *Williams v. the St. George's Harbour Co.*, 691

— A company was incorporated under the Joint-Stock Companies Act, 1856, the objects of which were to purchase a number of vessels and run them between England and Australia, or to let out the same for hire, and generally to transact the business of shipowners. By the articles of association the business of the company and all matters relating to the company, and the affairs thereof were to be controuled, managed and regulated by the directors, who might exercise and do all such powers, discretions and things which the company might exercise and do as were not by the Joint-Stock Companies Act, or by the articles, declared to be exercisable or done by the company in general meeting. Upon demurrer to a bill to set aside a mortgage of one of the company's ships, executed by the directors, it was held, the directors had power to execute the mortgage, the power not being required either by the act or by the articles to be exercised by the company in general meeting. *The Australian Auxiliary Steam Clipper Co. v. Mounsey*, 729

— Non-liability of, to a fine on admission to copyhold upon re-investment of purchase-money of land. *In re the Eastern Counties Rail. Co., ex parte the Vicar of Sawston*, 755

— In winding up a company the directors will, as against the shareholders, be allowed their fees for attendance at board and other meetings, when the same have been sanctioned at the general annual meetings of the shareholders, though in the result the dealings of the company were unfavourable. *In re Commercial and General Life Assurance, Annuity, Family Endowment and Loans Association, ex parte Johnson*, 808

— A creditor obtained a judgment against a company by default; he then proceeded at law against several of the shareholders, among whom was the plaintiff, individually; from some he obtained various sums of money, from others nothing. Upon a bill being filed, it was held, that the plaintiff, as he had not proved either fraud or collusion, could not question the debt, or the validity of the judgment at law; that a tradesman employed by the directors of a company were not bound to inquire whether they were acting *ultra vires*; that the creditor was bound to give credit to the shareholder for the sums received from the others, but that this Court would not direct any account of such monies, or of the payments made out of them in satisfaction of costs of proceedings against shareholders, from whom nothing was obtained. *Green v. Nixon*, 819

— By deed of settlement of an incorporated joint-stock company directors were empowered to effect assurances on lives on such terms and conditions as they should think proper; and it

was provided that every policy, &c. should be given under the hands of not less than three directors and sealed with the common seal of the society, and that there should be contained therein, and in every other contract to be entered into on behalf of the company, in or about the premises, a reference to the deed of settlement; and it was by another clause declared that it should be competent for the directors generally, where the deed did not otherwise provide, to act in the direction of the concerns of the society, and to do all things which might be requisite in that behalf. Three directors having signed a contract, not under seal, to grant a policy of assurance, it was held, that the directors had power to make such contract, and that the same was binding on the company. *In re the Joint-Stock Companies Winding-up Act, 1848, 1849; and In re the Athenæum Life Assurance Co., ex parte the Eagle Insurance Co.*, 829

— See Account. Mine and Mining Company. Winding-up Acts.

COMPENSATION—to purchaser. See Vendor and Purchaser.

COMPOSITION DEED. See Debtor and Creditor.

CONFLICT OF LAWS. See Marriage. Mortmain.

CONTRACT—Construction of arbitration clause, as to how far it excluded the jurisdiction of the ordinary tribunals. *Scott v. the Corporation of Liverpool*, 641

— Expenditure under. See Equitable Relief.

— *Ultra vires*. See Company.

— See Baron and Feme. Frauds, Statute of. Specific Performance.

CONTRIBUTORIES—D. agreed with the promoters of a joint-stock company to execute works, for which he was to be paid partly in shares. D. to assist the formation of the company, signed the subscription contract for 620 shares, and an act of parliament was obtained. The company failed, and was ordered to be wound up. On the share register D.'s name appeared as holder of only ten shares, but when that document was settled only one shareholder was present, who held the proxies of two others. It was held, on appeal, affirming a decision of one of the Vice Chancellors, that the name of D. was rightly placed on the list of contributors for 620 shares, he having signed the subscription contract for that number. *Ex parte Davidson, in re North Shields Quay Co.*, 488

— See Company.

CONVERSION—Real estate converted by will into personality continues as such in the absence of specific acts restoring the character of realty, and acts affecting part of a residuary estate will not

extend to the whole by implication. *Meredith v. Vick*, 162

— Testator directed his trustees to sell and convert into money all his property, except such portion as consisted of monies in the public funds, and the proceeds thereof to be invested in the public funds. This exception included long annuities. *Howard v. Kay*, 448

— Where a settlor conveys real estate upon trust for sale, and directs the proceeds to be applied to certain purposes, some of which fail, whether the sale is directed to be made in the lifetime of the settlor or after his decease, the property will, to the extent to which the purposes fail, result to the settlor as personal estate. *Secus*—if there is a failure of the whole purposes for which the sale is directed. *Clarke v. Franklin*, 567

— See Portions. Settlement. Trust and Trustee.

CONVEYANCING COUNSEL. See Costs.

COPYHOLD—A fund payable for enfranchisement of copyholds having been paid, pursuant to the Copyhold Act, 1852, into the Bank, in the name of the Accountant General, to an account "*Ex parte the Copyhold Commissioners*," the petition of the lord of the manor for investment of the fund, was served upon the Commissioners, who appeared thereupon, but only to ask for their costs. It was held, they were entitled to costs of their appearance. *Ex parte Queen's College, Cambridge*, 178

— A copyhold estate was held by a father, who was admitted as sole purchaser, "for the lives of his three sons and the life of the longest liver of them successively," at a yearly rent, and for a heriot on the death of the *cestui que vie*. The father, by his will, devised the estate to the first *cestui que vie*, who obtained admission to the estate for his own life, and afterwards died, having devised it to A. B. The second son was then admitted for his life as one of the lives in the grant to his father, claiming the estate beneficially and by way of advancement. Upon a bill by A. B. the devisee, and an annuitant under the first son's will, it was held (assuming the custom to be valid, and notwithstanding the father had given benefits to his sons by his will) that the names of the sons were inserted in the grant as an advancement to each son successively. Also, that if the custom was bad, and the admission obtained wrongful, the plaintiff's remedy was at law: the bill, therefore, was dismissed, with costs, but without prejudice to any proceedings at law. *Jears v. Cooke*, 202

— Testator, seized in fee of a copyhold estate, devised it to his wife for life; and after her decease he (without giving any estate to his executors) directed them to sell the copyholds, and then divide the proceeds. Testator's widow was admitted for life; and after her decease the

executors sold the estate, and executed a bargain and sale to the purchaser; and he, without having been admitted, made his will, and devised the estate to his wife; he was subsequently admitted to the copyhold estate, and died. Upon a suit to administer the estate of the wife, it was held, that the admission of the wife of the first testator enured for the benefit of the purchaser under the executors; that the customary heir of the purchaser took no estate in the copyholds, but that they passed to the wife as devisee. The wife, under the will of her husband, having also entered upon some freehold lands purchased after the date of the will, it was held, that they passed to the heir-at-law, and that he was not bound to elect between them and the benefits given by the will of the wife. *Seaman v. Woods*, 538

— An agreement was made by a copyholder to sell his estate so soon as it should have become freehold, and to apply to the lord of the manor, and use his best endeavours to enfranchise the same, and procure all necessary parties to join in conveying the inheritance in fee simple to the purchaser, his heirs and assigns. The agreement was made after the passing of 4 & 5 Vict. c. 35, but before the passing of 15 & 16 Vict. c. 51. The conveyance in fee from the lord of the manor was obtained after the passing of the latter act, and it contained a reservation to the lord of his manorial rights. It was held, that the agreement to purchase must be considered as made with reference to the Enfranchisement Acts, and that the reservations made under 15 & 16 Vict. c. 51. were within the terms of the agreement. Upon an enfranchisement under 15 & 16 Vict. c. 51, and under an agreement to purchase a freehold, it is not incumbent upon the vendor to produce the title of the lord of the manor. *Kerr v. Pearson*, 594

— A bill by a copyholder to set aside a wrongful seizure by the lord is maintainable, notwithstanding that there is a remedy at law by action of trespass. *Andrews v. Hulse*, 655

— Fine on admission. See Company.

COPYRIGHT—An agreement between an author and publisher that the latter should publish at his own expense and risk a work of the former, and after deducting from the produce of the sale the expenses, including a commission of 10l. per cent. on the gross amount of the sale, the profits remaining of every edition that should be published of the work should be divided equally between the author and the publisher, is not an irrevocable licence to publish, but a joint adventure, which the author might put an end to at any time after the publication of the first or any subsequent edition. An edition consists of so many copies as are issued to the public at a time; and where a work is stereotyped, every fresh issue is a new edition. *Read v. Bentley*, 254

COSTS—Candidates at a general election for mem-

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bers of parliament having employed a firm of solicitors as their election agents, it was held, the employment was professional, and that their bill of costs was subject to taxation under 6 & 7 Vict. c. 78. *In re Osborne*, 532

— In an interpleader suit, if the matter in dispute is under 1,000*l.* the costs to be charged, under the Orders of 30th of January 1857, must be upon the lower scale. *Gibbs v. Gibbs*, 577

— Settled estates having been purchased by a corporation under the powers in their act and the purchase-money paid into court, the tenant for life of the land taken petitioned for payment out of court of part of the money to be invested in purchase of another estate. She laid the abstract before her own counsel, who approved of the title, and, subsequently, it was laid before one of the conveyancing counsel of the Court, who also approved the title. The taxing Master disallowed the fees of the private counsel, but his decision was overruled by one of the Vice Chancellors; and it was held, on appeal, that so much of the costs as consisted of fees for consultation between the two counsel were reasonable charges, but that the whole cost of the investigation of the title by the private counsel was too much, and the Court sanctioned a compromise of the claim, and varied the order of the Vice Chancellor. *In re Jones's Settled Estates*, 706

— Testator, by his will, directed his executors to pay so much of his residuary personal estate as they could by law dispose of for charitable purposes, to the Lincoln Penitent Female Home, and made no further disposition of such residuary personal estates. It was held, that the costs of a suit to administer the testator's estate ought to be paid out of the residuary personal estate, inapplicable by law to the payment of the legacies to the charity, and, consequently, undisposed of by the will. *Taylor v. Mogg*, 816

— Where an information by the Attorney General is dismissed, the Court has jurisdiction to dismiss it with costs. *Attorney General v. Hanmer*, 837

— Lien for. See Mortgage.

— of appearance. See Copyhold.

— See Security for Costs. Witness.

COUNSEL — Authority of. See Attorney and Client. And see Costs.

COVENANT—The Earl of M., by articles of separation between himself and his wife, covenanted that he would on or before the 1st of February 1835, either by a charge on freehold estates to be situate in England or Wales, or by an investment in the funds, or by the best means which might then be in his power, secure the payment of an annuity to a trustee for his wife. It was held, this did not create a charge on the lands of

which the Earl was seised on the 1st of February 1835, but was a personal covenant providing for the doing of a certain act, whereby a charge might be created. *Mornington v. Keane*, 791

— for perpetual renewal. See Lease for Lives.

— to bequeath. See Settlement.

CREDITORS' DEED. See Debtor and Creditor.

CREDITORS' SUIT. See Debtor and Creditor.

CUSTOM—Whether a right can legally exist in an officer of the Crown to sell the soil of the Crown and not account for the proceeds, *quære*; but, if it can legally exist, such right ought to be established by evidence cogent and invincible. *Seeble*, an office of trust under the Crown cannot be annexed to a manor. A profit à prendre in another's soil cannot be claimed by custom, however ancient, uniform and clear the exercises of that custom may be. A right to carry away the soil of another, without stint, cannot be claimed by prescription; nor can the claim be sustained by evidence of a lost grant. *Attorney General v. Mathias*, 761

— OF LONDON—Where a freeman of the city of London by his will appoints an executor, the whole of the personal property is taken out of the custom; but where no executor is appointed, the custom is only displaced to the extent of the disposition contained in the will. *Chappell v. Haynes*, 836

— See Charity.

DEBTOR AND CREDITOR—In a creditors' suit, leave was given to the plaintiff to try an issue as to the sanity of the debtor at a particular time. The plaintiff subsequently declined to try the issue, and upon the application of other creditors they were permitted to be substituted for him, upon giving security for the costs of the trial. *Elliott v. Ince*, 51

— Certain trust-deeds were prepared for the benefit of creditors, and a time was fixed within which the creditors were to execute or be excluded from the benefit of such deeds, the trustees having discretion to allow creditors to sign after the period fixed. A judgment creditor, relying upon his claim as paramount to the deeds, declined to execute during twenty-two years. The judgment subsequently turned out to be invalid, and he now petitioned the Court, in a suit instituted for carrying into effect the trusts of the deeds, to be allowed the benefit of such deeds, and offered to execute them. It was held, there was no such case of mistake or misapprehension as to constitute an equity, and the petition was dismissed. *Brandling v. Plummer*, 188

— Creditors who sign or assent to a composition-deed are entitled to such dividends as are made

previous to the insolvency of the debtor. Creditors who assent to a composition-deed will be allowed to sign and take the benefit of the deed after the insolvency of the debtor. If creditors neglect or refuse to execute or claim the benefit of a composition-deed, they will not be allowed to come in after the insolvency of the debtor; but any dividends which they might have entitled themselves to before the insolvency will be paid to the provisional assignee, and they will be left to such legal remedies as they may have. *Biron v. Mount*, 191

— R. P. H. J., the eldest son and heir apparent of Sir R. P. J., on his marriage effected insurances on his life for 10,000*l.*, and settled them for the benefit of his wife. In 1853 he made his will, leaving his real and personal estate to B. and T. in trust to pay his debts, and then in trust for his wife; and appointed B. and T. his executors. In 1854, being unable to keep up the premiums on the policies, he arranged with B. and T., and afterwards with T. alone, to pay the premiums due and to become due, and that he, R. P. H. J., should give T. a bond for 14,000*l.*, payable, if R. P. H. J. should survive his father, Sir R. P. J. T. paid the premiums, and then he insured the whole life of R. P. H. J. for 14,000*l.* R. P. H. J. died in 1855, in the lifetime of his father, having had pecuniary transactions with B. and T. A suit was instituted by the widow of R. P. H. J. (who had subsequently married again) for administering the estate of her late husband, for an account of all dealings and transactions between him and B. and T., and for a declaration that the 14,000*l.* policies formed part of his personal estate, and for other purposes. The bill charged fraud in the transaction of the 14,000*l.* insurance; and at the hearing of the cause it was argued, that there was a contract between R. P. H. J. and T. that the latter was to effect the insurance. It was held, there was no evidence of express contract to insure; that the insurance was effected by T. for his own protection, and not as a trustee for R. P. H. J., and that, therefore, the 14,000*l.* formed no part of the personal estate of R. P. H. J.; and that if there had been fraud in effecting the policy, it was a fraud on the office, and the benefit of the policy would belong to the office, and not to the estate of R. P. H. J. *Freme v. Brade*, 697

— A creditor, who had obtained a judgment against a railway company whose tolls were wholly inadequate to meet the debts of the company, was held entitled to a charge on the tolls. He was also appointed receiver. A sale of the lands was refused, but inquiries were directed as to the best means of making the undertaking profitable. *Furness v. the Caterham Rail. Co.*, 771

— See Judgment Debt. Priority.

DEED. See Assignment. Conversion. Debtor and Creditor. Dower.

DESCENT. See Legitimacy.

DEVISE—A devise was made to trustees and their heirs, upon trust for an illegitimate person and his heirs. Upon the death of the *cestui que trust* without heirs, it was held, under 7 Will. 4. & 1 Vict. c. 26. s. 6, that a freehold lease for lives passed to the Crown under an administration taken out by the Solicitor of the Treasury; and that the trustees and their heirs took no interest as special occupants in the property. *Reynolds v. Wright*, 392

— Testator devised his estates to trustees in trust for A. B. upon attaining the age of twenty-five, for life, with remainder to the heirs male of his body, and with ultimate remainders over; and he directed that the persons who should severally come into possession, if they should be of the age of twenty-one years, or if under that age, then within twelve months after attaining that age, should assume the surname and arms of testator, they respectively not being of that name; and in case any of such persons should refuse or discontinue to take, assume and use such surname and arms respectively for the space of twelve months after they should severally become entitled, then the estate of any person so offending should, from and after the expiration of the said twelve months, cease and determine, and should go over to the next person entitled. A. B. upon attaining twenty-one assumed the name and arms of the testator, and came into possession of the estates at twenty-five years of age. Some years afterwards A. B. discontinued to use the required name and arms for above twelve months. It was held, a forfeiture had taken place, and the estate determined and went over. *Blagrove v. Bradshaw*, 440

— Testator devised a house and premises to trustees upon trust to offer the use and enjoyment of them to the eldest of his children, for the time being, rent free, so long as he or she should please; but on refusal, death, or ceasing to occupy, the offer was to be made to the eldest of his other children in succession, and on the refusal, death, or ceasing to occupy of all the children, then upon other trusts. It was held, a personal occupation was intended; that occasional residence would be sufficient if the house was kept furnished and in the occupation of a servant, but that the premises could not be let. *MacLaren v. Skainton*, 442

— Divesting of original devise, by subsequent gift over, though that gift had failed. *Robinson v. Wood*, 726

— See Alien. Conversion. Encroachments. Legacy. Mortmain. Will.

DIVIDENDS—on shares. See Apportionment.

DIVORCE AND MATRIMONIAL CAUSES ACT. See Baron and Feme.

DOWER—Where upon a purchase of freehold estate

the conveyance deed contained a declaration, "that no widow of the purchaser should be dowerable out of the hereditaments," it was held to be unnecessary, for the validity of the declaration, that the deed should be executed by the purchaser. *Fairley v. Tuck*, 28

DRAINAGE. See Vestry.

ELECTION. See Copyhold.

ENCROACHMENTS.—The possessor of lands, encroachments on the Forest of Dean, devised the same to his wife for life, with remainder to his sons. The 20 Car. 2. c. 3. had enacted that all titles obtained by encroachment after the passing of the act should be void. The 1 & 2 Vict. c. 42. enabled "holders" of certain encroachments so made to acquire the fee. The wife obtained a conveyance of the fee in such encroachments. It was held (affirming a decree of one of the Vice Chancellors), that she had acquired the fee, not for her own benefit only, but for the benefit of all parties interested under her husband's will. *Yem v. Edwards*, 23

ENFRANCHISEMENT. See Copyhold.

EQUITABLE RELIEF.—A. B. who had contracted to buy a ship, agreed with C. D. that he should make engines of a stated speed, at a stated price, and if the speed were not attained C. D. should remove them. This contract was not binding under the Ship Registry Acts. A. B. and Messrs. G. F. & S. Y. arranged with the owner of the ship that it should be sold to the Messrs. Y. and that A. B. should be entitled to buy it on certain terms. The ship was transferred to S. Y. absolutely. C. D. made the engines, and put them into the ship, with the knowledge of S. Y. the registered owner, but they would not attain the required speed. C. D. offered to remove the engines, but S. Y. would not allow it, nor would he pay for them. C. D. then filed a bill against A. B. and the Messrs. Y. for payment of the costs of the engines or for the sale of the ship and payment of the costs of the engines out of the proceeds, and for other purposes. The Master of the Rolls gave the plaintiff liberty to bring an action, for which he imposed certain terms; but upon appeal, it was held, overruling that decision, that plaintiff's remedy, if any, against S. Y. was at law, and not in equity. *Rennie v. Young*, 753

ESTOPPEL.—The doctrine of estoppel by deed only applies between the parties to the deed and to matters arising out of the deed. In collateral matters, the deed would be evidence, but no estoppel. *Carter v. Carter*, 74

EVIDENCE.—to explain Mortgage Deed. See Baron and Feme.

— See Legacy.

EXECUTION AGAINST SHAREHOLDERS.—By deed of settlement of the A. Life Assurance Company

it was provided, that in every policy granted by the company there should be contained a reference to the deed, and a proviso limiting the scope and effect of the contract thereby created should take effect and be satisfied only out of such funds and property of the society as should be at the disposal of the directors in that behalf, and negating an unconditional liability. Provided, that nothing in the deed or in such contract contained should limit the liability of any shareholder as to the performance of such contract, or prejudice the rights of any person or persons against any shareholder by virtue of the statute 7 & 8 Vict. c. 110. The A. Company granted to the P. Company a policy of insurance, containing a proviso that the capital stock of 100,000*l.*, and other the property of the society remaining at the time of any claim or demand made unapplied and undisposed of and inapplicable to prior claims, should alone be liable to make good all claims and demands upon the society, or otherwise, under the policy; and that no director, officer, or shareholder of the said society should be in anywise personally liable beyond the amount unpaid of his shares, nor longer than he should retain the same shares. The E. Company having recovered judgment against the A. Company in an action on the policy, it was held, that they were precluded by their contract from issuing execution against a shareholder personally; and that the clause in the deed did not give them the right. *In re the Joint-Stock Companies Winding-up Acts, 1848, 1849, and the Athenæum Life Assurance Company, ex parte the Prince of Wales Life Assurance Company*, 798

EXECUTOR.—Testator was possessed of leasehold estate in respect of which he was liable upon onerous covenants. In a suit for administration of his estate the leaseholds were sold and the money brought into court. It was held, that the suit indemnified the executor from all future breaches of covenant; that no part of testator's estate ought to be set aside to meet contingent liabilities; that the estate ought to be distributed, and that the remedy of any future creditor was not against the executor, but against the parties among whom the estate had been distributed. *Waller v. Barrett*, 214

— Liability of appropriated legacies to testator's covenants. *Noble v. Brett*, 516

— See Custom of London. Limitations, Statute of. Partners.

FIXTURES. See Landlord and Tenant.

FOREST OF DEAN. See Encroachments.

FORFEITURE.—of calls. See Mine and Mining Company. And see Will.

FRAUDS, STATUTE OF.—A paper was signed by a duly authorized agent; it contained an agreement to do a certain thing, but not any explanation of the necessary details, but it referred

to another paper which did contain them. It was held, that the two might be connected together by parol evidence, so as to constitute an agreement sufficient within the Statute of Frauds. A paper sent to a solicitor as "instructions" to prepare a lease, may be treated as the final agreement for the lease, if the evidence shews that it was only so sent to be put into a formal shape, but the act of so sending it is evidence to raise a *prima facie* presumption that it did not contain all that the parties meant, but might afterwards be modified by either of them. *Ridgway v. Wharton*, 46

— A. filed a bill against C. alleging an agreement in 1846, between them for working the T. mine, in which C. had a term of years, subject to payment of seven annual instalments of 500*l.* each; and praying an account, &c. The bill stated that the mine was afterwards, in 1847, demised by C. to E. on a royalty, and that A. had paid to C. monies on account of their partnership, and on one occasion, in 1849, C. had signed a receipt as follows—"Received from A. 250*l.*, his share of dividend in instalment due to Messrs. B. [the lessors] for the T. mine." C. set up a totally different agreement from that alleged by the plaintiff, and claimed the benefit of the Statute of Frauds. The subject of the agreement was held to be within the meaning of the Statute of Frauds, and the receipt not sufficient to take the case out of the statute. *Caddick v. Skidmore*, 153

— Part performance. See Baron and Feme.

GOODWILL. See Partners.

GRANT—A grant by letters patent by the Crown as lord of the manor of E, of "all those coal-mines found, or to be found, within the commons, waste grounds, or marshes within the said lordship of E," &c. with a proviso that the grant should be construed strictly against the Crown, and more strictly and beneficially for the grantees, was held to pass coal lying under the foreshore of the estuary of the river Dee, between high and low-water marks, and forming part of the manor of E. *Attorney General v. Hammer*, 837

INCUMBERED ESTATES ACT. See Sale.

INFORMATION. See Costs.

INJUNCTION—Upon an affidavit for an injunction to restrain proceedings at law, an affidavit of merits must be made by the plaintiff, though he has no personal knowledge of the facts stated in the bill. An affidavit by the solicitor, who had investigated the case, is not sufficient. *Mollet v. Enequist*, 815

— See Nuisances Removal Act. Vestry.

INSURANCE—A policy of assurance contained a proviso that in case the assured should commit suicide the policy should be cancelled by the

return of the premiums, except the policy should have been legally assigned. It was held, that the policy was forfeited, though the assured committed suicide while in an unsound state of mind. Also, that a deposit of the policy by the assured, as a security for monies advanced, amounted to a legal assignment within the meaning of the policy. *Dufaur v. the Professional Life Assurance Co.*, 817

— Construction of policy. See Debtor and Creditor. And see Winding-up Acts.

INTEREST. See Legacy.

INTERPLEADER—A bill of interpleader stated a demise by a former Earl of S. to plaintiff of certain lands forming part of an estate settled by act of parliament in perpetuity upon the Earldom of S, that Earl T. claimed the rent due from plaintiff as heir to the Earldom of S, and other defendants claimed the same rent under a disentailing deed executed by the last Earl of S. and his will. Plea, by defendants alleged to claim as devisees, that the premises in question were not portion of the estate settled by the act, was held sufficient. *Mealor v. Talbot*, 165

— See Costs.

INTERROGATORIES—A plaintiff having let the time go by for filing interrogatories does not by amending his bill become entitled afterwards to file them to the whole bill. The proper course is to apply to the Court for an extension of time. *Dennis v. Rochussen*, 368

INTESTATE. See Administration by the Crown.

INVESTMENT. See Company. Copyhold. Costs.

ISSUE DEVISAVIT VEL NON—Where a will of real and personal estate was executed after the Wills Act, (7 Will. 4. & 1 Vict. c. 26.) and was established as to the personality before the Judicial Committee of the Privy Council in proceedings in which the heir-at-law (but not as such) was a party, it was held, the heir was still entitled to an issue *devisavit vel non*. *Stacey v. Spratley*, 725

JUDGMENT—a security upon land. See Usury.

JUDGMENT DEBT—A decree in equity registered under 1 & 2 Vict. c. 110. does not constitute a judgment debt. *Garner v. Briggs*, 483

JURISDICTION. See Copyhold. Sheriff. School.

LANDLORD AND TENANT—Upon a question arising between landlord and tenant as to trade fixtures, the Court held, that buildings built of brick, with brick foundations let into the soil, although erected for the sole purpose of trade, could not be removed by the tenant; although machinery, engines, vats and utensils, with their accessories, might be removed. *Whitehead v. Bennett*, 474

— See Tenant for Life.

LANDS CLAUSES CONSOLIDATION ACT—Land belonging to A. B. was taken by a railway company, under the compulsory powers of their act, to form a branch line. In 1850 the scheme was abandoned. The company, in 1857, brought a bill into parliament to enable them to make another line, which would pass over the land taken from A. B. A. B. filed a bill charging that the company could not use for any other purpose than that of the branch line the lands which had been taken under their compulsory powers to enable them to form that line, and praying that as the project had been abandoned, the company might be ordered to reconvey the land to him upon payment of the present value. To this bill the company demurred, for want of equity, and the demurrer was allowed by one of the Vice Chancellors, and on appeal. A landowner cannot, under the 127th and 128th sections of the Lands Clauses Consolidation Act, require a reconveyance to him of the land taken from him for an undertaking which has been abandoned, before the expiration of the ten years limited by those sections. By "disposing of" lands within the 127th and 128th sections, the transfer of them to other persons is contemplated, and not the application of them to a different purpose from that for which they were originally obtained. *Asley v. the Manchester, Sheffield and Lincolnshire Rail. Co.*, 299, 478

— A railway company took lands settled to uses, and paid the purchase-money into Court under the Lands Clauses Consolidation Act (8 & 9 Vict. c. 18.) Certain houses, which were settled to the same uses, were condemned by the Commissioners acting under the Metropolitan Buildings Act (18 & 19 Vict. c. 122. s. 74.), and the houses were rebuilt by the tenant for life, more money being expended than the money paid in by the company. A petition was presented by the tenant for life, under the 69th section of the Lands Clauses Act, for payment of the money paid in, in part payment of the expenses of rebuilding; and on appeal from a refusal of the Master of the Rolls to make any order, it was held that the case came within the spirit of the 69th section, and the Lords Justices made the order. *In re Davies's Estate, and in re the Crystal Palace and West-End Rail. Co.*, 712

LEASE FOR LIVES—A lease for three lives contained a covenant that in case the lessees should, upon decease of either of the *cœtuis que vie* (naming them), be desirous of taking a renewed lease for another life, and should nominate a person in the room of the deceased *cœtuis que vie*, the lessor or the person entitled in reversion would execute a further lease for the life of the person so to be nominated, and the lives of such of them, the original *cœtuis que vie*, as should be then living, and of the survivors and survivor of them, at and under the same yearly rent and with and subject to such and the same covenants, provisions and agreements, "including this present covenant," as were therein contained. This a covenant for perpetual renewal, and must,

mutatis mutandis, be entered into by the reversioner for the time being on every fresh renewal. *Hare v. Burges*, 86

— See Devise.

LEGACY—Testatrix gave to her sister for life everything she died possessed of, and at her death she gave to her brother S. P. or his heirs 1,000*l.* in the 4*l.* per cents. S. P. died in the lifetime of the testatrix. It was held, the legacy to S. P. did not lapse, but took effect in his heirs by substitution. A substitutional gift to the heirs of a legatee who dies in testator's lifetime goes to the next-of-kin of the deceased legatee, and not to his personal representatives. *In re Porter's Trusts*, 196

— Testatrix had power, under her brother's will, to appoint real and personal estate; she gave the real estate to trustees to raise 1,000*l.* and pay the amount as legacies to various persons, and subject thereto for E. P. and his heirs. She then gave several legacies, payable out of her own personal estate, and other legacies payable out of an unappointed moiety of her brother's personal estate, after the decease of his widow, and she directed the duty on all the foregoing legacies to be paid out of her personal estate, and if deficient for full payment either of duty or legacies, such deficiency was to be made good out of the said real estate on which she charged the same. By two codicils testatrix left other legacies, and directed that the sums bequeathed out of her brother's estate should be paid with the other legacies, immediately after her decease. It was held, that the legacies given by the codicils were charged on the real estate, and that the legacies payable out of the brother's estate were not specific but demonstrative. *Williams v. Hughes*, 218

— A legacy given absolutely will not be divested if the event on which it is given over does not strictly happen. After ceasing of a life estate, gift to three persons equally, "or in case of the death of each or either of them, to be divided between the survivors or survivor, or their representatives." On death of the three before the tenant for life, their legal personal representative was held to be entitled to the fund. *Page v. May*, 242

— Testatrix gave two legacies and directed them to be paid out of a reversionary interest in stock to which she was entitled. It was held, the legacies were payable when the reversion fell into possession, and that interest was payable from that time. *Earle v. Bellingham*, 545

— Testator, after settling 10,000*l.* upon his daughter R, bequeathed to her 1,000*l.* on the day of her marriage as a marriage portion. R. was married in the lifetime of testator, who subsequently advanced to her husband 800*l.* in detached sums. The advances were held to be *pro tanto* in satisfaction of the legacy. *Farris v. Goodburn*, 574

— The mere circumstance that the personal estate of a testator not specifically bequeathed is more than sufficient to pay all his debts, funeral and testamentary expenses, and discharge all his liabilities, even with the added fact, that the property specifically bequeathed has been, in consequence, by the executor assigned and delivered to the specific legatee, is not sufficient to discharge the specifically bequeathed property from the demands of the creditors of the testator. *Davies v. Nicolson*, 719

— Testator gave a sum of money to trustees to pay the income to his then unmarried daughter for life, and after her decease to permit her husband to receive the income for his life, nevertheless to be by him applied for the maintenance, education or benefit of the children of his daughter: the daughter afterwards married, and her husband subsequently took the benefit of the Insolvent Act; his wife afterwards died, leaving her husband and two children surviving. It was held, he took beneficially a life interest in the legacy. *Byne v. Blackburn*, 788

— Testator bequeathed all the personal estate of which he should die possessed, except such share as he should become entitled to in the property of A. B. to his wife absolutely, and he bequeathed all his share in A. B.'s property upon certain trusts mentioned in his will. A. B.'s estate, which consisted of two separate sums of stock, came into testator's possession after the date of his will, and were transferred into his name. One of such sums of stock remained standing in his name at his death, but the other sum was sold out by him and applied for his own purposes. It was held, there was an ademption of the legacy in respect of the stock sold out, it having been mixed with testator's property and spent, but the stock transferred to him and continuing to stand in his name passed under the bequest. *Lee v. Lee*, 824

— Testator gave to his brother absolutely certain collieries, and all debts which might be due to him at the time of his decease in respect of such collieries and works, but subject to the payment of all debts and engagements due and payable in respect of or connected with the said works. And for the better enabling his brother to carry on the collieries, testator bequeathed to him 10,000*l*. Shortly before his decease testator sold all his property in the collieries to his brother. It was held, there was no ademption of the legacy of 10,000*l*., but that the direction as to receiving and paying debts could not be carried into effect. *Parsons v. Coke*, 828

— See Devise. Will.

LEGITIMACY—An ante-nuptial son, born in Scotland, of Scotch parents, who was legitimized according to the law of Scotland by the subsequent marriage of his parents, settled in England and purchased freehold property. The son died intestate and unmarried, leaving his father surviving him. It was held, that the father was

incapable, under 3 & 4 Will. 4. c. 106, of inheriting real estate from his son, although that son was legitimate by the law of England as to his personal *status*. The property, therefore, escheated to the Crown. *In re Don's Estate*, 98

— In June 1850, a widower and his deceased wife's sister, both English subjects, having an English domicile, intermarried during a temporary residence in Denmark, and afterwards had issue of the marriage. The legitimacy of the children of the marriage was questioned by the Crown in a suit (instituted after the death of both parents) for the administration of the father's estate. It was held, that the marriage was null and void by 5 & 6 Will. 4. c. 54, and the children, therefore, illegitimate, although by the law of Denmark the marriage of a widower with his deceased wife's sister is held to be a valid marriage. A marriage valid according to the *lex loci contractus*, but violating, in respect of their personal capacity to contract the marriage, the *lex domicilii* of the contracting parties, held invalid by the law of the domicile. Statute 5 & 6 Will. 4. c. 54, prohibiting the intermarriage of a widower and his deceased wife's sister, is an integral part of the English law and public policy, and has, therefore, a paramount effect, not to be evaded by having recourse to foreign laws, but binding upon all English subjects, in whatever country they may be. *Brook v. Brook*, 401

— See Settlement.

LETTERS PATENT. See Grant.

LIEN—A firm of solicitors were employed in May 1853 by trustees to sell some copyhold estates. The purchaser also employed them to complete the purchase. They had money of his in their hands, more than sufficient to pay the purchase-money, and the purchaser directed the solicitors to apply it and pay the purchase-money. The purchaser was let into possession in October 1853. In December following the vendors executed a deed of covenant to surrender the estates purchased, and they signed the receipt for the purchase-money indorsed thereon: the title-deeds were retained by the solicitors, who deposited them in a box containing other title-deeds and documents of the purchaser. The steward of the manor was one of the firm of solicitors, and in June 1854 he admitted the purchaser to the land purchased. The purchase-money was not actually paid by the solicitors as directed by the purchaser, but they settled accounts with the vendors, the trustees, and gave them credit for the purchase-money as received by them, and after allowing costs and charges, there was a balance due to the trustees. Four-fifths of this balance were paid to four of the five *cestui que trust* entitled to the proceeds of the sale. The solicitors retained the other one-fifth in their hands, and upon the remaining *cestui que trust* requiring payment of his share, the solicitors stated that the purchaser had not paid the purchase-money, and that they had retained the deeds which the trustees required them to hold

as security. The solicitors did not pay the purchase-money, and, in February 1866, became bankrupt. Upon a bill by the vendors, it was held, they were entitled to a lien upon the estate for the balance of the purchase-money remaining unpaid. *Wrot v. Dawes*, 635

— for outlay on another's land. See Mortgage.

— for solicitor's costs. See Attorney and Solicitor. Mortgage.

— for unpaid purchase-money. See Vendor and Purchaser.

LIMITATIONS, STATUTE OF—Sir G. B. the tenant for life of the R. estate, in March 1814, granted six redeemable annuities charged on his life estate. By a deed of even date he appointed a receiver of the rents of the R. estate, and directed that the six annuities should be paid *pari passu*. By another deed of even date he conveyed his life estate to a trustee, upon trust, if default should be made in payment of the six annuities, to sell the estate and pay the annuities. In August 1814 Sir G. B. granted three annuities, and by deed of even date he directed the receivers and the trustee to pay the whole nine annuities out of the rents *pari passu*. Notice was given to the receivers and trustee, and the latter entered into possession and paid the annuities, and also the interest on a mortgage (charged on the estates, and which had been assigned by Sir G. B. after the grant of the three annuities), but only for a very short time, after which the rents were only sufficient for payment of the six annuities. In 1846 G. B. the tenant in tail of the R. estate, purchased the six annuities, and having become entitled to the above-mentioned mortgage he obtained possession of the estate. In 1855, forty years after the last payment in respect of the three annuities, the three annuitants filed their bill for an account. During the pendency of another suit, relating to the incumbrances on the R. estate, the interest of some of these annuitants was purchased by the solicitor of one of the other parties to that suit, who covenanted to indemnify his vendors against past and future acts, and he joined as a plaintiff in this suit. The Master of the Rolls decided that the deed of receivership and trust created a trust for the benefit of the incumbrancers; that the plaintiffs were not barred by the Statute of Limitations; that they were entitled to an account; that the purchaser of the mortgage from Sir G. B. had notice of the trust; that after his death the interest on the mortgage was subject to the payment of the annuities; and that the purchase by the solicitor was not open to objection as champerty. On appeal, it was held, by Lord Justice Turner, affirming the decree of the Master of the Rolls (Lord Justice Knight Bruce doubting, and not assenting,) first, that an express trust under the 25th section of the Statute of Limitations (3 & 4 Will. 4. c. 27.) was created in the receivers and trustee, and that that section applies to the case of one *cetui que trust* excluding another, and that, therefore, the plaintiffs were not barred by

the statute; secondly, that by reason of the express trust the plaintiffs' claim was not a stale demand; thirdly, that although the plaintiffs had by their bill offered to redeem prior incumbrances, the Court would not hold them to that offer, the same being inequitable; fourthly, that the purchaser of the mortgage had constructive notice of the trust for the annuitants by receiving interest on the mortgage from the trustee; fifthly, that the purchase by the solicitor was free from champerty, and that even if it had been a purchase from his own client no objection on that ground could be maintained by a third party; and, sixthly, that the direction of the accounts was correct. *Knight v. Bowyer*, 520

— After a decree for taking accounts in an administration suit, one of several executors may insist upon the right of retainer in respect of a debt due more than six years before the testator's death, notwithstanding the Statute of Limitations. *Sharman v. Rudd*, 844

— See Winding-up Acts.

LUNACY—Several persons were joint tenants in tail in possession of an undivided share of lands. One of them was a lunatic. A suit was instituted for partition, in which the lunatic, by the committee of her estate, was a defendant and appeared. The chief clerk, by his certificate, allotted the lands in severalty, and one of the Vice Chancellors, at the hearing upon further consideration, decreed partition and made an order in the suit, and also under the Trustee Act, 1850, (13 & 14 Vict. c. 60.), for the purpose of effectuating the decree, by which he declared the lunatic a trustee of certain hereditaments. Application by petition was made to the Lords Justices to enable the order of the Vice Chancellor to be carried into effect, and their Lordships, on the committee stating his opinion that the partition would be for the benefit of the lunatic, made an order, entitled in the suit in the lunacy, in the matter of the Trustee Act, 1850, and of the Lunacy Regulation Act (16 & 17 Vict. c. 70.) directing the decree to be carried into effect, and that the committee should execute a conveyance of the land vested in the lunatic. *In re Bloomer*, 173

— A. B. gave all his real and personal estate and effects of what nature or kind soever, to C. D. upon trust to pay to his wife for her life, the rents of his real estate and the interest on all sums due to him on mortgages, bond, note or other security, and after her death to get in all debts owing to him on any security, and pay the same over to other persons. C. D. died intestate, leaving E. F. his eldest son and heir-at-law, a person of unsound mind and an infant. It was held, that the legal estate in the mortgaged property passed to C. D. and that he was a trustee, and persons were appointed to convey the property comprised in the mortgages to the purchasers thereof, under sections 3. and 20. of the Trustee Act, 1850. It is not necessary to resort to the jurisdiction in lunacy for such an

order, but it may be made in the jurisdiction in Chancery. *In re Arrowsmith's Trusts*; and *In re Thompson*, 704

MARRIAGE. See Legitimacy. Settlement.

METROPOLIS LOCAL MANAGEMENT ACT—Under a deed for the foundation of a charity, the right of electing almspeople was vested "in the minister, churchwardens, overseers of the poor and such of the parishioners as should pay taxations to the poor, and should not keep inmates or poor lodgers." It was held, that this was not a "duty, power, or privilege relating to the management and relief of the poor, or the administration of any money or other property applicable to the relief of the poor," within the meaning of the 3rd section of the Metropolis Local Management Act, 19 & 20 Vict. c. 120, and that the right of electing almspeople was not transferred to the new vestry appointed under that act. *Attorney General v. Drapers Co.*, 542

— See Vestry.

MINE AND MINING COMPANY—A shareholder in a cost-book mining company filed his bill against the managing committee and against a creditor of the company, to restrain an action at law brought against him by the creditor at the instigation of the managing committee. The bill also asked for an account as to the amount of the plaintiff's liability to the company. The Court granted an injunction to restrain the action by the creditor, but dismissed the bill as against the managing committee, on the ground that as the company was a simple partnership, formed under no act of parliament, it was necessary, in order to have an account, that all the members should be made parties to the bill. *Sibley v. Minton*, 53

— In mines worked on the cost-book system there is no custom to forfeit shares for non-payment of calls, without special stipulation. Assuming such a custom to exist, it must be strictly followed. *Clarke v. Hart*, 615

— See Partners. Specific Performance.

MORTGAGE—Father and son entered into an arrangement by which the father contracted to sell to his son three different estates, all of which were subject to mortgages; one of these mortgages being 880*l.*, which was also secured by a judgment confessed by both father and son. Upon sale of the estate all the mortgages were paid off, and the son mortgaged the purchased property to three other persons for the purpose of raising the purchase-money. There was a further mortgage by the father of other property not included in the sale, to C, out of which the 880*l.* was paid off, and the judgment was assigned to C. by the mortgagee. Some time after the purchase the third mortgagee and the son gave six months' notice to the first mortgagee to pay off the mortgage. Before the expiration of the notice the first mortgage was assigned to C, who then claimed priority in

respect of his judgment, and refused to be paid off unless the 880*l.* were also discharged; and he advertised the property for sale. The same solicitors were employed in negotiating the whole transaction, and it was the understanding of all parties that the purchaser's three mortgagees were to take the property unaffected by any prior incumbrance. Upon a bill filed by the third mortgagee and the son to restrain the sale by C, and for redemption of the first mortgagee, it was held, that C. was not justified in claiming priority for his judgment over the three mortgagees, and he must pay the plaintiff's costs. Decree to restrain the sale for redemption. *Cannock v. Jauncey*, 57

— Testator gave all his real estates to three trustees, of whom his brother J. C. was one, upon trust, amongst other things, to pay to each of his brothers the annual value of 100*l.* during his life, or until he should take the benefit of any act for the relief of insolvent debtors, or become bankrupt, or do any act which, but for that condition, would have the effect of giving the benefit of his annuity to any other person, and in the event of either of such last-mentioned events happening, then his annuity should from thenceforth cease; and upon trust, after paying certain other annuities, for the benefit of the testator's sisters, to pay the whole of the surplus rents and profits to J. C. for his life, with remainders in trust for the children of J. C., and in default of such issue, upon trust to pay the same unto and equally between such of testator's brothers and sisters as might be then living, and the survivors and survivor of them during their respective lives, but subject to the same restrictions respecting bankruptcy and insolvency and against alienation as thereinbefore contained with reference to the annuities. This will not having been discovered for several years after the death of testator, another will was acted on in the mean time, whereby testator had given all his real estates equally amongst his brothers and sisters; and acting on the belief that this was the last will, J. C. joined some of his brothers in mortgaging all their interest in testator's estate. It was held, that the whole interest given by the last will passed by the mortgage; and that the annuities given by the will to such as joined in the mortgage ceased upon the execution of the mortgage. J. C., being a trustee of real estate under a will, and being also beneficially interested in the same estate under the same will, mortgaged his interest and delivered the title-deeds to the mortgagee. The mortgagee afterwards handed back the title-deeds to J. C., who executed other mortgages, delivering the deeds to the subsequent mortgagees. It was held, that the first mortgagee had not lost his priority, the deeds having been properly delivered up to J. C. as a trustee. *Carter v. Carter*, 74

— If a person taking a legal mortgage chooses to leave the title-deeds with the mortgagor, not through negligence or through fraud, but intentionally, to enable him to raise a definite sum which should take precedence, the mortgagee

C

cannot complain if instead of the definite sum the mortgagor raises a sum of much larger amount, because he puts it in his power to raise any sum he pleases. *Semble*—That if the meaning of a transaction between a mortgagor and mortgagee is that the mortgagee should have his security, but that the mortgagor should have the title-deeds, and be enabled therefrom to deal with third persons, that is within the principle of the Statute of Elizabeth. *Perry-Herrick v. Atwood*, 121

— A solicitor having by misrepresentation procured his client to sign a deed of mortgage of certain estates, which the latter had purchased by auction, afterwards assigned the mortgage so obtained to another client to secure a sum of money advanced, the assignee taking the assignment without notice of the fraud, but without the concurrence of or communication with the mortgagor. The solicitor subsequently absconded, and was declared bankrupt. The Court, on bill filed by the mortgagor, and supported by his own personal evidence only of the particulars of the fraud by which his signature to the deed had been obtained, directed the deed to be delivered up to be cancelled, the defendant—the assignee of the mortgage—having declined to cross-examine the plaintiff, and the collateral facts bearing on the case tending to corroborate rather than impeach the plaintiff's evidence. *Vorley v. Cooke and Cooke v. Vorley*, 185

— An institution was incorporated by royal charter and deed of settlement, authorizing the council or managing body to hold lands, tenements or hereditaments, and to sell, grant, demise, exchange and dispose of the same; but no sale, mortgage, incumbrance, or other disposition of any such lands, tenements or hereditaments to be made except with the approbation and concurrence of a general meeting of the proprietors of the said corporation. At a general meeting of the proprietors the council were authorized to mortgage the property of the corporation for 25,000*l*. It was held, the council had no power to grant a mortgage with a power of sale. *Clarke v. the Royal Panopticon*, 207

— By indenture, dated the 27th of October 1851, J. R. conveyed freeholds to and to the use of W. T. B. and C. A. M. their heirs and assigns for ever, by way of mortgage, for securing the repayment of 3,000*l*. and interest, and the said indenture contained a power to the mortgagees, after six months' notice, to sell the mortgaged premises, and to hold the monies arising thereby upon the trusts therein mentioned for better securing the repayment of the mortgaged monies. J. R. died on the 1st of April 1856, having devised and bequeathed all his real and personal property for the benefit, as to the real estate, of his wife for life; and, after her decease, upon trust, as to both the real and personal estate, for the benefit of his twelve nephews and nieces. The mortgagees, on the 18th of October 1856, in conformity with the terms of the power, gave notice of their intention to exercise the power of

sale at the expiration of six months, if their debt were not previously paid. On the 10th of December 1857, the mortgagees, instead of selling under the power pursuant to their notice, filed their bill against the widow of the mortgagor and his devisees in trust, praying an account of the mortgage debt, and that the mortgaged premises might be sold under the direction of the Court, and the sum found due to the plaintiffs in respect of their mortgage debt paid out of the proceeds of the sale, together with the costs of suit; and it was decreed accordingly. *Hutton v. Sealy*, 263

— If judgment creditors, not parties to a suit, neglect or refuse, when served with notice, to come in under a decree for the sale of a mortgaged estate, they may be brought before the Court by supplemental bill. In their absence, a good title may be made to a purchaser. *Knight v. Pocock*, 297

— An attorney has no lien for his costs upon real estate recovered for a client. An order to tax costs, and a Master's *allocatur* thereon, cannot be registered as judgments under the 1 & 2 Vict. c. 110; but the rule absolute for payment of what has been found due on the Master's *allocatur* may be so registered. Where such a rule has been registered, it takes priority over all mortgages and purchases of a date subsequent to the registration, and within five years from the date of registration, and will retain such priority over them, though not re-registered within five years, under 2 & 3 Vict. c. 11. But any mortgage or purchase occurring between the end of the five years and the re-registration, will have priority over it. A mortgage to secure future advances will not operate as a security for costs subsequently incurred. *Staw v. Neale*, 444

— In November 1817 a married woman suffered a recovery of real estate belonging to her, the uses being declared to be as the husband and wife should jointly appoint, with remainder to husband for life, remainder to wife for life, and an ultimate remainder to the wife in fee. Two days afterwards the husband and wife jointly appointed to A. and B. upon such trusts as the husband should appoint, and in default upon trusts similar to the uses before mentioned. In March 1818 the husband appointed, and A. and B. conveyed the estate to C, upon trust to sell and to pay a sum advanced to the husband, and to pay the residue to the husband, his executors, administrators or assigns, and to convey the unsold estate to the husband, his heirs or assigns, or as he or they should direct. It was held, that the deeds of 1817 and 1818 could not be regarded as one transaction; and that the deed of 1818 was not merely a mortgage, but that the ulterior uses of the deed of 1817 were completely charged thereby. *Heather v. O'Neill*, 512

— A father purchased a piece of land, and took an agreement that the vendors would convey it to him. He afterwards built a granary, and allowed his sons to occupy the premises for their

business. They supplied goods to their father to the amount expended by him in building the granary, and they erected other buildings on the land of greater value. The father, pending these transactions, became surety for his sons to certain bankers for 10,000*l*. The sons afterwards surreptitiously obtained possession of the agreement; and one of them representing that his father had given the land to them, signed his father's name on the blank leaf of the agreement, and deposited it with the plaintiffs, who were bankers, to secure their cash credit. The sons afterwards became bankrupt; the son depositing the agreement was, upon several indictments, convicted of forgery; and the father was required to pay the 10,000*l*. for which he was surety. Upon bill by plaintiffs, to obtain the benefit of the deposit made with them, it was held, the sons had a lien on the land to the value of the goods supplied to the father, and the money expended by them in building; that the deposit of the agreement, though made under false representations, was good to the extent of that lien; that the plaintiffs had no notice of the father's interest; that the father, as against the plaintiffs, was not entitled to any set-off in respect of his subsequent liability as surety; and a decree was made to foreclose the security in favour of the plaintiffs as against the sons, with costs, and as against the father, without costs. *Unity Banking Association v. King*, 585

— W. R. in 1832, mortgaged an estate to three persons, trustees of an insurance company, as a security for 1,700*l*. and interest, and in April 1856 he joined as surety with W. N. in a mortgage, by which he assigned a policy of assurance on his own life to trustees of the same office to secure 2,000*l*. and interest. W. R. knew that both advances were made by the insurance company, though it did not appear upon the deeds. In May 1841 W. R. mortgaged the equity of redemption of the property in the deed of 1832, and in 1847 he further charged it in favour of S. and E. for securing in all 2,563*l*. and interest. No notice was given to the company. W. R. became bankrupt in July 1857, owing on the securities of 1841 and 1847 1,150*l*. The estates were sold, and the produce of that of 1832 was more than enough to pay the 1,700*l*. and interest, but that of 1856 was not enough to pay the 2,000*l*. and interest, or not sufficient to pay all the money lent. It was held, that inasmuch as the mortgagees named in the deeds of 1832 and 1856 were, though different persons, trustees for the same company, that fact was immaterial, and that the company were entitled to be paid the deficiency on the 1856 mortgage out of the surplus arising from the 1832 mortgage, in preference to the mortgages of 1841 and 1847, and to the assignees of W. R. *Tussell v. Smith*, 694

— A tenant in tail in remainder expectant upon a prior estate tail took a transfer to himself of a mortgage term affecting the estate. He afterwards became tenant in tail in possession, and after remaining in possession five years died, a bachelor and intestate, without having barred

the entail, and without having indicated any intention as to whether the charge should merge or not. Upon a bill by his administrator against the remainderman, the charge was held to be a subsisting charge. *Horton v. Smith*, 773

— A mortgagee of freeholds, with power of sale, and by deposit of deeds of leasehold premises, having failed after repeated trials to sell under his power, filed his bill for foreclosure, or for a sale of the mortgaged property, against the executors and devisees in trust of the mortgaged premises, under the will of the mortgagor. The plaintiff also went in and proved his debt in another suit, which had been instituted for the general administration of the mortgagor's estate. The fund, realized under a decree for sale made in the suit, was insufficient to pay the mortgage debt. It was held, nevertheless, that the defendants were entitled, as well as the plaintiff, to their costs out of the fund. *Macrae v. Ellerton*, 777

— A mortgagee filed a bill for redemption against a mortgagee in possession, and the usual decree for accounts was directed, but no direction as to annual rests. After the decree annual rests were directed under the above-mentioned section and order, but, upon appeal, the decision was reversed. Rule as to the directing of annual rests against a mortgagee in possession. *Nelson v. Booth*, 782

— to trustees. See Vendor and Purchaser.

— by husband and wife. See Baron and Feme.

— See Priority. Production of Documents.

MORTMAIN—The general law of the country is not altered or controuled by partial legislation made without any special reference made to it. Thus, an act, the 13 & 14 Vict. c. 94, passed in general terms, for a special object, without reference to the Mortmain Act (9 Geo. 2. c. 36.), will not enable a society to take a legacy, even out of pure personalty, when its purpose is the purchase of incorporeal hereditaments to be applied for charitable purposes. *Denton v. Manners*, 199, 623

— Validity of devise of freeholds to trustees for time being of a public library, to hold to them and their successors for ever for the use, benefit, maintenance and support of the said library. *Carne v. Long*, 589

— See Charity.

NUISANCES REMOVAL ACT—The Board of Works of the W. District passed a resolution that no privies or cesspools should be allowed in that district, and on the 27th of January 1857 served a notice on the owner of cottages, requiring him, within fourteen days, to convert privies into water-closets, and threatening compulsory proceedings in case of neglect. In June following they served a second notice, which, like the

former, was entitled in the Metropolis Local Management Act (18 & 19 Vict. c. 120.), and in the Nuisances Removal and Diseases Prevention Act (18 & 19 Vict. c. 121.), stating that as the former notice had not been attended to, they should, within seven days, enter and enforce the provisions of those acts against the owner. On the 7th of November, they entered and commenced the works, whereupon the owner filed a bill for an injunction, which one of the Vice Chancellors granted. It was held (affirming that decision), that the Board had exceeded its powers in coming to the resolution; that under the Nuisances Removal Act they had no authority to enter unless a previous order of Justices of the Peace had been disobeyed; and that the jurisdiction of the Court of Chancery to interfere by injunction was not ousted by the 211th section of the Metropolis Local Management Act, giving an appeal to the Metropolitan Board of Works. A Board of Works, empowered as above, is bound to exercise its authority with regard to the circumstances of each particular case, and it is their bounden duty to keep strictly within their powers, and not to be guided by any fancied views of the spirit of the act. *Tinkler v. the Board of Works for the Wandsworth District*, 342

PARTIES. See Company. Mine and Mining Company.

PARTNERS—A. & B. worked mines in partnership. The lease of the mines expired in 1845, and they continued to work them as tenants from year to year. In November 1857 A. died, and B. continued to work the mines only sufficiently to keep them going. At Lady-day 1851, B. obtained a new lease of the greater part of the mines, upon certain terms. On the 24th of November 1851, E, who claimed an interest under A.'s will, filed a bill against C. (A.'s executrix) and B. for the administration of A.'s estate, and that the mine might be worked under the direction of the Court. Answers were put in, but nothing further was done in the suit. B. continued to work the mine until December 1853, when he died intestate, and C. took out letters of administration. On the 1st of June 1854 E. sold his interest under A.'s will to X, who on the 17th of the same month, instituted a suit to establish an interest on behalf of A.'s estate in the mine after A.'s death. It was held, that the interest of A. in the mine did not cease on his death, but was still continuing. *Clements v. Hall*, 349

— Upon decease of a partner in trade, the firm was indebted to him for money advanced. The business was continued by surviving partner, who, with money of the firm, made additions to the stock in trade. It was held, as the executors of the deceased partners had permitted the continuance of the business, they had no lien upon the subsequently-acquired stock in trade for money advanced to the firm by their testator. *Payn v. Hornby*, 689

— F, H. & B. carried on the business of solici-

tors in partnership. A. was afterwards admitted as a partner, and in 1838 F. retired; he reserved to himself the right of introducing T. as a partner in the firm. In 1846, H, B. & A. entered into new articles of partnership, the term of which was extended to 1853, and articles were inserted for the valuation and purchase of the share of any retiring or deceased partner during the term; these articles were made subject to the right reserved by F. of introducing T. In 1848 H. died, and his widow was paid the value of his share. In 1849 F. introduced T. as a partner. A memorandum was then drawn up, without reference to the articles of 1846, declaring that from September 1850 T. should have one-fifth of the profits until September 1853, from which date he was to take an equal share in the partnership profits; the partnership to continue for ten years from the 1st of September 1850. A clause was afterwards added, that in the event of the death or retirement of either of the senior partners before the 1st of September 1853, his two-fifths should be divided into thirds, two-thirds to be taken by the surviving senior partner, and one-third by T. A, in connexion with his signature to this memorandum, wrote that it was not to annul or prejudice the articles of 1846. In August 1853, A. signified his intention of retiring from the business, and he claimed the value of his share of the partnership and of the goodwill. Upon a bill filed by A. to have the value of his share in the business and the goodwill thereof ascertained, it was held, that A, by his notice had dissolved the partnership; that the two days intervening between the notice and the determination of the partnership under the articles of 1846, could give no marketable value to the goodwill in the business, and that A. was only entitled to the profits during the continuance of the partnership. Where a trade is established in a particular place, the goodwill of that trade means nothing more than the sum of money which any person would be willing to give for the chance of being able to keep the trade connected with the place where it has been carried on. Goodwill is something distinct from the profits of a business, although in determining its value, the profits are necessarily taken into account, and it is usually estimated at so many years' purchase upon the amount of those profits. The term "goodwill" seems wholly inapplicable to the business of a solicitor, which has no local existence, but is entirely personal, depending upon the trust and confidence which persons may repose in his integrity and ability to conduct their legal affairs. *Austen v. Boys*, 243, 714

— See Mine and Mining Company.

PENSIONS. See Assignment.

PETITION OF RIGHT—Where upon an application to confirm an inquisition upon a petition of right, the Crown required time to make answer thereto, the Court declined, upon extending the time, to preclude the Attorney General from demurring. *Ex parte Von Prantznus*, 363

PLEADING—Unnecessary Averments. See Interpleader. And see Waste.

PORTIONS—By a voluntary settlement a father covenanted with trustees that his heirs, executors, or administrators should, within six calendar months after his death, pay to them 10,000*l.* if he should die in the lifetime of his only daughter, C. H. T., who was then an infant and unmarried; and he charged his real estates with the same. The trusts were declared to be for investment and payment of the interest to C. H. T. for life, with ulterior trusts for her children; if none attained twenty-one, to hold the money as part of the settlor's personal estate. The settlor borrowed money on mortgage of his real estates, and out of the money paid the trustees of the settlement the 10,000*l.*, and they executed a release. The trustees lent part of the 10,000*l.* to the settlor on a mortgage of his real estate; the remainder they lent upon mortgage to other persons. The settlor, by his will, gave his personal estate to his wife, and his real estate to trustees in trust for his wife for life, with successive life estates to other persons, and an ultimate remainder over. He died leaving his wife and daughter surviving, and the latter died an infant and without having been married. It was held, the whole 10,000*l.* was personal estate. *Tucker v. Loveridge*, 731

— See Sale.

POST OBIT BOND. See Debtor and Creditor.

POWER OF APPOINTMENT—By marriage settlement leasehold premises were assigned, upon trust for the wife for life, with remainder as the husband should appoint generally, and in default of appointment, and subject thereto, if any, for next-of-kin of the husband. The husband, by will, after certain specific and pecuniary legacies not affecting the property comprised in the settlement, gave all other his estate, property and effects, subject, as to such parts thereof as were comprised in the settlement, to the settlement and the trusts thereby declared, and which indenture he thereby ratified and confirmed in all respects, to his wife absolutely. This was held to be an execution of the power of appointment. *Hutchins v. Osborne*, 421

— Where a donee of a power made an appointment in favour of objects of the power, and they, in pursuance of an understanding between them, executed a declaration of trust for the benefit of themselves and of other persons not objects of the power, such appointments were not supported. *Birley v. Birley*, 569

— Testator directed his trustee "to divide an estate among his, the testator's, first cousins, as he, in his discretion, might think proper, by dividing the whole equally among them, or between two or more, or giving the whole to any one for such estates and interests, and subject to such conditions and limitations, as he should think proper." It was held, the trustee had a power

of selection only, and that if he appointed to more than one, he must do so equally among them. *Ward v. Tyrrell*, 749

— A married woman, whose husband was domiciled in England, had power, by any writing under her hand, or by her last will, to appoint, as if she were sole and unmarried, a sum of 3,226*l.* 12*s.* 1*d.* She resided in Paris, apart from her husband, for many years before her death without there having been any legal separation or divorce. She disposed of the fund by three several papers, signed by her. They were all unattested. It was held, that as the wife of a domiciled Englishman, she could not obtain a foreign domicile, and that the papers, though valid as a will in France, were invalid in England. Also, that the contemplated appointment by will deprived the documents of any force as a writing under her hand, and that there had been no valid execution of the power. *In re Daly's Settlement*, 751

— A married woman having a power of appointment over trust funds, and being also entitled to considerable sums of money, consisting partly of cash at the bank and partly of money held by the bankers on deposit-notes, gave, by her will, certain pecuniary legacies, which she directed to be paid out of any monies of or to which she might be possessed or entitled at the time of her decease, and then gave all the residue of the monies of which she might, at the time of her decease be absolutely possessed to B. and K. absolutely. It was held, that the residuary bequest carried not only the cash at the bank, but also the money held on deposit. *Landyale v. Whitfield*, 795

— By a marriage settlement power was given to the wife to appoint certain real property at any time or times during her life, by any deed or instrument in writing, with or without power of revocation, to be sealed and delivered in the presence of and attested by two or more witnesses. The wife executed the power, by will, dated before the Wills Act, and expressed in the attestation clause to be signed, sealed, published and declared, and also sealed and delivered in the presence of, and attested by, three witnesses. It was held, the power was well executed. The will was thirty years old from the date of execution, and came from the custody of the person in whose favour it was executed. This was held sufficient evidence of the fact of due execution. *Orange v. Pickford*, 808

— See Mortgage.

POWER OF SALE—An implied power of sale, arising from a direction to pay debts, will not enable the Court to direct the sale of an estate if it cannot make a decree for foreclosure. Such a decree can only be made in a creditors' suit. An executrix directed to pay debts cannot be considered to represent third parties within the meaning of the 15 & 16 Vict. c. 86. *Bolton v. Stannard*, 845

— See Mortgage.

PRACTICE—Dismissing a bill for want of prosecution. *Baker v. McClellan*, 57

— On the 4th of June 1857 A. was ordered to pay certain sums of money within eight days after chief clerk's certificate. The certificate was made, and was dated the 8th of August following. The certificate was not approved until after the long vacation, and was not served on A. until November. A. refused to pay on account of this irregularity. A notice of motion was served on him to obtain an order for him to pay. He did not appear, and on the 19th of November, on affidavit of service, an order was made for him to pay the amount mentioned in the certificate, "on or before the 1st of December next, or within four days of service upon him of this order." The order was not served on A. or his solicitor, and was not passed and entered until the 2nd of December. After a month's delay from the last-named day a writ of *f. fa.* was issued for each sum mentioned in the certificate, under which the sheriff levied on the goods of A, who on the 17th of February 1858 moved to set aside the writs and to have the money levied repaid to him. Vice Chancellor Stuart refused to make any order other than that A. should pay the costs of the sheriff on the motion. It was held, upon appeal, reversing that decision, that the order of the 19th of November not being perfected till the 2nd of December, was until that time a nullity, and A. had no opportunity of complying with the first part of it, and the order not being served upon A. the period limited in the latter part had never arrived, wherefore the writs were wholly irregular and void. *Adkins v. Bliss*; and *Vale v. Bliss*, 486

— Special examiners. See Witness. And see Commissioners. Substituted Service. Supplemental Bill.

PRE-EMPTION—Testator directed his trustees to offer his real estate to his brother M. for 2,500*l.*; but in case M. should not be living at the time of his decease, or should not within one calendar month after that event signify to the trustees his intention to take the estate at that sum, or should not at the expiration of two calendar months from the time of signifying such his intention pay the said sum of 2,500*l.* to the trustees, the trustees were to sell the estate. M. signified his intention to accept within the month after testator's death, and he asked for an abstract of title. Nothing further was done until after the expiration of the two months. It was held, by one of the Vice Chancellors, and affirmed on appeal, that the right of pre-emption was gone. *Brooke v. Garrod*, 226

PRESCRIPTION. See Custom.

PRINCIPAL AND AGENT—Spanish bonds, passing by delivery, were left by defendant with his stockbroker, to obtain money for him on them,

by deposit. The stockbroker borrowed money from plaintiff, also a member of the Stock Exchange, and deposited a part of the bonds; this was done without disclosing, as is the custom, the name of the principal. On others of the bonds the stockbroker, without the knowledge of his principal, obtained a further sum of money, which he applied to his own use. Defendant, afterwards, gave notice that he should settle his account, and on the settling day he sent a cheque to his stockbroker for the principal and interest then remaining due, and the stockbroker applied this money to redeem the bonds deposited to secure the money he had applied to his own use, and a part of the bonds deposited to secure the loan obtained for defendant; and on delivering the redeemed bonds to defendant, the stockbroker informed him that his assets were not sufficient to redeem the other bonds, and that he had postponed the further settlement to the following settling day. The stockbroker, on that day, informed defendant that his assets were still insufficient. It was then arranged, between the stockbroker and defendant, that the stockbroker should give his cheque to plaintiff, for the sum due, and that defendant, on receiving the bonds, should give him his cheque for a sum sufficient to enable the stockbroker to meet the cheque he was to give the plaintiff. The bonds were obtained by the stockbroker on his crossed cheque, and delivered to defendant, but he refused to give his cheque for the sum required, and the stockbroker's crossed cheque, in passing through the clearing-house, was dishonoured. In a suit instituted for a re-delivery of the bonds, it was held that plaintiff was not deficient in caution when he took the crossed cheque, and that he was not bound to inquire whether it would be honoured before delivering the bonds. Also, that defendant had induced his stockbroker and agent to give the crossed cheque by his promise to supply assets to meet it, and that the bonds would not otherwise have been obtained by his agent, and therefore that defendant must either pay the amount due to plaintiff with interest, or give up the bonds to him. *Mocatta v. Bell*, 237

— See Account. Winding-up Acts.

PRIORITY—A, to secure a loan, deposited with B. title-deeds relating to an estate, but not the deed of conveyance to himself, and signed a memorandum of deposit, which represented that these were all the deeds. A. afterwards deposited with C, who had no notice of B.'s claim, the conveyance to himself, and duplicates of some of the earlier deeds, and also signed a memorandum of deposit as to this loan. It was held, B. was entitled to priority. *Roberts v. Croft*, 220

— A stock and share broker of the city of London gave a bond to the corporation for the due performance of his office; he appropriated to his own use large sums of money intrusted to him for investment. After his decease, upon a claim filed by a simple contract creditor, it was held, the defrauded creditors had

no priority by virtue of the bond; and that the amount due upon such bond was equitable assets for the benefit of all the creditors. *Naish v. Bryant*, 748

— See Bankruptcy. Company. Mortgage.

PRIVILEGED COMMUNICATION. See Production of Documents.

PRODUCTION OF DOCUMENTS.—Before the institution of a suit, but in expectation that proceedings would be taken against them, the defendants, acting on the advice of their solicitor, employed an agent to collect evidence at a great distance from this country. The communications made by the agent were held to be privileged from production. Protection will not be withheld from communications made in apprehension of litigation, on the ground that the precise form which the litigation afterwards assumed was not foreseen. An affidavit in support of a claim to seal up certain passages in a book not being sufficiently explicit, the Court inspected the disputed passages in order to determine their right to protection. *Lafone v. the Falkland Islands Co.*, 25

— In a suit to set aside a mortgage-deed, as having been obtained by the mortgagee under circumstances of pressure and surprise, which alleged circumstances were, however, denied by the answer of the mortgagee, the Court, upon motion, ordered the production of the mortgage-deed, it appearing that the mortgagee was a solicitor, and that he had been the mortgagors' only professional adviser in the transaction of the mortgage. *Davis v. Parry*, 294

— A suit was commenced by bill, to which no interrogatories were filed and no answer required. Defendant obtained leave to file a voluntary answer, and moved, before putting in such answer, that plaintiff might be ordered to produce documents. It was held, that as no discovery was prayed by the bill and no answer required, the defendant was entitled to the order. *Bailey v. Dunkerley*, 816

PUBLIC HEALTH.—A local board of health has no power, under the Public Health Act, 11 & 12 Vict. c. 63, to enter upon land without the consent of the owner for the purpose of making reservoirs and deposit-beds for retaining the sewage; and the Court granted an injunction to restrain such a proceeding. *Sutton v. the Mayor, &c. of Norwich*, 739

— See Contract not under Seal.

RECEIVER—pending litigation. See Waste.

REGISTRATION. See Mortgage.

REPAIRS. See Tenant for Life. Will.

SALE—25,000*l.*, part of the produce of a sale under the Incumbered Estates Act, having been set

aside by the Commissioners, and invested in consols to satisfy portions of that amount, which were payable out of the estate upon the death of the tenant for life, it was held, that the tenant for life was entitled as against the portioners to the dividends in the mean time. *Wellesley v. Mornington*, 150

— See Auction. Copyhold. Mortgage. Ship and Shipping. Vendor and Purchaser.

SCHOOL.—A grammar school founded and endowed by King Edward the Sixth is essentially a Church of England School, founded for Church of England purposes, and members of the Church of England alone will be appointed trustees. The Court is bound by the charter of foundation: it has no power to expand, curtail or diminish the purposes of the foundation; and so that the school is preserved in its integrity, it will not restrain the trustees from making rules and ordinances to extend the general benefit of the foundation to persons not members of the Church of England. *In re the Stafford Charities*, 381

SECURITY FOR COSTS.—Defendant having applied for time to answer plaintiff's bill is not thereby precluded from afterwards moving that plaintiff may give security for costs, if subsequently to the application he discovers facts not appearing upon the face of the bill, which would have entitled him to make the application before taking any step in the cause. *Swanzy v. Swanzy*, 419

— See Mortgage.

SERVICE. See Attachment. Practice. Substituted Service.

SET-OFF.—Bankers assigned the securities given by a customer indebted to them without giving him notice. The bankers afterwards became bankrupt. In a suit by the debtor, against the assignees of the securities, it was held, that he was entitled to set off the monies due to him on his running account, against the debts due from him; and that the assignees had merely the rights of the assignors, and could claim no advantage beyond what the bankers were entitled to. *Cavendish v. Geaves*, 314

SETTLED ESTATES ACT. See Commissioners.

SETTLEMENT.—By a marriage settlement, an annuity and policy of assurance were assigned by the husband to trustees, upon trust for himself and his wife during their lives, and then for the benefit of the children of the marriage, and in default of children, to such person as the husband should by deed or will appoint, and in default of appointment, "unto the executors or administrators of the husband to and for their own use and benefit." It was held, that the executors took the property as part of the husband's general assets. The husband, by his will, directed the remainder of the produce of his real and personal estate to be placed out at interest, and the divi-

dends and produce thereof to be paid to his wife during her life. It was held, that she was entitled to have all the property of the testator, including the reversionary interest in the annuity, treated as converted at the time of testator's death. *Johnson v. Routh*, 305

— By settlement made on the marriage of R. J. M. with S. D. it was recited that, upon treaty for the marriage, P. M. proposed and agreed to secure, in manner and subject as thereafter expressed, to S. D. after the decease of the survivor of them, the said P. M. and R. J. M. an annual sum or yearly rent-charge for her jointure, to be issuing and payable out of manors and other hereditaments, thereafter charged therewith, and of or to which P. M. was seised or entitled in fee simple. By the operative part of the deed P. M., in consideration of intended marriage, gave, granted, bargained, sold and confirmed unto S. D. and her assigns, in case the marriage should take effect and she should survive P. M. and R. J. M., an annual sum or rent-charge of 300*l.* to be charged and chargeable upon and yearly issuing and payable out of all and singular the manors or reputed manors of M. N. and R., and also all that mansion house called M. in the same county, and also all and singular the messuages, &c., in the several parishes of R., &c., in the county of K., of or to which he, the said P. M. or any person in trust for him, was or were seised or entitled for an estate of inheritance at law or in equity, subject, as to such of the hereditaments as were charged therewith, to a mortgage for a term of 2,000 years; and by the same deed P. M. covenanted, granted and agreed with S. D. that so often as the annuity should be unpaid for twenty-one days she should have power, subject as aforesaid, to enter and distrain upon the manors, &c. charged therewith; and for further securing the annuity P. M. granted, bargained, sold, demised and confirmed to the trustees the manors, &c. thereby charged therewith for a term of 100 years. P. M. and R. J. M. died, leaving S. D. surviving. It having been subsequently determined that P. M. had only a life interest in the estates charged with the annuity, it was held, there was no covenant in the settlement on which S. D. or the trustees could maintain an action; and that there being no covenant, she could have no special or separate equity against the estate of P. M. *Monypenny v. Monypenny*, 369

— A father, on the marriage of his son, covenanted with trustees to bequeath one full fourth part of all his real and personal estate, after payment of his debts, to the trustees of the settlement, who were to sell and convert the same into money and stand possessed of the proceeds upon the trusts of the settlement. After the father's death, in a suit to administer his estate, it was held, that the covenant meant a fourth in value and not a fourth in specie. *Bell v. Clarke*, 674

— Effect of covenant to settle after-acquired property. *Townsend v. Harrowby*, 553

— See Portions. Voluntary Settlement.

SHERIFF—Upon an attachment to enforce an order made for payment of 1,228*l.* 7*s.* 1*d.*, the sheriff arrested the prisoner, but subsequently allowed him to go at large, without bail, upon his promise to surrender when called on. This he neglected to do, and, without having been recaptured, he committed suicide. Upon application against the sheriff, it was held an escape had been permitted; that this Court had jurisdiction to ascertain the damages sustained; that 5 & 6 Vict. c. 98. must be considered as controuling the practice of this Court; and that the sheriff's liability was the actual loss, and not the full sum for which the attachment issued. *Moore v. Moore and In re Mozley*, 385

SHIP AND SHIPPING—The Merchant Shipping Act, Part IX., limiting the liability of shipowners, applies only to British ships, excepting when foreign ships are expressly named. *Cope v. Doherty*, 600

— On the 20th of August 1857, B, the senior partner of a firm of Bristol merchants and ship-owners, being then in London, wrote and delivered to plaintiff for valuable consideration a delivery order, directing D, one of the partners of B, then at Bristol, in whose name the wharfage business of B's firm at Bristol was carried on, to deliver to the order of plaintiff "fifty tons of palm-oil out of the first of our ships which shall arrive, whether it be the *Glen-eldg*, *Arab*, *Mary Ann B*, or *Victory*." On the day following, the Bristol firm suspended payment, and their affairs were wound up under the provisions of the arrangement clauses of the Bankrupt Act, by deed of assignment, dated the 8th of September 1857, of which the defendants were trustees. The deed provided that no creditor having a specific lien or security for his debt, who executed the deed should be prejudiced as to his security. Notice of the delivery order was given to the defendants at latest on the 5th of September. The first of the ships named in the order which came to port arrived at Bristol on the 23rd of October 1857, but of her cargo only twenty-seven tons of palm-oil remained unaffected by contracts for sale, entered into by B's firm before the date of the delivery order. It was held, that the delivery was an assignment of and a valid security upon fifty tons of palm-oil, the first that should arrive belonging to B. & Co., in the ships named in the order. *Rayner v. Harford*, 708

— Several owners of ships established an association for the insurance of ships. The association and insurances were each confined to a year, commencing on the 20th of February at noon, and ceasing on the 20th of February following at noon, in each year. It had been so continued for several years. Plaintiff was the owner of 16-64ths of the ship *The Boyne*, and he insured his interest in the association for 500*l.* He was indebted to P, the owner of the remaining 48-64ths, in the sum of 432*l.* 10*s.*, and the

plaintiff, on P. requiring other security for the debt than a promissory note, made an absolute assignment of his 64-16ths to P, who, though he gave no written undertaking, understood that the shares were to be re-transferred to plaintiff on payment of the debt. Neither plaintiff nor P. gave any notice of this transaction to the association. On the 27th of January 1856 the ship was lost, and upon a bill by plaintiff to obtain payment of the insurance, it was held, the claim was within the rules of the association, that he was the owner of the ship; that notwithstanding the assignment, his interest and the insurance continued; that he was liable for the debt though the ship was lost; that P. never incurred any risk; that the ship was sailed at the plaintiff's risk, and that he was entitled to the insurance money. *Hutchinson v. Wright*, 834

SOLICITOR AND CLIENT. See Attorney and Client.

SPECIFIC PERFORMANCE—By an agreement in writing, A. agreed to demise to B. certain premises which were then in lease to C, and B. undertook to procure a surrender of the existing lease from C, and to accept the new lease. C. having afterwards refused to surrender, A. filed a bill against B. for specific performance with a modification. Upon demurrer, the bill was not sustained. *Beeton v. Stutely*, 156

— An agreement to lease two seams of coal, "known as the two-feet coal and the three-feet coal, lying under land to be hereafter defined, in the Bank-End estate," is not so indefinite as to prevent its being enforced. In the absence of fraud or misrepresentation, this Court will decree the specific performance of a speculative agreement, and it will exercise no discretion upon the probable value of the undertaking. A lessor of mines, by delivering the draft of a lease in accordance with an agreement dated in 1855, and not insisting on the execution of the lease until 1857, after the mines had been tried and abandoned as of no value, does not, by the lapse of time, lose his right to require specific performance of the agreement. The taking possession of the mine, however, is not an acceptance of the title. *Haywood v. Cope*, 468

— An agreement to build a house of a given value and according to a plan to be agreed upon, cannot be carried into effect in the Court of Chancery, when neither plan nor specifications have been under the consideration of the parties. *Brace v. Wehnert*, 572

— A. B. agreed to transfer to C. D. certain shares in a railway company, upon which no deposit or other sum had been paid, and C. D. agreed to accept the same, and to do all acts necessary to relieve A. B. from liability in respect of the shares. A. B. filed a bill for specific performance of the agreement. C. D. demurred for want of equity; and it was held, reversing the decision of the Master of the Rolls, who had

allowed the demurrer, that the demurrer must be overruled. *Cheale v. Kemaard*, 784

— An agreement for letting a farm for ten years, though void at law, under 8 & 9 Vict. c. 106, as a lease, was held to be valid as an agreement, and specific performance of it was decreed. The insertion of "&c." in some of the terms of the agreement did not produce such uncertainty as to render the agreement incapable of specific performance, where the property, the rent, and the other material points in the lease were sufficiently described and ascertained. *Parker v. Tinsell*, 812

— See Baron and Feme. Company.

STATUTE—Construction of, as to word "holder," 23

— See Metropolitan Local Management Act. Nuisances Removal Act.

— 20 Car. 2. c. 3, 23

— 56 Geo. 3. c. 60, 168

— 3 & 4 Will. 4. c. 106, 98

— 1 & 2 Vict. c. 42, 23

— 2 & 3 Vict. c. 37, 238

— 19 & 20 Vict. c. 97. s. 5, 54

STOCK AND STOCKBROKER—Where stock, which had been standing in the names of two persons, had been transferred to the Commissioners for the Reduction of the National Debt, in consequence of the dividends not having been claimed for ten years, the Court, upon petition of the administrator of the survivor of the two persons to have the stock transferred to him, directed a reference to inquire who was entitled to the stock. *In re Bishton*, 168

— standing in joint names. See Tenancy in Common. And see Principal and Agent. Priority.

SUBSTITUTED SERVICE—To a vendor's bill to enforce a lien upon the purchased estates in respect of unpaid purchase-money, by means of a sale of those estates, certain judgment creditors of the insolvent purchasers were made parties in respect of their interests in those estates as such creditors. Two of these judgment creditors being out of the jurisdiction, substituted service of a printed copy of the bill upon their respective attorneys in the actions in which the judgments had been recovered was ordered to be good service on them respectively, such attorneys being still the attorneys named on the records of the judgments, but declining respectively, for want of instructions, to accept service of the bill for their respective clients. *Governors of the Gray-coat Hospital v. Westminster Improvement Commissioners*, 250

— An order for substituted service of a traversing note will be drawn up, though it is not

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shown that the defendant is within the jurisdiction. *Hunt v. Niblett*, 295

SUPPLEMENTAL BILL—A supplemental bill, with the original bill annexed by way of schedule, permitted to be filed. *The Gray-coat Hospital v. the Westminster Improvement Commissioners*, 52

— See Mortgage.

TENANCY IN COMMON—Where stock has been purchased in the joint names of two, out of money standing to their joint account in the bank, it is not necessarily to be considered in equity as held in joint tenancy, but the origin of the money and the acts and intentions of the parties may be looked to, and a conclusion in favour of a tenancy in common drawn from the circumstances. The distinction taken in equity between a purchase by two advancing equal shares of purchase-money in their joint names, and a mortgage to them under the same circumstances, the first being considered to create a joint tenancy and the other a tenancy in common, disapproved of. *Robinson v. Preston*, 395

— See Will.

TENANT FOR LIFE—An agreement for letting a farm having been sanctioned by the Court, the tenant for life was allowed the expense of permanent repairs done to the house and buildings out of the sum of stock settled upon the same trusts. *Macnolty v. Fitzherbert*, 272

TITLE—Production of. See Copyhold.

TITLE DEEDS. See Mortgage.

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TRUST AND TRUSTEE—Funds were settled for the benefit of the survivor of husband and wife for life, and after the death of the survivor to be held in trust for all or one of the children or child or remoter issue of the marriage as husband and wife should jointly appoint, and in default as the survivor should appoint. There was only one child of the marriage, a son, and the wife died without having exercised the joint power. Two months after the son came of age the father appointed that the fund should be paid to him after his own decease. Soon after this the father and son applied to the trustees to transfer the funds into their joint names. The father had also, during the minority of the son, applied to the trustees to transfer the far greater part of the fund into his sole name. The trustees laid a case before counsel, who advised that if certain requisitions were complied with, the trustees might safely transfer without suit. The requisitions were complied with, but the trustees refused to transfer without the protection of the Court. The father and son filed a bill to compel the transfer to them, and prayed that the trustees might pay the costs. One of the Vice Chancellors made a decree for the transfer, but ordered the father and son to pay the costs of the suit;

and upon appeal, as to costs, by the father and son, it was held, that the decree was correct: Lord Justice Knight Bruce dissenting. Where there are transactions between father and child, commencing before the child attains twenty-one, and continued soon after that time, regarding the property of the child, trustees of the fund, who act *bond fide*, and from no improper motive, are entitled to have evidence of their caution and vigilance preserved by suit before they make a transfer. *King v. King*, 29

— Trustees who are directed to sell an estate are not justified in raising money by mortgage, notwithstanding a discretion is given to them to postpone the sale. *Devaynes v. Robinson*, 157

— A trustee will be allowed his costs of paying money into court under the Trustees' Relief Act where there is a case of *bond fide* responsibility. He is not bound to take upon himself the liability of deciding between adverse claimants. *In re Headington's Trust*, 175

— A trustee was removed by decree of the Court and ordered to pay the balance of the trust fund in his hands to the new trustees appointed by such decree; but no time was fixed by the decree for the payment. The retiring trustee, having omitted for some weeks to make the payment ordered, a correspondence took place between his solicitor and the solicitors of the new trustees, who in their last letter fixed a day by which they said the payment must be made. Shortly before the day so fixed, the bank in which the trust balance had been deposited by the retiring trustee failed. It was held, the retiring trustee was personally liable to make good the fund to the trust estate. *Lunham v. Blundell*, 179

— A. by deed assigned to B. timber and stock in trade upon trust to sell all and apply the money arising from the sale in paying the expenses of preparing for, making and completing such sale or sales, "including the usual auctioneer's commission, and otherwise incidental to the aforesaid trusts." B. was an auctioneer, and had been employed as such by A. It was held, that the words appeared to have been inserted to provide for B. being employed in the sale, and that B. was entitled to charge his commission. *Douglas v. Archbutt*, 271

— *Semble*—that the legal estate in mortgaged property having descended to the heir of the mortgagee, the Court will not, where there is no sale or transfer proposed, vest the estate in the administrator of the mortgagee, although the administrator is beneficially interested in the money secured. *In re Hewitt*, 302

— Testator gave funds to trustees, to pay the income to his wife, or otherwise, for maintenance of his seven children till the youngest should attain twenty-five, if a son, and if a daughter, till that age or marriage; and when the youngest should attain twenty-five, to divide the same equally amongst the children, the share of the

daughters to be for their separate use. The trustees four years after testator's death sold out the trust funds and invested the proceeds in railway shares (which resulted in great loss). The youngest child attained twenty-five. Upon a bill by a married daughter of testator claiming her original share of the trust fund, it was held, that she, though aware of the sale of the trust funds, either immediately before or shortly after the purchase of the railway shares, had not sanctioned the breach of trust; that she was bound to assume that the discretion vested in the trustees was properly exercised, and though she did not complain for some years afterwards, that she was entitled to have her share of the stock replaced, allowing for the sums paid for maintenance beyond those which would have arisen from the dividends of the trust stock. *Davies v. Hodgson*, 449

— Where a sum of stock was standing in the names of four trustees, one of whom was residing abroad, it was held, that the 13 & 14 Vict. c. 60. s. 22. (the Trustee Act, 1850,) empowered the three resident trustees to ask for an order that the dividends of the stock due, and accruing due, might be paid to them without any authority from the fourth trustee. *In re Peyton's Settlement*, 476

— Where the last surviving trustee of a term of years died in 1799, and it appeared that there would be great difficulty and expense in obtaining limited administration, the Court appointed a new trustee under 15 & 16 Vict. c. 55. s. 9. *Davis v. Chanter*, 577

— See Administration of Estate. Alien. Charity. Lunacy.

USURY—Plaintiff advanced money in 1853 at usurious interest, upon a bill of exchange at six months' date, secured by a judgment. The bill was renewed from time to time until January 1856. The borrower became bankrupt in December 1855, and in a suit instituted for having it declared that the freehold and leasehold property of the borrower was bound by the judgment, and ought to be sold in order to satisfy the amount due to the plaintiff, it was held, the judgment was a security upon land, and could not be enforced upon the freehold and leasehold property; but the bill was dismissed, without costs. *Bond v. Bell*, 233

VENDOR AND PURCHASER—A purchaser for valuable consideration without notice, getting in the legal estate for a trustee, takes it subject to all those trusts upon which the trustee held it, and appearing upon the face of the instrument under which the trustee takes—*Fausett v. Carpenter* observed upon. *Carter v. Carter*, 74

— Whether a vendor who sells an estate in consideration of an annuity has or has not a lien on the property for the payment of the annuity, must depend upon the circumstances of each particular case. Where a vendor sold lands

in consideration of an annuity for three lives, to be secured by a bond, it was held he was not entitled to a lien on the land for the annuity or the arrears. *Dixon v. Gayfere*, 148

— Where a mortgage was made to secure a sum of stock, which was for the purpose sold by trustees, who had power to give receipts for monies and power to vary securities, the mortgage was held not to be sufficiently discharged on payment of a sum of money to the trustees, the money not appearing to have been again invested in stock or upon security. *Pell v. De Winton*, 230

— In a suit by a vendor for specific performance of a contract to purchase an estate which, by deed, dated in 1841, was limited to the use of the vendor for life, without impeachment of waste; and after the determination of that estate, by any means in his lifetime, to the use of a trustee and his heirs during the life of the vendor, in trust, nevertheless, for the vendor and his assigns; and after the determination of the estate so limited to the trustee and his heirs, to the only use and behoof of the vendor and his heirs and assigns for ever, it was held, upon objection taken by the defendant, that he was entitled to a conveyance of any interest which might have become vested, by forfeiture or otherwise, in the dower trustee. *Collard v. Roe*, 295

— E. D., by will, appointed R. S. D. and T. T. R. trustees and executors of her will, and she gave to them and the survivor 2,000*l.*, upon trust to invest it and pay the produce to her daughter for life, with remainder to her children; and in default of children, or descendants of a child who should attain a vested interest, in trust for R. S. D. She also gave her residuary real and personal estate, "subject to the payment of her debts and legacies," to R. S. D. absolutely. R. S. D. died; and T. T. R., by a deed which recited that all debts and legacies had been paid, conveyed the testatrix's real estate to the devisees of R. S. D. The plaintiff purchased the Rectory of J; and on a re-sale the conditions provided "that if from any cause whatever the purchase-money was not paid at the time appointed interest should be payable." It was objected, that there was no proof that the debts and legacies were paid, and it was found that the 2,000*l.* had not been duly invested; but after some delay and expense, the objection was removed. Upon the vendor claiming interest upon the purchase-money, it was held, that the devisees made a good title to the vendor, without proving that the debts and legacies were paid as stated by the recital in the deed conveying the estate to them, and that a purchaser from them was not bound to make inquiries into the payment. Also, that the fact of proving the payment of the debts and legacies did not dispense with the conditions of sale; but that the vendor was entitled to interest upon the balance of the purchase-money. *Storrey v. Walsh*, 338

— Where a purchaser requires the deed of con-

veyance to him to be executed by the vendor in the presence of, and to be attested by, his (the purchaser's) solicitor, that requisition ought not to be refused unless there are special circumstances justifying the refusal. The possession by the vendor's solicitor of the executed conveyance, with the signed receipt for the consideration money indorsed, is not in itself an authority to the solicitor to receive the purchase-money. Although a purchaser has not a right in every case to insist upon the vendor being present when the purchase-money is paid, the vendor is not entitled to refuse compliance with a request of this description when circumstances arise which are sufficient to justify it. *Viney v. Chaplin*, 434

— Vendor of an estate had granted to A. B. the right to work coals under the property, with a proviso, that when the workings of the coal had finally ceased, the pits should be filled up, and the land restored to a proper state of cultivation. A. B. ceased to work the mines, and filled in the pits. Upon sale of the estate A. B. claimed to be entitled to re-work the coal, and the purchaser therefore claimed compensation. The Court considered that there had only been a temporary cessation to work the coals, and held, that the purchaser was entitled to compensation, to be ascertained by an expert appointed by the Judge. *Ramsden v. Hurst*, 432

— Plaintiff purchased by auction a house and premises, which were the subject of one lease; there were stables, &c. attached, accessible only from the premises purchased, but the latter had been built upon a piece of land, part of that comprised in the lease upon which the adjoining premises were built: these were also sold at the same auction to a different person. An abstract was delivered to the purchaser, but he never discovered that the stables were not included in it, and he took a conveyance of the house and premises comprised in the one lease only. The stables, as being upon the land in the second lease, were assigned to the purchaser of the adjoining house. Upon bill by the purchaser of the first house, it was held, that the contract could not be rescinded, that the assignment could not be rectified, and that no ground existed to ask for compensation; but upon appeal, relief was decreed against the purchaser of the adjoining house, and the bill was dismissed as against the vendor. *Leuty v. Hillas*, 534

— A vendor has duties inseparable from that character which he is bound to perform, and cannot avoid by restrictive conditions of sale. A vendor is not justified in rescinding a contract under a restrictive condition of sale reserving that power, when he has not answered the purchaser's requisitions, or made an attempt to answer the objections to the title. *Greaves v. Wilson*, 546

— Constructive Notice. See Limitations, Statute of.

— See Copyhold. Lien. Pre-emption.

VESTRY—Defendants, in exercise of powers given to them by s. 76. of the Metropolis Local Management Act, 18 & 19 Vict. c. 120, served plaintiff with a notice requiring him, in the construction of the drainage to certain houses then building by him in their district, to use pipes of stoneware of the best quality. The plaintiff proposed to use pipes of Aylesford manufacture as coming within the description of stoneware mentioned in the notice. To this defendants objected, who required pipes of Lambeth manufacture, or of manufacture similar to that of Lambeth, to be used; and they refused, unless this was complied with, to make an opening into the main sewer for plaintiff's drainage. Plaintiff thereupon made the opening himself, and completed his drainage by means of Aylesford pipes. The evidence of scientific men as to the comparative merits of the two manufactures being conflicting, it was held that the act gave the vestry the right to determine which of the two materials should be used; and the Court therefore refused a motion by plaintiff for a perpetual injunction to restrain the defendants from entering upon the plaintiff's premises for the purpose of taking up the drainage works constructed by him with the Aylesford pipes. *Austin v. the Vestry of St. Mary, Lambeth*, 388, 677

— See Metropolis Local Management Act.

VOLUNTARY SETTLEMENT—A parol agreement by a husband, who was indebted at the time of his marriage, to settle his wife's railway stock after marriage, will not support a subsequent settlement against his creditors, even though he represented to the wife that it would be as good as if made before marriage. *Warden v. Jones*, 190

WASTE—It is a well-settled rule that the Court will not interfere to appoint a receiver at the instance of a person alleging a mere legal title in himself against other persons who are in possession of the estate. Whether the Court will in such a case interfere to prevent destructive waste—*quære*. The case of *Courthorpe v. Mappleden*, in which the Court granted an injunction against a trespasser cutting timber by collusion with the tenant, is the strongest case in which it has interfered to restrain waste; there is no case in which it has interfered to restrain the acts of a mere trespasser; but if the acts complained of are such flagrant acts of malicious waste as to indicate fraud—*semble*, that would be such a case. To a bill stating that by a private act of parliament certain real estates were settled inalienably upon the Earldom of S, and that proceedings were pending in the House of Lords to establish the plaintiff's claim to the earldom, and that the defendants were in possession under an alleged title derived from a former Earl, and praying that pending those proceedings before the House of Lords, a receiver might be appointed, and the defendants restrained from committing waste, the defendants demurred. Demurrer allowed, there being no allegation that any proceedings were pending for the recovery of the estates. The bill charged that many of the tenants of

divers parts of the settled estates had, by reason of the conflicting claims, refused to pay their rents to either the plaintiff or the defendants, and by reason thereof such rents were in danger of being lost. It was held, that this was not sufficient to support a prayer for a receiver, there being no allegation that proceedings had been taken against the tenants. The bill also stated that defendants were trustees of other parts of the estates for the benefit of such person as should be Earl of S, and that the claim to the Earldom was in litigation, and prayed for a receiver. Plea, that the plaintiff was not Earl of S. was held to be good. Plea not overruled by a voluntary answer in support. *Talbot v. Hope Scott*, 273

WILL—Bequest of legacy upon trust to pay, assign, and divide the same, upon death of testator's daughter, unto and equally between all her children, if more than one, as joint tenants, and if but one, then to such one child,—held to create a tenancy in common amongst the legatees. *Booth v. Alington*, 117

— Testator gave and bequeathed all his residuary estate to his wife, "upon trust" to pay thereout an annuity, and "upon further trust" to pay certain legacies, which did not exhaust the personal estate. He referred to his wife as his executrix in the will; but the will did not contain any express appointment of her as executrix. It was held, upon the construction of the will, that she was entitled beneficially to the surplus estate. *Williams v. Roberts*, 177

— Testator, by will, bequeathed unto his wife all his leasehold property, wheresoever situate, for her sole use and benefit, except a certain house therein described; and in a subsequent part of his will he directed that as soon after the decease of his wife as might be practicable, all his leasehold property not already disposed of by her (save and except the before-mentioned house) should be sold, and the produce thereof distributed by his executors (of whom the wife was named one) amongst certain persons, in the proportions therein stated. It was held, that, upon the death of testator, his widow became absolutely entitled under his will to the leasehold property bequeathed to her, and that the direction to sell and the expressed disposition of the proceeds of sale were repugnant to the preceding absolute gift to the testator's wife, and void. *Bowes v. Goslett*, 249

— Testator gave his residuary real and personal estate to his wife for life, and afterwards to T. H. H. for life, and after the death of the survivor he gave the same to and amongst his brothers and sisters (whom he named), and the brothers and sisters of his wife (whom he also named), and the children of her deceased brother and sister (who were also named). Testator provided that if any of his brothers and sisters, or the brothers and sisters of his wife then living, should happen to die in the lifetime of his wife and of T. H. H. or of the survivor of them,

without leaving issue, the share of him or her so dying should be divided amongst the survivors; but if any of them, his brothers and sisters, or the brothers and sisters of his wife, should so die leaving issue, the share or shares of him or her so dying should be divided among such issue. At the date of the will W. H. one of the testator's brothers (named in the will) was dead (although testator was ignorant of the fact), leaving children. It was held, that the children of W. H. were entitled to their father's share, and that the words "now living" only applied to brothers and sisters of testator's wife. *Hannam v. Simms*, 251

— Construction of a will, as to which fund was primarily liable for maintenance under a bequest of income to trustees for lunatic possessed of absolute property. *Rudland v. Crozier*, 261

— Testator directed his trustees, out of the produce of the sale of his estate, to invest "sufficient to realize the clear annual income or sum of 200*l.* a year, and to pay the same to his wife for her life or widowhood, and after her death or second marriage, if he should die without issue, to hold the capital in trust for other persons; and as to the residue of the property, after "raising thereout money sufficient to realize the annuity for his wife," in trust for other persons. The estate was insufficient to raise 200*l.* a year. It was held, by the House of Lords, that the widow was not entitled to have the deficiency made good out of the corpus of the fund, and she was ordered to replace the stock which had been sold out under the order now reversed. *Baker v. Baker; in re Baker's estate*, 417

— G. P. gave residue of his personal estate to trustees for his wife for life, and after her decease to his nephew R. P. for his own use and benefit. After death of G. P. an undated letter was found in his handwriting, addressed to R. P. entreating him, as a last request, to accept that letter in explanation, lest there should be anything not fully explanatory of his intention in the terms of his will. The paper then went on to make certain requests in very vague and ambiguous language. It was admitted to probate. One of the Vice Chancellors decided that the absolute gift of the residue contained in the will was cut down to a life estate by the terms of the letter; but on appeal, it was held, that though the letter was a testamentary instrument, it was uncertain in its meaning, and did not revoke or cut down the absolute gift to R. P. in the will; and, moreover, that the words of the letter were not sufficient to create a trust which this Court could enforce. *In re Pinckard's Trust*, 422

— Testator by will directed his trustees to collect and convert into money such part of his personal estate as should not consist of money, and to invest the same, and permit his wife to receive the annual income of the trust fund during her life; and he authorized his trustees to postpone from time to time the sale, calling in, collection or conversion of any part of his per-

sonal estate, to such period or periods as they should in their judgment think fit, and to pay the rents, dividends and produce of the same, or any part thereof not sold, called in, collected or converted, to the same person or persons, and in the same manner as the income of the money to arise by such sale, &c. would be payable under the trusts thereinbefore declared. Testator, at time of his death, was a partner in a mercantile firm under articles of partnership, which provided, amongst other things, that interest at 5l. per cent. should be allowed on the balances standing to the credit of the respective partners at the end of each year before any division of the profits; and that in the event of the decease of one or more of the partners during the term, the partnership should not cease, but the representatives of the deceased partner should be entitled to his share of the capital and profits up to the expiration of the term, and the survivors should pay to the representatives of the deceased partner the balance appearing to his credit at the expiration of the term, by three equal yearly instalments, with interest at 5l. per cent. in the mean time, on the balance remaining unpaid. The trustees allowed the whole of testator's capital to remain in the business until the expiration of the partnership by effluxion of time, and large profits were made after the testator's death. It was held, that the widow was entitled to all the interest and profits arising from testator's capital, as it stood at the first making up of the accounts after his death, together with a proportionate part of the interest on the balance standing to testator's credit at the last previous making up of the accounts, for so much time as elapsed between his death and the next making up of the accounts. *Johnston v. Moore*, 453

— Testator gave the share of one of his daughters in his personal estate to trustees, to pay the interest to his daughter for life, and after her decease to divide the same among "her children and their issue, such children and their issue to be entitled as amongst themselves to the benefit of survivorship and accruer of surviving shares." It was held, that all the children and the issue of such children coming into *esse* during the life of the daughter were entitled to take after her death as tenants in common with benefit of survivorship. *Law v. Thorp*, 649

— Testator bequeathed a sum of 2,000l. consols to be divided between his children when each of them attained the age of twenty-one years; but should neither of them attain that age, then he bequeathed the said sum to his wife for her life and afterwards to his "next heir-at-law." It was held; that the "heir-at-law" at the death of the testator was the person entitled, and not the next-of-kin. *Southgate v. Clinch*, 651

— Testator by will bequeathed to each of his five daughters 400l. per annum, to be payable during their natural lives, and after their respective decease he gave the same to their children respectively, share and share alike, such children not to be entitled to more than their

deceased parent's share; and in case any or either of his daughters should die without issue, he directed such annuity to cease and fall into the residue of his estate. It was held, the annuities given to the daughters and after their deaths to their children were perpetual, and not merely life annuities; also, that the words "die without issue" did not enlarge the gift to the daughters to an absolute gift; and also that no interest vested in the children of daughters who died in the lifetime of their parents. *Hedges v. Blicke and Hedges v. Harpur*, 742

— A residuary estate was given to three brothers and a nephew for their lives as tenants in common, and after their decease then for their heirs and assigns as tenants in common. The will then contained provisions that the shares of any or either of their children dying under twenty-one without issue should go to the survivors, and that the share of such child as died under twenty-one, having left issue, should go to the children of such child; but that in case one child only of the brothers and nephew should attain twenty-one, or be married, then in trust for such child, his or her heirs or assigns. It was held, the brothers and nephew took an absolute vested interest in the residuary estate, with an executory devise over in case of children being born. *Spence v. Handford*, 767

— Testator gave an annuity or yearly rent-charge of 300l. to his niece A. B. and after her decease unto her children equally, if more than one, share and share alike, to be applied for their maintenance until the youngest should attain twenty-one; in the happening of which event he directed the annuity to be absolutely sold by such children, and the proceeds divided among them; and he charged the said annuity upon his real estates, which he devised to H. in fee. It was held, that the gift created a rent-charge on the estates in fee simple. *Mansergh v. Campbell*, 769

— A married woman having a power of appointment over trust funds, and being also entitled to considerable sums of money, consisting partly of cash at the bank, and partly of money held by the bankers on deposit-notes, gave, by her will, certain pecuniary legacies, which she directed to be paid out of any monies of or to which she might be possessed or entitled at the time of her decease, and then gave all the residue of the monies of which she might at the time of her decease be absolutely possessed to B. and K. absolutely. It was held, that the residuary bequest carried not only the cash at the bank, but also the money held on deposit. *Langdale v. Whitfield*, 795

— Testator directed that his trustees should, during the life of the tenant for life, out of the rents and profits of his estate, keep the mansion house and all other buildings and messuages in good repair; rebuilding, if necessary, any farm buildings that might from time to time require it. The buildings were very dilapidated at testator's

death. It was held, the repairs were to be effected out of the annual rents; that the rebuilding applied only to the farm houses and farm buildings, and not the mansion house; and that only such repairs were to be effected as a surveyor should consider indispensable in order to make the buildings serviceable for the tenants, and no ornamental or unnecessary improvements to be included. *Cooke v. Cholmondeley*, 826

— See *Issue Devisavit vel non*. Power of Appointment.

WILLS ACT. See Administration of Estate. Power of Appointment.

WINDING-UP ACTS.—Upon petition for winding up a benefit building society, which had been duly enrolled under the 6 & 7 Will. 4. c. 32, it was held, that such societies came within the operation of the Winding-up Acts. *In re St. George's Benefit Building Society*, 96

— After a joint-stock company had been adjudicated bankrupt, and an order in Chancery had been pronounced for winding up its affairs, a creditor of the company obtained a judgment against the official manager, and then, having first obtained leave by a Judge's order, sued out a writ of *elegit* against the property and effects of a shareholder of the company, under which the lands of the shareholder were delivered up to him by the sheriff. He then filed his bill as tenant by *elegit* to redeem a mortgage upon the lands prior in point of date to the execution. Upon demurrer, it was held, the bill was not within the prohibition of section 7. of the Joint-Stock Companies Winding-up Act, 1857, which act had passed since the filing of the bill. *Barnes v. Thrupp*, 183

— A company was formed in 1853, and carried on upon the cost-book principle until 1857, when it was registered as a limited company, under the act of 19 & 20 Vict. c. 47, and an order was subsequently obtained for winding up the affairs in bankruptcy. An order was now made upon petition that the company should be wound up in Chancery, under the Acts of 1848 and 1849, in respect of such transactions as occurred prior to the date of registration as a "limited company." *In re the Joint-Stock Companies Winding-up Acts, 1848 and 1849; and In re the Welsh Pottery Mining Company*, 311

— A banking company, registered under 7 & 8 Vict. c. 113, was ordered to be wound up, and official managers and a creditors' representative were appointed, the latter appointment being on the 13th of January. Some creditors of the company brought an action against the company on the same 13th of January, and on summons by the official managers to stay proceedings, it was ordered that plaintiffs should be at liberty to proceed, but the judgment was not to be available for any other purpose than to make the company bankrupt. Judgment was accordingly entered up, and a notice requiring payment was served. One of the Vice Chancellors having

refused an injunction to stay the proceedings the company was, on the 22nd of April, adjudged bankrupt. On an appeal from the Vice Chancellor's judgment, and an application to annul the adjudication, it was held, that the bankruptcy was valid; 20 & 21 Vict. c. 78. not preventing a company being made bankrupt under 7 & 8 Vict. c. 111, but that the bankruptcy was of no further avail than to clothe the assignees with authority to concur with the official manager in the proceedings in the winding up. *Re London and Eastern Banking Corporation*, 457

— An assurance for 300*l.* was effected with a company registered under 7 & 8 Vict. c. 110; the policy was afterwards adopted by another company. After the death of the assured, his executrix brought an action to recover the 300*l.* Judgment was obtained, but it was unproductive. An order to wind up the company was afterwards obtained, and an official manager was appointed; but no advertisement was issued under 20 & 21 Vict. c. 78, calling upon the creditors to appoint a representative. The executrix proved her debt before the Judge, and then filed a bill against the official manager to obtain payment. Upon a demurrer, it was held, that the suit was rightly instituted. *Robson v. M'Orright*, 471

— Right of creditors' representative to be present at the settlement of the list of contributories. *In re the Mexican and South American Mining Co.*, 658

— A company was formed without any deed or act of incorporation. Scrip certificates alone were issued; these were passed by delivery, without any other transfer. A stockbroker bought several on the Stock Exchange; he received dividends and paid calls, and he was the holder of certificates when a winding-up order was made against the company. It was held, he must be placed on the list of contributories. A party about to be put on the list of contributories is entitled to question the regularity of the winding-up order. *In re the Mexican and South American Mining Co., ex parte Barclay*, 660

— A merchant held shares in a scrip company, some in his own right and others on behalf of parties abroad; he received dividends and paid calls on all the shares in his own name, without disclosing that any of the shares were held on behalf of other parties. Upon an order to wind up the company, it was held, that he must be put on the list of contributories for his own shares, but that as agent or trustee he was not responsible to the company on the shares of his *cestui que trust*, or liable to be put on the list of contributories. *In re the Mexican and South American Mining Co., ex parte Finlay*, 664

— A. B., a director and promoter of an insurance company, took 500 shares in order to enable the company to obtain registration, upon an understanding that he was not to be called upon to pay anything in respect of those shares. Calls.

were made, and a resolution was then passed declaring the forfeiture of all those shares upon which the calls had not been paid, but payment of past calls was not required, although the directors had power to enforce such payment. The 500 shares (upon which no calls had been paid) were declared to be forfeited, and were taken up by other parties. The directors subsequently voted a sum of money to A. B. for his services, and compromised the question of forfeiture for that sum, which was only half the amount of the calls due. Upon the winding up of the company, it was held that A. B. was liable to be placed on the list of contributories in respect of the 500 shares. *In re the London and County Assurance Co., ex parte Jones*, 686

— Shareholders alleged that a company was insolvent and unable to meet its debts and liabilities; also that the acts of directors were not *bond fide*, and that a proper contribution could only be obtained through the Court. They supported the allegation by balance sheets prepared by an accountant, and made an affidavit stating their belief that the allegations were true. It was held, without any affidavit being made by the respondents, that the company could enforce the liabilities arising from the subscription to the deed; that, with these facts, it did not appear that the company was insolvent. Petition and appeal dismissed, with costs. *In re the National and Provincial Live Stock Insurance Society*, 689

— A railway company having been projected in 1845, 700 persons signed the subscribers' agreement and parliamentary contract, by which it was stipulated that the majority of the managing committee should have power to bind all the members as to payment of solicitors and others employed by them. No act of parliament was obtained, and this inchoate company amalgamated with two other companies in the same position, at which time it was agreed that a specific sum should be set apart for payment of the expenses incurred by the original company. The solicitors of this company, who had been employed by the committee of management, applied to the amalgamated company for payment of their bill of costs. The liability was denied, and upon the winding up of the company in 1849, the solicitors carried in their claim before the Master. No decision having been then come to, the matter stood over, and the solicitors after the expiration of six years sought for payment of their debt from the general body of shareholders, the fund set apart upon the amalgamation having been already expended. It was held, that all the members of the inchoate company who had signed the subscribers' deed and parliamentary contract were liable for the debt, and that as the claim had been carried in before the Master within six years, the solicitors were not barred by the Statute of Limitations. *In re the Warwick and Worcester Rail. Co.*, 735

— A joint-stock company was in difficulties, and the directors came to an arrangement with an actuary experienced in such matters for the purpose of "resuscitating" the company. One of the directors disagreeing with his co-directors in this and other matters, transferred his shares to a nominee of the actuary, and the transfer was executed with all the formalities required by the deed of settlement. Soon afterwards the company was ordered to be wound up, and one of the Vice Chancellors being of opinion that the arrangement to "resuscitate" the company, however beneficial, was not warranted by the deed of settlement, and was beyond the powers of the directors, and that the transfer of the shares, though formally executed, was invalid, and that, therefore, the director who made the transfer did not get rid of his liability, and must be placed upon the list of contributories; but, upon appeal, it was held, that although the arrangement with the actuary might have been beyond the powers of the directors, the transfer of the shares having been made *bond fide*, the decision of the Vice Chancellor must be reversed, and the name of the director removed from the list of contributories. *Ex parte Jessop, in re the London and County Assurance Society*, 757

WITNESS—A party to a suit is entitled to his expenses and allowance as a witness before he can be required to be cross-examined on an affidavit filed by him under a decree. *Davey v. Durrant and Smith v. Durrant*, 503

— A party to a suit cannot abandon one proceeding for another to obtain the examination of a witness who was also a party to the suit without first paying the costs of the first proceeding. *Davey v. Durrant and Smith v. Durrant*, 504

— A special examiner will not be appointed on the mere ground that a witness resides more than twenty miles from London. *Altree v. Sherwin*, 725

— See Company. Contributory.

WORDS—"Children and their issue," 649

— "Die without issue," 742

— "Disposing of," 478

— "Edition," 254

— "Heirs," 196

— "Holder," 23

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BANKRUPTCY.

ADJUDICATION—A creditor took out a trader debtor summons, under section 78. of 12 & 13 Vict. c. 106. The debtor admitted the debt, and on the same day filed a petition, under the 211th section, for arrangement with his creditors, and obtained protection. The creditor, however, on his debt remaining unpaid, presented a petition for adjudication founded on the summons, but did not prosecute it in due time. Another creditor was thereupon substituted for the original creditor, and the trader was adjudicated bankrupt. It was held (affirming a decision of one of the Commissioners), that the original creditor had a right to proceed to adjudication, notwithstanding the protection under section 211, and that the second creditor was rightly substituted for the first. *Ex parte Dales, in re Dales*, 13

— A Commissioner having annexed a joint adjudication against two partners to an earlier one against one of them, under section 98. of 12 & 13 Vict. c. 106, on appeal, the Lords Justices refused to interfere. *Ex parte Green, in re Dales*, 32

— Two separate adjudications had been made against two partners, and subsequently a joint adjudication was made against both. The district Commissioner having annexed the former to the latter, upon appeal, the decision was reversed. *Ex parte Haines, in re Powell*, 33

— An adjudication in bankruptcy had been made in April 1857, on the petition of a gentleman who had been in trade, but had ceased to be so for more than sixteen years, and in October he obtained his certificate. At the date of the bankruptcy there were debts incurred during the trading, though not trade debts, which still remained unpaid. A creditor who was aware of all the proceedings petitioned to annul in April 1858. There was no proof of collusion or fraud. Petition to annul held to be too late. Whether an outlaw can petition for an adjudication against himself, and whether he can have available assets under the 20th section of the Bankrupt Act, 1854 (17 & 18 Vict. c. 119),—*quere*. *Ex parte Adams, in re Hawkes*, 37

— A banking company registered under the 7 & 8 Vict. c. 113, was ordered to be wound up, and official managers and a creditors' representative were appointed, the latter appointment being on the 13th of January. Some creditors of the company brought an action against the company on the same 13th of January, and on a summons by the official managers to stay proceedings, it was ordered that plaintiffs should be at liberty to proceed, but the judgment was not to be available for any other purpose than to make the company bankrupt. Judgment was accordingly entered up, and a notice requiring payment was served. One of the Vice Chancellors having refused an injunction to stay the proceedings, the company was, on the 22nd of

April, adjudged bankrupt. On appeal from the Vice Chancellor's judgment, and an application to annul the adjudication, it was held, that the bankruptcy was valid, the 20 & 21 Vict. c. 78. not preventing a company being made bankrupt under the 7 & 8 Vict. c. 111, but that the bankruptcy was of no further avail than to clothe the assignees with authority to concur with the official manager in the proceedings in the winding-up. *Re the London and Eastern Banking Corporation*, (Chanc. 48) 457

APPEAL—Where an appeal by a bankrupt against the Commissioner's refusal of his certificate was, through accident, not presented at the proper office until after the office was closed on the last day allowed for appeal, but was in the evening of the same day tendered to the officer at his private residence, the Court permitted the petition of appeal to be entered as of that day. *In re Hull Bank*, 13

— A contributory not having presented a petition of appeal against an order of a Commissioner acting in the winding up of a company in bankruptcy under the Joint-Stock Companies Act, 1856, until after the expiration of the twenty-one days limited for appeals under the Bankrupt Law Consolidation Act, 1849, his petition was too late, and could not be considered on its merits. *Ex parte Clarke, in re the Welsh Pottery Lead and Copper Mining Co.*, 25

ARRANGEMENT—A trading firm executing a deed of arrangement and inspection, made between the partners of the first part, the inspectors of the second part, and several persons creditors of the partners, or some or one of them, of the third part. The deed did not contain an assignment of the property of the firm for the benefit of the creditors, but it contained covenants to carry on the business and wind up the affairs under inspection, and to assign the property if called on so to do by the inspectors. The inspectors certified under the 226th section of 12 & 13 Vict. c. 106. that it was signed by six-sevenths in number and value of the creditors whose debts were 10*l.* and upwards. It did not, however, appear from the deed or the certificate whether six-sevenths in number and value of the separate as well as of the joint creditors or of each class of creditors had executed. It was held, the deed was not properly signed, and therefore that the certificate under section 226. of the same statute must be refused. The deed contained a grant to the traders to carry on the business, to wind it up, and collect and get in the debts for the benefit of the creditors; the creditors covenanted not to sue or molest the traders, and if any of the creditors did so his debt was to be forfeited. The traders were to carry on the business under inspectors, the creditors were to be paid out of the assets and profits, and if the inspectors required it, the traders were to assign the property of the firm for the benefit of the

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creditors, after which the traders were to be released from liability, and if the inspectors certified that the affairs of the firm had been wound up within two years, the traders were wholly released. Whether such a deed, even if sufficiently signed by creditors, is a good deed of arrangement under the 224th section of the same statute, *quære*. *Ex parte Calvert, in re Calvert*, 42

BANKER—Bankers received short bills from their customers, and credited them with the amount as cash, and dealt with the bills at their discretion. The bankers became bankrupt, at which time they held some of such bills which were not then due. The assignees refused to deliver up the bills to the depositing customer, but it was held by one of the Commissioners that there being no evidence of a contract or arrangement between the bankers and customer that the bills should be treated in all respects as cash, the fact of these bankrupts having credited the amount secured by the bills to the customer as cash, did not render the bills the absolute property of the bankers; and the state of the account at the time of the bankruptcy shewing that the customer had a balance in his favour, the assignees must deliver up the bills. Upon appeal, the Lords Justices affirmed the decision. *Ex parte Barkworth, in re Harrison*, 5

BANKRUPT—Presence of. See Certificate.

CERTIFICATE—Where a bankrupt had committed the offence of fraudulent preferences enumerated in the 4th clause of offences appended to section 256. of 12 & 13 Vict. c. 106, one of the Commissioners refused him any certificate; but upon appeal, the Lords Justices granted him a certificate of the second class, with a suspension of six months, and, with the consent of the assignees, granted protection in the mean time. *Ex parte King, in re King*, 11

— Where an adjudication of bankruptcy was made under such circumstances as, upon the evidence, satisfied the Court that the adjudication was substantially that of the bankrupt himself, and it appeared that there were no assets to divide among the creditors, the Court (*Lord Justice Turner* not assenting) affirmed a decision of one of the Commissioners, refusing the bankrupt his certificate. *Ex parte Sellers, in re Sellers*, 14

— A solicitor received money on behalf of a client, and on the client bringing an action for the amount, he pleaded never indebted, and alleged that the money was agreed, when recovered, to be left in his hands in part discharge of costs in proceedings against the client, and for which he, the solicitor, was responsible. The action against the solicitor was originally brought in the County Court of Lancashire, when it was removed by him to the Common Pleas of the Duchy of Lancaster. The trial ended in a reference, on which an award was made shewing that the solicitor was debtor to the client. There-

upon a brother of the solicitor obtained an adjudication in bankruptcy; and on the application of the bankrupt for his certificate, the Commissioner suspended it for twelve months, then to be of the second class, and refused protection for three months; and on appeal, the order was affirmed. *Ex parte Blackhurst, in re Blackhurst*, 24

— A bankrupt had granted to him by one of the Commissioners a second-class certificate, suspended for ten months, but with protection, for having within twelve months preceding the adjudication, lost over 200*l.* by the purchase and sale of stock, within the meaning of section 201. of 12 & 13 Vict. c. 106. Part of the losses were on stock and part on shares not converted into stock, and the former did not amount to 200*l.* The assignees appealed against the decision, but the Lords Justices refused to make any variation in the order. Where a bankrupt's certificate is in question the bankrupt ought himself to be present. *Ex parte Turner, in re Wood*, 30

COMPANY—Winding-up. See Adjudication. Contributories.

CONTRIBUTORIES—A. B. was the holder of shares in a mining company established upon the cost-book principle. In October 1856 it was determined by the shareholders to register the company as "limited" under the 19 & 20 Vict. c. 47, with a view to its being wound up. A delay however occurred, which prevented the registration of the company until June 1857. In January 1857 A. B. sold his shares, and the transfer was completed, A. B.'s name not being returned as a shareholder on the company's being registered in June 1857. In July the company was ordered to be wound up, and Mr. Commissioner Fane placed A. B.'s name on the list of contributories; but it was held, on appeal, that the name was improperly placed on the list. *In re Welsh Potosi Lead and Copper Mining Co., ex parte Lofthouse*, 1

— A. B. was the holder of shares in a mining company established on the cost-book principle. In accordance with one of the rules of the company, he gave notice, in April 1857, to relinquish his shares, but he had not then paid all his arrears, and the purser declined to take the relinquishment. In May the arrears were paid, and on the 4th of June his solicitor applied to the purser to know why the name was retained on the list. On the 26th of June the company was registered as a limited company under the 19 & 20 Vict. c. 47, and A. B.'s name was then returned as a shareholder. The company being in July ordered to be wound up, A. B.'s name was placed by the Commissioner on the list of contributories. On appeal, it was considered that the proper course was for A. B. to apply to have his name removed from the list of shareholders, and the petition of appeal being agreed to be treated as such application, the name was removed from the list. *In re Welsh Potosi Lead and Copper Mining Co., ex parte Birch*, 4

COPYRIGHT. See Order and Disposition.

COSTS. See Proof.

DEED—of arrangement. See Arrangement.

DISTRICT COMMISSIONER. See Adjudication.

INFANT. See Proof.

LESSOR AND LESSEE—Mutual debts. See Proof.

ORDER AND DISPOSITION—E. B., the registered proprietor of three newspapers, mortgaged, on the 1st of February 1853, the copyright of all of them, and the types and plant for printing the same, to E. F. He also, on the 2nd of February 1853, mortgaged two of the three papers and the types and plant to C. B., subject to the former mortgage. E. B., after meetings of his creditors had been held, at which the securities were discussed, continued to carry on his business under inspection, though no deed for the purpose was ever executed. On the 16th of February 1857 the sheriff seized the property comprised in the mortgages under a writ of *fi. fa.*, and notice of the mortgages was, on the following day, given, notwithstanding which the sheriff remained in possession until the 19th, E. B. being adjudicated a bankrupt on a petition presented on the 18th. It was held, the types and plant were not in the order and disposition of the bankrupt; but that the copyright was in his order and disposition and reputed ownership, he being the sole registered proprietor of the newspapers. *Ex parte Baldwin, in re Baldwin; Ex parte Foss, in re Baldwin, 17*

OUTLAW. See Adjudication.

PARTNERS. See Proof.

PETITIONING CREDITOR. See Adjudication.

PRACTICE. See Appeal.

PROMISSORY NOTE. See Proof.

PROOF—Money was lent to one, to secure the repayment of which he and two others made a joint and several promissory note. The lender required payment some years after the date of the note; but upon the makers procuring a new name to the note, he forebore payment. The new name was written on the face of the note, but not under the former names, and had its date appended. One of the original makers became bankrupt, and one of the Commissioners refused to allow proof of the debt on account of the alteration of the note. On appeal, that decision was reversed, and it was held that the creditor was entitled to prove, for that the third name, though on the face of the note, was added as an indorsement, and for the purpose of adding a person with fresh liability, and not as a new maker. *Ex parte Yates, in re Smith, 9*

— A firm of two partners owed a debt to A. B. A. B. brought an action against one of the partners, obtained judgment, and proceeded to execution and sale. Between execution and sale, the partner sued was adjudicated bankrupt; and the day after the sale the other partner was also adjudicated bankrupt, and both sets of proceedings were consolidated. In proceedings at law the proceeds of the sale were decided to be partnership assets. The partner who had been sued had no separate assets. A. B. was admitted to prove against the joint estate of the bankrupts; but, upon appeal by the assignees, it was held, that the joint debt of the two partners was extinguished by the judgment against one of them; and that, therefore, the proof must be rejected. *Ex parte Higgins, in re Tyler, 27*

— O. K., one of two partners, executed, together with his partner and another person, a joint and several bond, to secure money lent to the partnership. As part of the security, he agreed to effect a policy of assurance on his life, and for that purpose signed a declaration that he was of the age of twenty-two years. O. K. was, in fact, an infant; and after he attained twenty-one he became bankrupt. The lenders of the money were admitted to prove against O. K.'s separate estate; and, on appeal, it was held, that the fraudulent misrepresentation of O. K., the bankrupt, as to age, rendered him, although an infant, liable in equity to the debt, and the appeal was dismissed. *Ex parte the Unity Joint-Stock Banking Association, in re King, 33*

— Owners of a factory and machinery let the same from year to year to traders, lessees to be entitled to a lease, the machinery to be valued at the beginning and end of the tenancy, the difference in value, if any, to be paid by lessors or lessees as the case might be. The first valuation was made. After that, the lessees were adjudicated bankrupt, and then the second valuation took place, and the result was in favour of the tenants. No lease was ever demanded, and the assignees refused to take one. At the time of the adjudication the bankrupts owed rent and money for goods sold by lessors, who claimed to set off the increased value of the machinery due from them against their debt, and to prove for the balance, but the assignees claimed to be paid the increased value, and that lessors should prove for the whole amount due for rent, for goods and for the increased value. One of the Commissioners decided in favour of the lessors, and the Lords Justices, on appeal of the assignees, confirmed the order, giving costs against the appellants personally. *Ex parte Hope, in re Hanson, 40*

PROTECTION. See Certificate.

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